INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 5 AND ISSUE 8 OF 2025

INSTITUTE OF LEGAL EDUCATION

INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN - 2583-2344

(Open Access Journal)

Journal's Home Page – https://ijlr.iledu.in/

Journal's Editorial Page - https://ijlr.iledu.in/editorial-board/

Volume 5 and Issue 8 of 2025 (Access Full Issue on - https://ijlr.iledu.in/volume-5-and-issue-7-of-2025/)

Publisher

Prasanna S,

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 5 AND ISSUE 8 OF 2025

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

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ANTITRUST MEETS OIL MARKETS: PERSPECTIVES FROM INDIA AND ABROAD

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BEST CITATION - ANIKET RAINA, ANTITRUST MEETS OIL MARKETS: PERSPECTIVES FROM INDIA AND ABROAD, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 5 (8) OF 2025, PG. 84-95, APIS – 3920 – 0001 & ISSN - 2583-2344.

ABSTRACT

Crude Oil or Black Gold as aptly referred is a crucial gear piece to the global economy's machinery, powering and paving its trajectory. Standing on the shoulders of this precious resource and its derivatives, companies have amassed vast fortunes but like any commercialized product is susceptible to domineering and exploitative forces which in recent times have included "antitrust" as a response. In lieu of the same, this paper, in its entirety, acts pursuant to the aspect of antitrust in the oil market and its derivatives in India and abroad. The paper begins with an overview of antitrust and oil markets while rendering brief detail to the questions at hand and the scope and structure of the paper. Subsequently, the paper provides a succinct overview of the antitrust landscape in India and that of the Indian Oil Market and its derivatives followed by a thorough comparative analysis of antitrust approaches in India vis-à-vis foreign jurisdictions respectively. It is in lieu of the aforementioned backdrop that a summary of findings reinforced by recommendations and a conclusion is furnished therein inscribing the future tryst between oil markets and antitrust.

Keywords: crude oil, antitrust, derivatives, abuse of dominance, competition

I. INTRODUCTION

Paul Thomas Anderson's theatrical magnum opus, *There Will Be Blood*[33], presented the account of a cutthroat capitalist, oil prospector and megalomaniac Daniel Plainview. A fitting lesson the movie communicates to its audience is that humans as a species are hardwired to overreach be it in personal concerns or in matters of commerce. Keeping in continuity with the core subject of the movie i.e., crude oil, it can be unequivocally stated that crude oil in contemporary times has shown to the fullest extent the manner in which the human grasp can extend. While it has resulted in significant technological innovations and revolutionized lifestyles, it is, like any resource, susceptible to forces in tuned with Daniel Plainview's motivations, viz wealth and control. Stemming from these forces, inter alia, include anti-competitive conduct which seeks to monopolize and/or dominate smaller businesses and consumers. In lieu of the same, lawmakers found it fit to evoke antitrust law to counteract these forces. Incidentally, antitrust law's origins can be credited to the rise of oil "trusts" in the United States of America (hereinafter "US") in the late 19th century. A trust was a mechanism wherein stockholders of multiple companies could transfer their shares to a single group of trustees through a trust arrangement. These trusts started gaining traction and consequently acquired vast control over industries therein eroding competition. One such trust was the Standard Oil Trust which in lieu of the powers vested in the trust mechanism acquired a monopoly. This prompted government action leading to the inception of the first measure to counter said trusts i.e., the Sherman Antitrust Act, 1890 (hereinafter referred to as "Sherman Act"),

[33] THERE WILL BE BLOOD (Paul Thomas Anderson, dir., 2007)

named after Senator John Sherman of Ohio.[34] Following its enactment, scores of monopolies such as Standard Oil were either dissolved or separated into smaller entities by lawmakers, staying true to the ethos of antitrust enforcement. Principal to this ethos lied in Section 2 of the Sherman Act[35] which expressly prohibited any person from monopolizing or making an attempt towards monopolization or performing a collaboration with other entities to monopolise.

Over the years and as a gradual response to the everchanging business and market dynamics of economies, jurisdictions across the world have enacted antitrust measures to prohibit monopolies and related anti-competitive behavior from stymying domestic business and consumer interests. On the crude oil front, it can be unequivocally stated that antitrust remains just as and even so more important in today's world. Albeit the slow but gradual shift towards renewable energies such as wind and solar power, it is not in a position to dethrone market incumbents i.e., crude oil and its derivatives such as petroleum. To render perspective, the International Energy Agency (hereinafter referred to as "IEA") postulates that India is on track to account for the largest increase in oil demand between now and 2030, driven by a myriad of factors including but not limited to industrialisation, a wealthier middle-class, etc. Moreover, it was suggested that India should increase its stockpile so as to insulate itself against potential oil disruptions.[36] The aforementioned analysis paints a picture into the trajectory of oil demand and when viewed from an antitrust perspective, such demand invariably creates a condition for aggressive investment and expansion by oil companies with a potential for behavior that distorts competition and harms consumer interest. It is in this ground reality that antitrust presents itself as an impetus for regulation and consumer protection.

