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**COMPETITION LAW DYNAMICS IN THE INDIAN EDUCATION
SECTOR- THE CHALLENGES WITH SPECIAL
REFERENCE TO FAIR PRICING**

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Introduction

Educational institutions are often perceived as providing service of the highest order to the society, by creating good citizens for a better tomorrow. But in today's era of globalization and fast-paced Economy, Neo-Entrepreneurs have capitalized on the fact that the youth of the world requires quality education and a good skill set for survival, and they are willing to invest hefty amounts of money for the same. This is where the corporate world of mergers, cartels and market abuses apply to the mushrooming businesses in the Educational Sector.

Competition Law regulates the activities of those offering services or goods, for the benefit of the consumers. The crucial objectives of the Competition Act, 2002 include protection of the interests of the consumers as well as to promote and sustain competition in the markets. Effective competition is the key to efficiency and productivity in businesses, including those in the Educational sector². Healthy competition encourages innovation, cost and production efficiency and enhanced consumer satisfaction because of which businesses strive to keep ahead of their competitors. However, the stiff competition also creates incentives for unethical traders to 'cut corners' to beat their rivals, and this is where the Competition Authorities such as the Competition Commission of India (CCI) must step up the investigation, advocacy and enforcement procedures, the need for which is highlighted by this article.

The Education Sector as an Economic Market

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For the purposes of this article, “*Educational Sector*”, when referred to in the sense of an Economic Market, means Educational institutions offering degrees, diplomas, skill/based certificate courses; both through the online and the offline mode.³

India’s education sector offers great prospects, with about 29 % of India’s population being between the age group of 0-14 years. Due to this, India’s higher education sector is expected to increase to US\$ 35.03 billion by 2025.

As of December 2018, internet penetration in India had reached 46.13 per cent. Increasing internet penetration will help in the dissemination of educational services. Also, India has over 250 million school going students, the largest in the world. It also has one of the most massive networks of higher education institutions in the world. Number of colleges and universities in India reached 39,050 and 903, respectively in 2017-18.⁴

As far as the investment by private players in the education sector is concerned, the sector has received cumulative FDI worth US\$ 2.47 billion up to March 2019. Indian education sector witnessed 18 merger and acquisition deals worth US\$ 49 million in 2017.

All these statistics indicate that there is a boom in the educational sector of India and hence, there is wide scope and necessity for the application of Competition law in this field.

How can the Education Sector be made effectively competitive? a few problems and possibilities:

Since it is apparent that each of the markets related to the Educational Sector are competitive in nature, it is not surprising that there have been a few Antitrust concerns which have been raised by with the competition authorities, be it India or other common law countries. Further, we will analyse probable competition issues through relevant case law or by illustrating certain conditions which might fall into the ambit of Anti-competitive activities:

³However, wherever these terms might be used in case laws, each of these types of markets would be considered a separate “Relevant product market” as defined under section 2(t) of the Competition Act, 2002.

⁴www.ibef.org. (2017). *Education Sector in India*. [online] Available at: <https://www.ibef.org/archives/detail/b3ZlcnZpZXcmMzc2MjUmMTA1Ng==> [Accessed May 2024].

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- Peer-Group institutions sharing information:

Many Academic institutions collaborate formally or informally. Formally, they could be academic consortiums or associations; informally, they could be characterized by periodic gatherings of administrators from similarly-situated institutions. The competition authorities and competition policies recognize the fact that these organizations might have been formed for the collective benefit of the consumers by setting standards and sharing best practices. In such cases, anti-trust concerns could arise only when there is evidence of lack of an independent decision-making amongst the members of the association or if there appears to be some type of collaborative measure which would hurt the end-consumers.

Article 101 of the TFEU (Treaty of the Functioning of the European Union) prohibits collusion amongst undertakings, which might have an “appreciable” or harmful effect on the competition amongst the member-states. While there has not been a case on Educational Institutions under EU law yet, the Office of Fair Trading (the UK’s competition Authority, OFT) already found that private schools had established a cartel. The schools had exchanged confidential price information over an extended period of time and were thus fined with £10,000 each for ‘participating in an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition in the relevant markets for the provision of educational services’.^[4] It was held by the OFT that their actions were in violation of section 2(1) of the Competition Act, 1998.

In India, such an agreement would fall under the ambit of *Horizontal Anti-Competitive Agreements* under section 3(3) of the Competition Act, 2002 and is declared to be an anti-competitive agreement under section 3(1), provided that there is an Appreciable Adverse effect on Competition (AAEC) within India.

- Jointly Establishing Admissions Protocols:

There are many agreements or even establishments formed by universities or colleges to collectively hold their admission procedures. Such agreements or conventions govern when applications are received, common collection of fees for administering entrance tests, collectively holding counselling rounds, etc. On the face of it, these agreements don’t arouse Anti-trust suspicions, as they help streamline the admission procedures for

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the students by consolidating the application and exam dates for multiple institutions. however, in recent days, such agreements have been subject to scrutiny, as they display elements of Horizontal Anti-Competitive agreements.

In India, An NGO called *iJustice*, A public Interest Law Initiative of the Centre for Civil society, filed information under Section 19(1)(a) of the Competition Act, 2002, against the CLAT (Common Law Admission Test) and its Convenors. *iJustice* alleged that the 14 law schools that jointly held the annual CLAT admissions test to National Law Schools, were able to consistently increase examination fees from Rs 3,000 to Rs 4,000, and hike the “pre-admission advance deposit” pending admission from Rs 50,000 to Rs 1 lakh, at their own convenience.

