Where to draw the line? Exploring the bounds of CCI's protective net

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Khaitan & Co partner Anisha Chand and senior associate Soham Banerjee explore jurisdictional boundaries and the interplay between the Competition Act, 2002 and the Consumer Protection Act, 1986. While some contractual disputes ostensibly can be addressed by both laws, Chand and Banerjee identify the appropriate forum depending on the nature and scope of the dispute to ensure no overstepping of the legislative mandates. In this light, they have done a deep dive into the Competition Commission of India's order in the Esaote case to assess whether such jurisdictional trespass has occurred and whether the case can be seen as a precedent to hold dominant companies accountable under the Competition Act, 2002 for a breach of contractual terms.

Consumer and competition law share the goal of protecting consumers from distortions and misadventures in the marketplace. The means to achieve this common end, however, are markedly different. While consumer protection laws ordinarily aim to immunise and shield consumers from a more direct impact, competition laws aim to protect consumers indirectly by prohibiting conduct and market practices that harm the state of competition. For instance, misleading or false advertisements regarding the efficacy of a product are a routine consumer law matter. On the other hand, an agreement between competitors to keep prices high would be right up the alley of a competition authority.

The nature of the conduct checked under the two policies affects the end-consumers in entirely different ways. While the scope of the Competition Commission of India's (CCI's) review and that of the Consumer Forum – the consumer protection agency – are quite distinct, both regulators are increasingly confronted with cases where the distinction is obscured. This is perhaps one of the reasons behind the growing deliberation to integrate the consumer and competition authorities into a single institution.

As it stands in India today, the consumer and competition authorities are constituted under separate laws and continue to be separate and independent in their scope and functioning. Until India decides to merge its consumer and competition authorities into a single agency, it is imperative that the consumer and competition authorities tread with caution while discharging their ostensibly similar yet very distinctive mandates.

In this context and background, we discuss the 2018 decision of the CCI in *House of Diagnostics v Esaote*. This case brings to the fore vital questions, including whether individual consumer or contractual disputes can be viewed as violations of the Competition Act, 2002 (Competition Act) and be dealt with accordingly.

The Esaote case at a glance

House of Diagnostics agreed to purchase certain newly manufactured dedicated standing/tilting (DST) magnetic resonance imaging (MRI) machines from Esaote, the only producers of the DST machines.

Esaote was allegedly required to deliver certain newly manufactured DST machines – along with perforated see-through cages, head coils and two ultrasound machines – to House of Diagnostics for an all-inclusive purchase price of 61.5 million Indian rupees. All the machines were to be accompanied by a warranty and an annual maintenance contract for a period of five years.

However, the machines received by House of Diagnostics were not new and had been manufactured prior to the date of the agreement. Further, Esaote refused to supply the additional parts and provide the after-sales services that had been agreed. House of Diagnostics approached the CCI alleging that Esaote's violations of the contract amounted to a violation of the Competition Act.

The order issued by the majority of CCI commissioners, after considering the facts and conclusions expressed by the agency's director general, noted that the DST machines formed a distinct relevant market of their own. Accordingly, Esaote, being the only producer of such machines, was found to be dominant in the said market. After establishing dominance, the CCI held that Esaote had abused its position of dominance by breaching its contract with House of Diagnostics.

However, the chair of the CCI authored a dissent disagreeing with the finding of dominance. He noted that in the absence of dominance, whether an abuse took place was moot.

For the purpose of this article, we have assumed that Esaote is dominant in the relevant market so defined by the CCI, and instead focus our analysis on whether the breaches of contract that are central to the finding of abuse would merit scrutiny under the Competition Act in the first place.

The litmus test for the applicability of the Competition Act

Before we dissect the Esaote case and appraise the CCI decision, a quick recap of the intents and purposes of the Competition Act and Consumer Protection Act, 1986 (Consumer Protection Act) will bring the objectives of the two laws into perspective.

The scheme of the Competition Act requires the CCI to promote, protect and sustain competition in the market. The preamble also speaks of protecting "the interests of the consumers". However, considering that the primary purpose of the Competition Act is to ensure a level playing field and prevent adverse effects on competition, protection of consumer interests is simply a logical consequence or derivative of the chief mandate of protecting the state of competition in the market.

The Consumer Protection Act, on the other hand, deals with protecting individual consumer interests from deficiencies in services or goods purchased from sellers. The CCI has recognised this distinction and often declined to adjudicate on matters that fall within the ambit of a consumer dispute or a breach of contract.

For instance, in *Subhash Yadav v Force Motor*, the complainant had purchased a sports utility vehicle that did not perform to his satisfaction. He sought to proceed against the seller for imposing unfair and discriminatory conditions in violation of section 4 of the Competition Act. However, the CCI refused to intervene in what was patently a consumer dispute. In other past cases – *Rajendra Agarwal v Shoppers Stop*, S*hivang Agarwal v Supertech Noida*, *Sanjeev Pandey v Mahindra & Mahindra* – parties have regularly approached the CCI for adjudication on contractual issues, but the CCI has consistently said it is not a forum for adjudicating contractual issues.