Ergo, this paper as a chief objective aims to lend perspective on antitrust and crude oil and its derivatives in India. For the sake of brevity, this paper shall address key questions. First and foremost, the paper shall delve into the antitrust implications prevalent in oil markets and its derivatives adequately reinforced by major antitrust cases and trends in this sector. The next aspect covers, a comparative note shall be made between India and other foreign jurisdictions in respect of tackling anti-competitive behavior in oil markets.

In addition, a doctrinal approach has been adopted towards answering the aforementioned questions. Towards the same, the doctrinal approach consists of (a) primary sources of research and (b) secondary sources of research. The primary sources of research include, inter alia, case laws and statutes and secondary sources of research including but not limited to academic web sources, articles and reports from relevant sources. In no uncertain terms, the referred material was chosen on the basis of reliability and accuracy, relevancy to competition conditions, and its applicability to the subject matter of the paper. Furthermore, the term "oil market" shall for the purposes of this paper include crude oil and its derivatives altogether unless specifically mentioned.

II. WHAT ARE THE ANTITRUST IMPLICATIONS IN OIL MARKETS?

The oil sector is predominantly occupied by government owned undertakings in both upstream (ex. ONGC) and downstream (ex. IOCL). It is plain to note that these companies, in addition to several other public undertakings dominate the oil production process from discovery all the way to distribution. Private companies such as Reliance, while a major player nonetheless may face barriers owing to the wide net of influence existing incumbents cast all over the oil market. Given the ever increasing need for crude oil and its popular

[34] U.S. National Archives and Records Administration, Sherman Anti-Trust Act (1890) https://www.archives.gov/milestone-documents/sherman-anti-trust-act.
[35] Sherman Antitrust Act of 1890, 15 U.S.C. §§2 (1890).
[36] International Energy Agency, Indian Oil Market Report (2024), https://iea.blob.core.windows.net/assets/6b3a9f48-adeb-4de3-bbe5-1be9c8fcd069/IndianOilMarket-Outlookto2030.pdf.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]
VOLUME 5 AND ISSUE 8 OF 2025
APIS – 3920 - 0001 *(and)* ISSN - 2583-2344
Published by
Institute of Legal Education
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derivatives, such as petroleum and diesel in automobiles, a concentrated oil market as is present may lead to the spread of monopolistic behavior which in the long run can erode competition. The CCI, being the sole competition watchdog in all aspects thus has an intrinsic role to play in making sure that the oil market continues to act in a competitive manner towards existing and new users while simultaneously protecting the interests of its users.

Going into antitrust implications on the oil market on a section-wise basis first draws out attention towards Section 3 of the Competition Act[37] (hereinafter referred to as "Act").[38] Section 3(3) of the Act at the very outset prohibits any anti-competitive agreement entered into enterprises at a similar production or provision of goods or services. Several antitrust implications arise from this subsection alone. For instance, it may be possible for oil companies to intentionally limit production or supply of crude oil or finished products in order to bend market prices to its favor which can either result in undercutting the competition or exploiting users. This is particularly determinative considering crude oil is practically an essential good in today's day and age and can for good reason be considered as inelastic meaning its demand is not relative to its price further potentially putting users in a bind as they need oil for everyday purposes.

Another potential antitrust implication from Section 3(3) of the Act alone is sub-subsection (a) which prohibits any direct or indirect determination of purchase or sale price. Naturally and like most industries, the oil market is overseen by the government. As the government plays the part of a market regulator (i.e., the Ministry) and that of market participants (i.e., government owned undertakings such as ONGC, IOCL, etc.), there may be a blur between such powers to a point where it can affect competition. To set facts first, oil companies in India revise petrol prices on an everyday basis (taking into account of a multitude of factors such as taxes) which is looked after by the Petroleum Planning & Analysis Cell (hereinafter referred to as "PPAC").[39] An example situation to the aforementioned is an instance where such revision can occur without fair reason and is rather predicated on collusion between multiple oil companies and profit expectations disguised in the name of international price and market considerations. While the chances are obviously slim given the tight regulation in this respect, it nonetheless raises a question on the tight balance that must be maintained between antitrust considerations and profits, even if from government owned undertakings. On the vertical agreements as enunciated under Section 3(4) of the Act[40], an antitrust implication arising from the same is potentially where both upstream and downstream companies can enter into "exclusive agreements" which given the mass resources available to market incumbents can further entrench their respective position. Moreover, another implication lies in a "refusal to deal" scenario where private oil companies may be excluded from any dealings or access to vital infrastructure for their oil operations which can prove determinantal not only in respect of their operations but that of their larger userbase as well.