However, the CCI decided it was unable to investigate the allegation because the CLAT core committee was not an “enterprise” under section 2(h) of the Competition Act but merely a memorandum of understanding (MOU), contractual agreement or “merely an arrangement” between the 14 colleges, which was not sufficient to constitute a “person” within the meaning of the Act.⁵ But the CCI could have looked into the definition of “Horizontal Anticompetitive Agreement”, as under section 3(3) of the Competition Act, 2002, and could have discussed the case in the light of the same to bring out the instance of Anti- Competitive behaviour in this case.

- Commercial Activities in the Ancillary Markets:

Education is a very complex economic good and involves a lot of complementary goods which are required for effectively imbibing the main service. Most of the times, the price of the Main service, i.e. the teaching and the research activities, are dependent on the quality of the ancillary goods/supplementary goods and services. There is a high possibility that such agreements could be made by Educational Institutions with dealers of such ancillary goods such as books, uniforms, etc., to restrict competing institutions from gaining access to quality supplementary goods. There have been instances where Educational Institutions such as schools have attempted to exploit the consumers through

⁵Gideon, A. (2012). Higher Education Institutions and EU Competition Law. *The Competition Law Review*, [online] 8(2), pp.169-184.

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Exclusive Supply Agreements and Tying and Bundling agreements⁶. Such conduct results in Tying Arrangements or a wide variety of Vertical Anti-Competitive conduct, which are prohibited under section 3(4) of the Competition Act, 2002 in India.

In the United States, in the case of *Sunshine Books, Ltd. v. Temple University*, the plaintiff, was the owner of a bookstore that sold student textbooks from trailers parked on the street near the University bookstore. He complained that the University bookstore's one-week "manager's special" sale which offered about 50 undergraduate book titles at 15% off the retail price, showed an attempt by Temple University to monopolize the sale of undergraduate course textbooks to students at the University by means of a predatory pricing scheme, in violation of the provisions of the US's Sherman Act. Temple University, to defend itself, moved the court for summary judgment on the grounds that its discounted prices were above average variable cost and, therefore, were presumptively not predatory. The trial court granted the motion for summary judgment but the appellate court reversed and remanded the case for factual determination with respect to issues relating to pricing and costs.^[8]

- Merger (Combination) Control:

The words combination and merger can be used interchangeably. The Competition Act, 2002 defines different types of Mergers or Amalgamations which can be classified as Combinations, in Section 5 of the Act.

Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad.⁷ The CCI has the power to permit or even disallow the mergers which could have an adverse effect on the Education sector. This is because mergers between powerful players have the capability to create monopolies in the market.

⁶www.legallyindia.com. (2014). *CCI: CLAT convenors immune from anti-trust scrutiny for unilateral fee-hikes*.

⁷Zimbhoff, J., Suryanarayan, S. and Scott, T. (2019). ANTITRUST ISSUES AFFECTING COLLEGES AND UNIVERSITIES. *National Association of College and University Attorneys NACUANOTES*, [online] 13(3).

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There have been no cases in this aspect in the Indian Scenario. However, The OFT of UK has dealt with two mergers in the sector already⁸ In both cases, there were no enforcement activities, as the market shares of the colleges in both cases were too low to impact the relevant markets. The cases illustrate, though, that Educational Institutions have not only been regarded as undertakings, but have also been investigated and, in future cases, mergers might be prohibited.

There are many other possibilities of Anti-competitive conduct by Educational organizations, such as Abusing of dominant position in the relevant market and imposing predatory pricing, Exploitation of Intellectual property rights by institutions in terms of research, etc., which are some of the possibilities wherein future Anti-trust action could arise.

The Way Ahead:

- **Rules and Regulations:** There are scanty rules and regulations released by the CCI as well as The Ministry of Corporate affairs related to Competition Law, which are industry-specific. There should be more work in this aspect.
- **Suo Motu Action:** The CCI should exercise its powers and should check the Education Sector for Anti-competitive behaviour and conduct investigations on its own accord.
- **Advocacy:** CCI should create awareness amongst the masses and the stakeholders regarding the practice of compliance to Anti-Trust laws and assisting the Commission whenever required, as prevention is always better than a cure.

CONCLUSION

The interface between CCI and sectoral regulators seems very uneasy in India as evident from the existing legislative framework. The CCI is mandated with the task of regulating competition without any sectoral boundaries. However, the sectoral regulators are entrusted with the twin functions of regulating technical standards as well as promoting competition.

⁸The merger between City College Manchester and the Manchester College of Arts and Technology and merger concerned the University of Manchester, the Victoria University of Manchester and the University of Manchester Institute of Science and Technology.

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It is very hard to think that anyone can exist in the absence of others as one alone cannot serve as an effective tool for the promotion of competition and protection of consumer welfare in the society. They have very sophisticated and complex functions within their boundaries which cannot be delegated or transferred in totality to each other. Hence, it is imperative to leave the competition law enforcement specifically in the hands of competition authority to enhance legal certainty in an efficient manner. This does not indicate that the role of sectoral regulators is wound up but the clarity with regard to jurisdiction between competition regulator and specific sector regulators is a must for smooth and efficient working of both.

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