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Competition law through a gender lens: the role of CCI in fighting gender inequality

Saksham Malik (The Dialogue) · Monday, April 19th, 2021

The law is blind. Competition law, however, has the potential to see through a gender lens. In World Economic Forum's Global Gender Gap Index 2020, India ranked at 112th position in a list of 153 countries. According to a 2019 survey, the gender pay gap in the country was estimated to stand at 19%, where men earned Rs. 249 and women earned Rs. 196.3 for the same work. The Competition Commission of India (CCI/Commission), as a key player in the economic development of the country, can play a role in bridging this gender gap. While specific incorporation of gender equality in competition policy is yet to be achieved, the wider consideration of public interest has found a place in the competition law of various jurisdictions. For instance, Section 10(3)(b) of the Competition Act, 1998 of South Africa provides an exemption from the chapter on prohibited practices if the agreement or practice enables firms controlled or owned by historically disadvantaged persons to become competitive. The CCI has an opportunity to lead the way by making gender considerations an overt part of its conduct and the Indian competition policy. This article explains the link between gender and competition law and also provides a guidance map for the CCI to level the proverbial playing field for men and women while reducing anti-competitive conduct in the market.

Investigation of markets that are more important for women than for men needs to be prioritized by the CCI. The financial services sector acts as an interesting example. There is a higher need for and lower access to quality credit among women. The increased need can be attributed to extreme poverty and minimal ownership of resources. A 2020 report by UN Women highlights that the pre-pandemic poverty rate for females was 13.3%, compared to 12.1% for males. By 2021, the pandemic is expected to push more than 100 million women into poverty. Further, it should be noted that the share of women borrowers to total borrowers was 26% in 2019, pointing to the prevalence of unequal access to credit. The CCI has the potential to reduce gender inequality by reducing distortions in the financial services market. A healthy market ensures quality and affordable services while making it unsustainable for firms to discriminate among its customers. Pro-competitive steps can, therefore, contribute to gender equality.

To date, the CCI has given 8 final orders in the financial services sector. Notably, it analyzed an allegation of charging a differential rate of interests from a different set of borrowers in the case of *Shri Govind Aggarwal & Ors. v. M/S ICICI Bank Ltd. & Ors*. However, there is a need for increased scrutiny of the sector, especially in the sphere of home loans and personal loans to augment access to affordable credit services for women. Gender equality in access to credit, in return, has the potential to improve the financial health of the sector. A recent study by Transunion CIBIL highlighted that women on average have a credit score of 720, while the average score among men is 709. Timely repayment of credit reduces pressure on financial institutions and increases the availability of credit in the economy. In this manner, higher participation of women as borrowers can have a positive impact on the financial services sector. The missions of gender equality and healthy market conditions can, therefore, complement each other.

The market for contraceptive products is also important for women. Access to affordable contraceptives has noteworthy implications for women's bodies, reproductive health as well as personal and financial autonomy. However, the sector has seen virtually no competition scrutiny despite being dominated by a handful of players. The CCI needs to acknowledge the importance of the aforementioned market as well as similar key industries for women in order to ensure efficient protection and realization of their rights. While inquiring into allegations of anti-competitive agreements and abuse of dominance, due importance needs to be given to factors pertaining to gender. For instance, Section 2(t) and Section 19(7) of the Competition Act provide, *inter alia,* that demand substitutability and consumer preferences are significant for defining the relevant product market. Consumer choices, especially in cases of gendered consumer products and services like razors, cosmetics and salon services, are influenced by gender identities. For instance, in the case of *Mr. Karan Sehgal v. M/S Lakme Lever Private Limited*, it was alleged that Lakme was abusing its dominant position and had entered into an anti-competitive franchise agreement with the informant, a beauty salon. Keeping consumer preferences in mind, the Commission defined the relevant product market as 'the market for beauty and wellness salons for women'. If the Commission had considered salons for men to be substitutable with salons for women, it would have misidentified the product market and incorrectly analyzed the allegations. Incorrect analyses can lead to continued anti-competitive conduct like price discrimination and excessive pricing. In markets for products and services geared towards women, it is the female consumer that will ultimately bear the brunt.

Further, advocacy initiatives including market studies can be employed to understand the role of gender in competition policy. For instance, barriers to entry in the market is an important consideration while analyzing combinations as well as alleged anti-competitive conduct. Gender can act as a formal and informal entry barrier and needs to be studied by the Commission. For instance, high levels of licensing fees and minimum paid-up capital requirements prescribed by law stifle women entrepreneurship. As discussed earlier, access to credit is low among women, affecting their ability to satisfy the legally prescribed capital requirements. Further, informal barriers influenced by the socio-economic realities of a patriarchal society affect the ability of women to enter various markets. Having received no attention from the CCI, analysis of these themes needs to be done to advance the cause of gender equality.

Therefore, competition authorities can help reduce gender inequality by prioritizing investigation of key markets, reducing anti-competitive conduct in the market for gendered products and services and studying the role of gender in competition policy. On the other hand, incorporating gender in competition law refines competition analyses and helps create more competitive markets. With the help of a gender lens, the Competition Commission of India can set its sight on a fairer and more inclusive future.

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