On the front of abuse of dominance under Section 4 of the Act[41], it is plain to note that government owned oil companies in India are clearly the dominant entity in their respective upstream and downstream activities. This is true as they meet the definition of "dominant position" as enunciated under the Act i.e., they can operate in an independent manner in their relevant manner outside competitive influence. While it must be noted that dominance per se is not bad but rather abuse of dominance is bad,

[37] Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).
[38] Competition Act, 2002, § 3, No. 12, Acts of Parliament, 2002 (India).
[39] Sakshat Kolhatkar, *How is Petrol Price Calculated In India? Factors That Determine Petrol Price*, NDTV PROFIT (Oct. 13, 2022) https://www.ndtvprofit.com/business/pfx-how-is-petrol-price-calculated.
[40] *Id.* at 5.
[41] Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2002 (India).

repercussions of potential abuse of dominance situations must be taken into consideration. Now, an intrinsic aspect of oil discovery, production and distribution is the large infrastructure such as refineries, storage facilities, etc. along with operational costs to sustain such activities. Naturally, smaller market players may not have access to these facilities owing to the vast expense required in purchasing and maintaining these facilities, thus they turn to market incumbents. If market incumbents limit access to any technical development they own or allow said access on conditions which have no material relation to the subject of such access, these can be construed as anti-competitive, calling for strict enforcement by the CCI. While market incumbents can conversely claim that it is merely protecting their legally protected infrastructure, critical infrastructure as employed in upstream and downstream activities can be dubbed as "essential facilities" (subject to certain conditions) and thus protected under its namesake doctrine. While this doctrine originated under the landmark US Supreme Court ruling of ***United States v. Terminal Railroad Association***[42], a case where it was held to be violative to refuse the allowance of use to a facility deemed essential, this principle nonetheless is still of sound pertinence in the Indian context.

Another probable implication in respect of abuse of dominance is where market incumbents may use their entrenched position in one relevant to explore and set up operations in another relevant market. A close example would be where a traditionally upstream oil company decides to set up downstream operations by leveraging its position, name and resources in the upstream market to the detriment of traditional downstream companies. Thus, while there does exist room for Section 4 violations in this sector, the CCI plays an inherent role in preventing abuse of dominance in this respect. It's worth mentioning that an unseen but possible and rather parallel to its US counterpart at one point of time, the CCI under Section 28 of the Act[43], if need be, can divide enterprises who abuse their dominance under the Act subject to certain terms and conditions as enshrined within that provision, a possible last measure if necessary.

On the aspect of M&A as set forth in Section 5 of the Act[44], persistent combinations in the form of a merger or acquisition between oil market incumbents would severely degrade competition given their market presence and would, in no uncertain terms, give sufficient reason for such merger or acquisition to be rejected. For instance, a horizontal combination between market incumbents operating at similar production of goods can lead to higher concentration and further consolidate their foothold over their respective relevant market while a vertical combination would combine oil entities among differing levels on the supply chain potentially leading to diminishing access to oil infrastructure. While it can be said that these measures are guided by government policy in lieu of a larger public motive and should be thus treated with less scrutiny from market regulators, on the contrary, government owned undertakings, even in strategic sectors such as oil cannot be placed at a pedestal, especially where such action prejudices the competition amongst its competitors and that which may ultimately affect users. An escape to the aforementioned thus lies in joint ventures as delineated in Section 3 of the Act which can be treated as valid so long as they enhance efficiencies in respect of the distribution, supply, etc. of services or goods. Albeit the potential implications vested in such combinations, the prevalent regime nonetheless in consideration of regulation by the CCI endures and remains as the gold standard in ensuring that combinations do not threaten their market's competitive edge.

The preceding portions have laid focus on the

[42] United States v. Terminal Railroad Association, 224 U.S. 383, 411 (1912).

[43] Competition Act, 2002, § 28, No. 12, Acts of Parliament, 2002 (India).
[44] Competition Act, 2002, § 5, No. 12, Acts of Parliament, 2002 (India).

potential antitrust implications and it is on that anvil that practical case studies must be examined to better understand the real life implications of the same.

A. Ms. Sanyogita Singh v. Hindustan Petroleum Company Limited & others[45]

An information was filed against Hindustan Petroleum Company Limited (hereinafter referred to as "HPCL") and other parties by Ms. Sanyogita Singh on the alleged encroachment of Sections 3 & 4 of the Act. The information revolved around a tender floated by HPCL for transportation, from the bottling plant, of LPG gas cylinders for a term period of 5 years and towards the same sought for trucks for carrying various weight capacities of LPG cylinders. It was further averred that HPCL purposefully did not take into consideration the bids of their distributors and dealers but rather that of their competitors from companies such as IOCL and that it favored "cartel rates" from bids quoted. Thus and inter alia, the informant sought the CCI's direction to cancel the same and call for issuance of a fresh tender through inclusion of a clause in favor of HPCL's distributors and dealers. The CCI first provided a backdrop into the LPG transportation market and after defining the relevant geographic market and relevant product market and noted that HPCL lacked dominance in the defined market and thus, an alleged conduct of abuse of dominance could not suffice. Moreover, it was also noted that even if dominant, the informant's stand of incorporating preferential terms to HPCL's own distributors would not be seen as fulfillment to the intention and norm of competition law.