However, the majority order in the Esaote case seems to have reopened this dichotomy, as the majority found that the breaches of contract violated the Competition Act. This raises the preliminary question of whether the failure by Esaote to provide adequately functioning machines and additional items to House of Diagnostics is a mere contractual violation pertaining to service deficiencies affecting a single company, or whether such failure affects the state of competition in the market as a whole.

Esaote's breaches primarily inconvenienced House of Diagnostics, as the complainant was unable to acquire the products and services it set out to obtain. This failure arguably made House of Diagnostics temporarily unfit to optimally compete in its relevant market. However, if this argument is pursued, whenever a dominant entity's conduct or contractual breach hinders other market participants from competing in an optimum manner, it would be deemed to have violated competition laws. This raises the question as to whether every contractual transgression by a dominant entity inevitably gets tainted and transforms into abusive conduct. The answer to this query is critical and rooted in the very objective of competition law.

Practically speaking, any contractual breach or violation by a dominant entity would invariably affect the other party to the contract and would also cause the other party to be in a less than optimum position than it would be in if the agreement was performed without the breach. However, the bright line test to establish a violation of the Competition Act would be to demonstrate whether the breaches that are otherwise a matter of routine affect the state of competition in the entire market, and not just that of a single contracting party.

To put it simply, we propose that whether an act constitutes an abuse of dominance depends on: whether the terms of an agreement imposed by a dominant entity on the counterparty at the conclusion of an agreement make it abusive, or whether the breach of the agreed terms by a dominant entity for failure to perform the agreement violates the Competition Act.

The distinction in both the above questions is paramount. In the first situation, the imposition of unfair terms is highly problematic from a market perspective because a dominant entity will be able to impose onerous terms on almost all market participants by leveraging its strength. This is where the Competition Act can remedy the situation by putting a special responsibility on the dominant entity. In this regard, we appreciate that any market participant can also impose onerous terms, but if such a player does not have sufficient market strength, there are good reasons to assume that other market players will offer more favourable terms to the counterparty. This is precisely why only a dominant entity's abusive terms are considered problematic in the competition law paradigm.

On the other hand, the breach of a contractual term affects every counterparty irrespective of whether the violating party is dominant or not. As such, this ailment can be cured more easily by the Consumer Protection Act, given that its onus is to protect individual consumers affected by misadventures of market players. Therefore, dominance of an entity ought not be the guiding tool to determine if a contractual breach can be legitimately examined under the Competition Act. As a corollary, the test should be based on the nature of the alleged misconduct regardless of the market position or dominance of the entity. This reasoning resonates with the objective of the Competition Act, which is to sanction abuse of dominance and not dominance by itself. In the same vein, a contractual breach must be distinguished from abuse that, under the present construct of the Competition Act, can arise only if there is a finding of dominance.

Further, this distinction will allow the parties to determine when to knock the doors of the CCI and when their remedies are intrinsically covered under the Indian Contract Act, 1872 or the Consumer Protection Act. The CCI itself has recognised in cases such as *Shivang Agarwal v Supertech Noida* that not every unfair trade practice or abuse by an enterprise is covered under the Competition Act.

Accordingly, given that the Consumer Protection Act exists specifically to address consumer complaints pertaining to deficient services, and the contractual breaches in *Esaote* corresponded to effectively the same issue, the appropriate venue for this dispute should have been the Consumer Forum.

Following this approach while establishing jurisdictional boundaries is also in line with the findings of India's apex court. The Supreme Court in *CCI v Bharti Airtel* ruled that it is within the exclusive domain of the CCI to investigate and adjudicate whether an agreement will have an appreciable adverse effect on competition within the relevant market in India. However, it is not within the CCI's jurisdiction to review issues for which the Indian parliament has established specialised tribunals and authorities.

Additionally, it is an established principle of jurisprudence that when the legislature has given its attention to a separate subject and made a provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms.

Therefore, the parliamentary intent behind the Competition Act does not allow the CCI to adjudicate on solely consumer-centric contractual disputes, as the Consumer Protection Act has already been entrusted by the Indian parliament to handle such issues.

Conclusion

As seen above, pre-*Esaote*, the CCI ordinarily did not consider those disputes that pertain to the domain of product liability, as individualistic or contractual in nature, to be under the competition authority's jurisdiction. However, in *Esaote* the CCI seems to have deviated from its prior decisional practice, inferring far-fetched anti-competitive implications from everyday contractual breaches.

Given that the violations by Esaote are not only strictly contractual but also patently deficiencies in the provision of service, in light of the discussion above, we argue that this deviation by the CCI will only create uncertainty about how the competition authority will assess cases going forward.

In conclusion, it may be said that as a rule, consumer protection is only an indirect objective aimed at protecting the state of competition in the market. Further, care must be taken to ascertain the true substance of the alleged misconduct before proceeding to rule upon a case that may inherently be outside the jurisdiction of the CCI. In doing so, the CCI should not interpret the "state of competition" so broadly that it trespasses upon the jurisdiction of other appropriate regulators and tribunals.

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