On the aspect of cartelization as so averred by the informant, the CCI observed that the informant did not identify or through any detail, reinforce how said cartelization occurred. Therefore, the CCI, had, in its final order, came to the ultimatum that HPCL and the remaining opposite parties did not contravene Sections 3 & 4 of the Act.

B. In Re: Formation of cartel in the supply of 14.2 kg LPG cylinders fitted with S.C. valves procured by BPCL through Tender No. 1000125304 dated 13.08.2010[46]

The CCI had taken suo moto cognizance of an alleged cartelization in respect of a tender published by Bharat Petroleum Company Limited (hereinafter referred as to "BPCL") where bids were invited for its plants situated across multiple states. Initially, the CCI, through a 2014 order and on analysis of bids submitted that these were identical or even near identical and thus, the participating bidders had contravened Section 3(3)(d) of the Act. This was consequently referred and taken over by the DG for further investigation to the same. While this was undergoing, one of the manufacturers i.e., Tirupati LPG Industries Ltd. had filed a writ petition before the Delhi High Court averring that as it was already subject to an order of cartelization passed in a prior case with measures passed against them, there was no reason on the CCI to order another investigation into them on the same aspect of allegations. Based on this, the Delhi High Court had, in its decision, set aside the CCI's ruling & remanded it back to them for fresh consideration.

While dismissing Tirupati LPG Industries Ltd. from being one of the subjects of investigation in relation to the tender, it was found that the conduct of 17 relevant entities was not investigated and accordingly, the CCI passed orders directing investigation by the DG in to the 17 companies and that of the individuals in charge who were responsible towards such conduct. Subsequently, the DG in its investigation report found, inter alia, that 14.2kg LPG cylinders, in addition to being used solely on a domestic basis and cannot be sold on the open market by manufacturers. Moreover, the regulatory framework called prohibited sale of LPG cylinders to any other entity asides from Oil

[45] Ms. Sanyogita Singh v. Hindustan Petroleum Corporation Limited & Others, Case No. 33 of 2021.

[46] In Re: Formation of cartel in the supply of 14.2 kg LPG cylinders fitted with S.C. valves procured by BPCL through Tender No. 1000125304 dated 13.08.2010, Suo Moto Case No. 4 of 2014.

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Marketing Companies (hereinafter referred to as "OMC"). It was also observed that the LPG market is demand-driven and that due to extensive technical requirements mandated by OMCs, no reason or incentive existed for LPG cylinder manufacturers to innovate their product. While the DG report did not examine the conduct of 11 parties in the case on the basis that they were investigated and penalized in a prior case and while noting the penalization to be on different terms as that of the present scenario, nonetheless and in consideration of the court case of ***Rajasthan Cylinders and Containers Limited v. Union of India and Anr.***[47] decided to close the case without further proceeding on merits.

III. MEASURES UNDERTAKEN BY FORREIGN JURISDICTIONS IN RESPECT TO ANTITRUST AND THE OIL MARKETS

Foreign jurisdictions such as that of the US and EU are no particular stranger to antitrust and anti-competitive behavior of enterprises. As both the US and EU are arguably seen as one of the leading jurisdictions for antitrust enforcement, these shall be of focus for the purpose of this section. Even in a rapidly evolving sector such as oil markets, international antitrust has always managed to remain steadfast in addressing *ex ante* and *ex post* behavior amounting to antitrust with a view to better the interests of consumers and that of the participating enterprises within the relevant sector. Given that the oil market is as paramount as it is within India and that both the US and EU too possess a rich history in resolving anti-competitive behavior, a comparative approach for understanding the nuances of antitrust in these jurisdictions must be brought into perspective as it would not only enable us to better understand the inner workings of the respective antitrust regime, the relevant regulators, but it would also enable us to explore any relevant measures adopted by the US and EU antitrust regulatory regime which can be incorporated in a manner that fits with India's economic and antitrust context.

A. UNITED STATES OF AMERICA

The US possesses two main regulatory bodies in respect of antitrust enforcement and they are the Federal Trade Commission (hereinafter referred to as "FTC") & the US Department of Justice, Antitrust Division (hereinafter referred to as "DOJ"). In respect of how their roles are set forth and owing to the fact there may be overlap in respect of their roles as regulators, before an investigation is opened, either regulator consults with the other regulator so as to duplicity of efforts undertaken in said investigation.[48]

The FTC comprises of a group of five Commissioners, with each serving seven-year terms and one of whom is chosen by the President of the US to act as Chair of the FTC.[49] In respect of a FTC investigation, these are generally performed in a confidential or non-public manner so as to protect the entities involved in the investigation. Moreover, any decision promulgated by the FTC can be appealed before the US Court of Appeals and finally, before the US Supreme Court.

The FTC also plays a crucial role in regulating M&A activities in the US and towards maintaining the status quo of competition in the market, the FTC can also seek a preliminary injunction until a full examination of the transaction is underwent and a determination in respect of the same is made. In respect of antitrust criminal sanctions, any evidence pointing towards the same may be referred by the FTC to the DOJ and it is in respect of criminal sanctions that it must be noted that only the DOJ, asides from having sole jurisdiction in antitrust matters of banks, airlines, railroads and telecommunications can obtain criminal sanctions.[50]

[47] Rajasthan Cylinders and Containers Limited v. Union of India and Anr., Civil Appeal No. 3546 of 2014.

[48] FEDERAL TRADE COMMISSION, THE ENFORCERS https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers#:~:text=The%20injunction%20preserves%20the%20market's,banks%2C%20railroads%2C%20and%20airlines.

[49] FEDERAL TRADE COMMISSION, COMMISSIONERS https://www.ftc.gov/about-ftc/commissioners-staff/commissioners.

[50] *Id.*

In respect of the legislation, these are predominantly the Sherman Act, 1890[51], Federal Trade Commission Act, 1914 (hereinafter referred to as 'FTC Act") and the Clayton Antitrust Act, 1914[52] (hereinafter referred to as "Clayton Act"). To summarize both legislations, the Sherman Act, while brief in text, nonetheless is of paramount importance in antitrust enforcement. For instance, the Sherman Act prohibits any contract or combination that is in restraint of trade among several states or with foreign countries. The Sherman Act further casts a wide net in terms of applicability by defining a "person" to be any corporation or association as authorized under the laws of the US or that of foreign countries. More pertinently, the Sherman Act also criminalizes monopolization or any attempts to monopolize trade or commerce with varying punishments of fines and imprisonment prescribed for corporations and individuals. It must be noted that the restraint of trade in question, as envisaged by the Sherman Act requires to be unreasonable in order for the same to be prohibited. In this respect and for instance, an exclusive agreement between individuals that prohibits contracting with any third party, while restraining trade need not be unreasonable, subject to the facts and circumstances of the case.

Next, the Clayton Act[53] expanded on the groundwork laid forth by the Sherman Act and prohibited business prices such as price discrimination (where different prices are charged to different types of customers in an arbitrary manner), tying agreements (where the price is subject to corresponding condition that restricts competition), interlocking directorates (where the same person sits on the board of directors of companies in competition with one another), etc. Moreover, the Clayton Act requires the notification of M&A activities of a certain threshold.[54]

The FTC Act, in brief aims to promote fair competition and protect the interests of consumers against "deceptive or unfair business practices". The FTC Act makes such business practices to be illegal.[55]

Going into the US' tryst with the oil sector, as mentioned in preceding sections of the paper, the US antitrust landscape came into inception with the Standard Oil case, which was simultaneously the first antitrust case where a corporation was divided into smaller companies. When looking through the lens of today's antitrust landscape in respect of the oil sector, it is imperative to note that the FTC plays an enhanced role in the US' petroleum industry and towards dissemination and furthering enforcement expertise, publishes reports and working papers, merger and anti-competitive enforcement data and related studies. The FTC, in this specific sector has also released a specific rule titled the "Prohibition of Energy Market Manipulation Rule"[56] which inter alia, prohibits a person from committing an act of deceit or fraud in respect of wholesale petroleum markets. Accordingly, any illegal agreement between persons acting towards price manipulation which restrains competition would therefore be subject to antitrust scrutiny under the FTC.

Taking a practical and case-based approach to the above, the FTC has ruled on a significant number of antitrust and M&A related cases over the years. For instance, the FTC had challenged, vide an administrative complaint, a JV between Arch Coal, Inc. and Peabody Energy Corporation as it would not only consolidate mining operations in NE Wyoming but it would also eliminate any competition between the two parties in respect of the geographical region of the Southern Powder River Basin. The preliminary injunction request by the FTC to the above transaction was granted by the US District Court, following which, the parties did not follow up on the transaction.[57] Next and

[51] Id. at 3.
[52] Clayton Act of 1914, 15 U.S.C. §§12-27 (1914).
[53] *Id.*
[54] *Id.*
[55] Federal Trade Commission Act of 1914, 15 U.S.C. §§41-48 (1914).
[56] Prohibition of Energy Market Manipulation Rule, 16 CFR 317.
[57] Peabody Energy/Arch Coal, In the Matter of, FTC Matter/File Number 191 0154.

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more recently, the FTC had announced that three oil and natural gas companies would have to pay a 5.6 million Dollars fine for performance of "gun-jumping" activity i.e., where steps have been taken towards the transaction before said transaction had been cleared by the competition authorities.[58] Also, the FTC had required Casey's General Stores, Inc., Steven Buchanan and Buck's Intermediate Holdings, LLC to divest their retail fuel assets across two states so as to settle FTC charges that the proposed acquisition by Casey's General Stores, Inc. would contravene antitrust law.[59]

Now, when comparing the US antitrust regime to that of India's own antitrust regime, the following aspects come into light, some of which may be of some benefit if incorporated towards overseeing the oil and gas sector in India and are as follows:

(a) Just as the FTC has a separate rule pertaining to price manipulation in respect of wholesale petroleum products, a separate rule or regulation can be devised by the CCI in conjunction with the Ministry or any other statutory regulatory body that acts as a means for prohibiting anti-competitive conduct in the oil sector. This rule can be further devised in a manner that harmonizes both the Petroleum and Natural Gas Regulatory Board and CCI's parent legislation.

(b) The punishments in lieu of contravention of antitrust laws is significantly stricter in the US than in India. As such, amendments of existing punishments as envisaged under the Act can play a role in the long run towards deterring future antitrust conduct.

(c) The enterprises participating in the US oil sector are dominated by private oil companies unlike India where government owned undertakings occupy the top position.

(d) The Clayton Act, as mentioned above, prescribes prohibition of interlocking directorates in respect of prohibition of a person acting as a director in competing companies, subject to conditions. It would be beneficial if the same was incorporated within the Indian antitrust context as it would restrict any antitrust coordination between persons acting as directors of competing companies.

(e) Some states in the US such as California have their own antitrust laws to be applied and read in addition to federal antitrust laws. While it could result in additional enforcement power, it would create cause for confusion among Indian states and it may complicate transactions or agreements going forward.

(f) The FTC has remained quite strict in respect of M&A activities in the oil sector.

(g) International cooperation between the Indian and US competition bodies on the side of oil sector can help deter any possible future anti-competitive conduct.

The actions of the FTC paint a strong and proactive role towards regulating the actions of participating entities within the US oil sector. It is at this juncture that our focus must now be shifted towards the EU oil sector and antirust regime so as to better understand the relevant antitrust regulatory regime and whether the same can be incorporated within the Indian antitrust context.

B. EUROPEAN UNION

The EU, unlike the US is not restricted to a single country but it instead encompasses multiple countries with multiple corporate, commercial and antitrust considerations. In respect of the applicable regulatory regime, the same are the European Commission (hereinafter referred to as "EC") and Articles 101 & 102 of the Treaty on

[58] MICHAEL S. WISE, MARTIN J. MACKOWSKI, CHRISTOPHER H. GORDON, *Record Fine Highlights Importance of Observing Antitrust Requirements Between Signing and Closing*, SQUIRE PATTON BOGGS (Jan. 2025) https://www.squirepattonboggs.com/en/insights/publications/2025/01/record-fine-highlights-importance-of-observing-antitrust-requirements-between-signing-and-closing.

[59] Casey's General Stores, In the Matter of, FTC Matter/File Number 221 0028.

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the Functioning of the European Union (hereinafter referred to as "TFEU").

The EC is considered to be the executive body of the EU and its roles include but are not limited to overseeing, managing and monitoring the budget of the EU and the proposal and implementation of new laws and policies. Furthermore, the EC also acts as the representative of the EU in respect of its interests at the global stage. The EC comprises of a college consisting of twenty-seven Commissioners and is headed by a Commission President who is responsible towards guiding the EC's work.[60] The EC also plays a role in dismantling cartels through various mechanisms such as leniency programme which allows participants of a cartel to submit evidence pointing to the cartels itself in exchange for a reduction or removal of fines. To this effect, the leniency programme (as was also incorporated later in India) allows the first entity applying for leniency to receive full immunity from fines that would have been applicable provided the information rendered allows the EC to initiate an investigation into the cartel activities. Another tool in prohibiting cartels is the whistleblower tool which allows any person with suspicion or inside knowledge of a cartel to report the same to the EC. Finally, participants to a cartel are allowed to settle the case by admitting their activities in the cartel and thus be eligible to receiving a ten percent reduction in respect of any eventual fine.[61]

In respect of TFEU, Article 101 of TFEU[62] prohibits any agreements amongst enterprises acting independently i.e., two or more, in a manner which restricts competition (including cartel activities as well) whereas Article 102 of TFEU[63] does not allow entities that maintain a dominant position in a given market to abuse said dominance.

In an Article 101 investigation, the EC can either come out with a Prohibition Decision or a Commitment Decision and may also impose fines to any entity that was party to an anti-competitive agreement. It must be noted however that decisions taken by EU, as per Article 263 of TFEU[64] can be subject to the Court of Justice of the European Union's review i.e., in particular, the Court of Justice and the General Court. In an Article 102 investigation so as to determine abuse of dominance, the EC first defines the relevant market which includes both the relevant markets. Following its investigation to the activities of the entities and also what is commonly seen in an Article 101 investigation, the EC may issue a Statement of Objections (hereinafter referred to as "SO") so as to let the parties know of the objections raised against their activities by the EC. As was seen in the case of an Article 101 investigation, the EC can either come out with a Prohibition Decision or a Commitment Decision and may also impose fines to any entity that was party to an anti-competitive agreement. Furthermore, decisions stemming from Article 102 investigations can be subject to the Court of Justice of the European Union's review i.e., in particular, the Court of Justice and the General Court.

Coming to the oil sector, the EU too, over the years, has taken immense steps in deterring anti-competitive conduct. For instance, in 2007, the EC had imposed a fine of 183 million Euros on bitumen (derivative of crude oil) in respect of participation of the parties to the cartel in the geographic market of Spain. As per the facts of the case, between the years of 1991 to 2002, the contravening parties would inter alia, set market quotas, exchange with one another sensitive market information, etc. This cartel had come to the notice of the EC following an immunity application by BP under the applicable leniency notice.[65]

[60] EUROPEAN COMMISSION, ABOUT THE EUROPEAN COMMISSION, https://commission.europa.eu/about_en.
[61] EUROPEAN COMMISSION, ANTITRUST AND CARTELS, https://competition-policy.ec.europa.eu/antitrust-and-cartels_en.
[62] Consolidated Version of the Treaty on the Functioning of the European Union art. 101, 2012 O.J. C 326/88.
[63] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. C 326/89.
[64] Consolidated Version of the Treaty on the Functioning of the European Union art. 263, 2012 O.J. C 326/162.
[65] EUROPEAN COMMISSION, ANTITRUST: COMMISSION FINES BITUMEN SUPPLIERS € 183 MILLION FOR MARKET SHARING AND PRICE COORDINATION IN SPAIN, https://ec.europa.eu/commission/presscorner/detail/en/ip_07_1438.

INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]
VOLUME 5 AND ISSUE 8 OF 2025
APIS – 3920 - 0001 *(and)* ISSN - 2583-2344
Published by
Institute of Legal Education
https://iledu.in

On the side of combinations activities in the EU and its antitrust considerations, it is fitting to refer to the EU's merger control rules. On assessment of proposed mergers, the EC decides whether the merger would hinder fair competition. . If it does not do so, then the merger is approved unconditionally and if it does do so and that commitments are not rendered by parties to the merger to undo the hinderance as stated in the proposed merger, such proposed merger must be prohibited so as to protect the consumer and business interests.[66] An example in the oil sector was a recent acquisition of Pavilion Energy Pte Ltd (hereinafter referred to as "Pavilion") by Shell Plc (hereinafter referred to as "Shell") through purchase of shares. On assessment of the same, the EC came to the conclusion that the transaction was applicable with the merger regulations and the European Economic Area agreement.[67] Furthermore, and what is quite unique in EU's case is the promulgation of a competition policy that is focused towards ensuring decarbonization and a clean transition while allowing European consumers and businesses alike to thrive.[68] Going forward, this has the potential to not only work towards the betterment of global environment conditions, seeing as the EU comprises of several countries, but such clean transition can also lead to efficiencies within businesses in respect of their activities. For example, even if a company is involved in production & exploration of oil, there will be a greater ease and push towards entering into agreements or combination transactions that benefit green innovation and sustainability at large. Not only would this be highly beneficial to the parties to the transaction as such competition policy would incentivize it but also, it would check off another obligation and goal of companies in respect of the environment and their societal obligations towards ensuring a clean environment in their operations.

Now, when comparing the EU antitrust regime to that of India's own antitrust regime, the following aspects come into light, some of which may be of some benefit if incorporated towards overseeing the O&G sector in India and the same are as follows:

(a) Just as the EC has a separate law pertaining to Gatekeeper designations (although the same applies to tech platforms in respect of their services and their ability to access vast quantities of data), such designations can be introduced for oil companies in India in respect of their size and role in the larger oil markets and with specific obligations to be attached so as to ensure compliance with the larger competition outlook. The same can be performed in coordination with the Ministry and other statutory regulators in the oil sector, if needed so as to ensure harmonization of workings.

(b) Potential adoption of a competition policy, similar to that of EC, which is set towards achieving common goals such as decarbonization and sustainability therein allowing green innovation to thrive. This would also help prevent environmental concerns in the commercial sphere going forward as this policy, if implemented in Indian antitrust context, can help make sure that green innovation and the larger environmental goals of the economy progress forward in tandem with agreements or combinations that enterprises may be enter into.

(c) The punishments in lieu of contravention of antitrust laws is stricter in the EU than in India. As such, amendments of existing punishments as envisaged under the Act can play a role in the long run towards deterring future antitrust conduct.

(d) The enterprises participating in the EU oil

[66] European Commission, Mergers Overview, https://competition-policy.ec.europa.eu/mergers/overview_en.
[67] Shell Group/Pavilion, Case M.11669.
[68] European Commission, Competition Policy Contribution to the Clean, Just and Competitive Transition,https://competition-policy.ec.europa.eu/about/contribution-clean-just-and-competitive-transition_en.

sector are dominated by private oil companies unlike India where government owned undertakings occupy the top position.

(e) Members in the EU such as Germany have their own antitrust laws that can be applied and read in addition to the overarching EU antitrust laws. While it could result in additional enforcement power, it would create cause for confusion among Indian states and it may complicate transactions or agreements going forward.

(f) The EC has remained quite strict in respect of M&A activities in the oil sector.

(g) International cooperation between the Indian and EU competition bodies on the side of oil sector can help deter any possible future anti-competitive conduct.

IV. RECOMMENDATIONS & CONCLUSION

Over the span of analysis rendered by coverage of multifarious aspects in the paper, crude oil, its derivatives and the market at large and the antitrust intersection were covered in order to render an adequate overview into the subject. Against the aforementioned backdrop and keeping in line with present-day realities, the following recommendations may be put into practice so as to reinforce antitrust enforcement and its obstruction against anti-competitive behavior. These are as follows:

1. Following a note of existing market studies prepared by the CCI, accordingly, a Market Study on crude oil in respect of both upstream and downstream activities and that of its more critical derivatives such as petroleum and LPG can be initiated. As there is no existing study covering these aspects, a new market study dealing in the above respects and of potential antitrust implications in the long run considering the consolidated control of government owned undertakings in oil production and distribution and its effect on private players (though private players are equally capable of anti-competitive conduct) and users on a wide basket of verticals such as anti-competitive agreements, claims of bid-rigging, combination deals, etc.
2. As antitrust is an ever evolving and crucial point of focus for any enterprise, the Advocacy Division of the Commission, which has played an intrinsic role in promoting knowledge on the aspects of antitrust law, can provide specialized training and awareness sessions, webinars or even technical training to relevant stakeholders in this field such as the Ministry, government owned oil or derivative related undertakings, etc. This would further ensure harmonization between the oil regime and competition law which is certainly beneficial in the long run.
3. As discussed, prior, India can align its antitrust enforcement policy with that of its US and EU counterparts as not only would it reinforce their existing firewall but would simultaneously stimulate global investor confidence. This can be incorporated in the form of amendments, new regulations, adoption of foreign antitrust guiding principles, etc.
4. As private players have comparably minimal share in terms of upstream, downstream and retail operations, existing laws and regulations in this regard can be relaxed in order to stimulate private participation and to this effect, specific small upstream or downstream government oil companies can be privatized to even the arena between public & private players.
5. While fossil fuel subsidies promulgated by the government have been slowly phased out over time[69], prevailing subsidies which are geared towards the benefit of government owned oil

[69] Press Trust of India, *ADB lauds India's fossil fuel subsidy*, PRESS TRUST OF INDIA (Nov. 2, 2024) https://www.ptinews.com/story/business/adb-lauds-india-s-fossil-fuel-subsidy-reforms/1951392.

companies make it difficult for private players to compete. Moreover, as private players would naturally have to adjust prices based on price revisions by government owned oil companies, it creates a price parallelism scenario which from a bird's eye view inhibits competition. A potential solution to this effect can be through either grant of similar subsidies or availing of certain economic or business benefits to compensate for the above.

Antitrust is no stranger to oil markets and its derivatives. Its famed origins took inception with the split of the then mega oil giant Standard Oil in the US and since then has made commendable strides in regulating this market. In India, antitrust jurisprudence in respect of crude oil and its derivatives, while relatively limited compared to other turbulent sectors such as technology and even in the face of renewable and efficient energy sources still calls for participation at the highest level from industry stakeholders and the CCI to address anti-competitive behavior, if any. As already pointed out in the recommendations, market study, stakeholder engagement, international alignment, further private participation, business incentives such as subsidies, and even more can ensure fair competition. Non-consideration of potential risks posed despite a rapidly developing energy market and consumer base as pointed out earlier can further upset the competitive balance within the renewable energy space as well as some traditional oil companies can expand their operations into renewables by leveraging their existing market position. Thus, while the oil market and its derivatives continue to have a footing today, it is imperative that these positions be taken into consideration and that the government, assuming both the role of regulator and corporation must find a way to balance competitive interests with corporate interests, even if in service of public.

Finally, citizens too possess a significant part to play in respect of securing the prevalence of competition. As business competition invariably affects their interests as consumers, citizens must maintain active participation and curiosity in respect of the conduct of upstream and downstream oil companies, public or private. If at the very outset, citizens utilize the rights vested under the Act, not only would competition continue to prevail, but so too their interests.