Competition Commission of India Journal on Competition Law and Policy
Vol. 1, December 2020, pp. 141-163

Competition Law and Employment

Rajat Moudgil* and Suhaib Bandey**

Abstract: Since inception 'consumer welfare' has defined antitrust laws in many jurisdictions. The first antitrust legislation in the United States, enacted on the recommendations of the Temporary National Economic Committee, was in response to the consumer harm caused by big trusts and monopolies. The subsequent legislation in the United States and the antitrust regimes adopted by other countries focussed on protecting consumers and competitors. Consumers and consumer welfare were perceived from the demand side. The intermediaries on the supply side that are considered as factors, including labour for production remained ignored by antitrust authorities for a major part of the 20th century. The trend of a limited number of employment-related antitrust litigations has continued thereafter.

The anti-competitive practices of fixing wages, predatory hiring, non-poaching agreements, non-compete obligations, etc., affecting workers, competitors and consumers, have escaped the same level of scrutiny that antitrust authorities adopt in traditional product/service market(s).

This article aims at examining these anti-competitive practices in the labour market, their application in India and the responsibility of antitrust regulators.

Keywords: Antitrust, competition law, employment, labour market power imbalances, predatory hiring, anti-poaching agreements, unilateral conduct

* Lawyer and Former Research Associate, CCI. The author may be contacted at: rajat.moudgil@gmail.com

** Lawyer and Former Research Associate, CCI. The author may be contacted at: suhaibfarooqbandey@gmail.com

1. Introduction

In 1995, the restrain on *Jean-Marc Bosman* by his Belgium first division club '*Royal Football Club de Liège*' from joining a French football club '*Dunkirk*' without payment of a transfer fee paved the way for free movement of players in the European Union.[1] Consequently, it invested more power in the players to decide their future and bargain their wages. This change was only possible because the European Court of Justice was willing to analyse the restriction outside the strict interpretation of the contract which restrained *Bosman* from joining the French football club. The Court ruled that the system, as it was constituted, placed a restriction on the free movement of workers and was prohibited by Article 39(1) of the EC Treaty. It meant that players could move to a new club at the end of their contract without their old club receiving a fee. Without explicitly stating, employees and their rights were brought to the forefront and the shackles of contractual obligations were removed. The effects of this ruling are tangible to this day. The transfer window in the European football league is the most lucrative period for footballers and importantly the footballers are equally placed to bargain for their contractual terms, as the big football clubs.

In spite of the overwhelming impact on 'labour welfare' due to regulatory intervention, as is clear from this case, the competition authorities globally have largely ignored the importance of antitrust regulation in labour markets. There are more than one reason for this inattention. The inception of antitrust laws focussed on 'consumer welfare'. Regulators restricted the primary application of antitrust laws to reach this end. The first clear statute expanding the ambit of the antitrust regime to labour markets was the Clayton Act, 1914. Twelve years after this enactment, the Supreme Court of the United States held[2] that Section 6[3] of the Act, unequivocally applied to 'Wage-Fixing Conspiracies'. Even thereafter, consumer welfare and labour welfare could never get the same attention of the authorities.

Conservative scholars like Stutz (2018) in the United States believed that labour and antitrust policy are conceptually different and cater to competing values. Moreover, higher wages resulting from antitrust intervention process can harm downstream product-market competition by raising marginal costs and reducing output. The inverse correlation between these two values could be a reason for giving preference to the consumers placed

at the end of the downstream market over a factor relevant in the supply chain. Additionally, most countries adopted their own labour laws. To some extent, these statutes or other non-statute exemptions may combine to shield collusive behaviour on both sides of labour negotiations (Jerry and Knebel, 1984).

Another reason that may have created the impression that consumer welfare in the product and service market(s) is more significant is the negligible antitrust litigations against employers, across the globe. The absence of antitrust litigations in the employment sector also leads to the perception of non-application of antitrust laws in labour markets. However, there are various reasons for the limited antitrust litigations in the labour market. Unlike the product market litigations, which are either initiated by competitors, large companies, etc., with the resources and incentives to bear the high costs of complex antitrust litigations, aggrieved workers may not always have the resources or incentives (Weil, 2017). The straightforward analysis based on the rise in prices is inapplicable in labour market antitrust litigations. Class action suits also become tough as workers would usually have diverse interests and be at different positions in life and employment. The small number of successful antitrust litigations in the labour markets have taken place in highly specialised settings like sports leagues, fashion models market, doctors and nurses. These litigations will be discussed in the following sections. These cases show that so far litigations have been brought forward by sophisticated and high earning workers (Naidu, Posner and Weyl, 2018).

However, in the recent past, competition law and labour market issues have been addressed by various antitrust agencies globally. In 2016, the U.S. Department of Justice (DoJ) even announced its intention to initiate criminal prosecution in anti-competitive agreements affecting the labour market.[4] Similarly, the Hong Kong Competition Commission (HKCC) also released an advisory bulletin[5] indicating that it has encountered several situations where businesses have engaged in employment-related practices which may give rise to competition concerns. In 2018, the Japan Fair Trade Commission (JFTC) released a report with discussions on the application of the Antimonopoly Act on human resources.[6] The Organisation for Economic Cooperation and Development (OECD) also held a session in June 2019 to discuss antitrust concerns in the labour markets with a

focus on the factors contributing in the creation of monopsony powers. Another follow up session was held in February 2020.[7] In India, though concerns have been raised in the sports industry, this issue largely remains unattended by all stakeholders.

Macroeconomists began to use models of monopolistic competition to explain how small costs of adjusting prices could give rise to business fluctuations (Akerlof and Yellen, 1985). This trend has started influencing labour economics with the argument that employers also have market power in the setting of wages (Bhaskar, Manning and To, 2002). The imbalances prevailing in the labour market have been compared to the traditional buyer power in a product market by Scheelings and Wright (2006). Criminal liability for anti-competitive agreements in employment is logical and prudent due to the economic effects of these practices; the justification for this was given by Davis (2018). Naidu, Posner and Weyl (2018) recommended the most suited antitrust remedies for labour market power. The restraints in the labour market and the evolving antitrust treatment in the United States were discussed by Stutz (2018). The extension of antitrust practices against workers in the gig-economy space has been brought forward by Steinbaum (2019). These discussions have primarily focussed on the situation in the United States. However, the challenges faced by the antitrust authorities in the employment sector worldwide still require extensive discussion.

Through the analysis of different labour market conditions in India and other jurisdictions, this research aims to understand the application of competition law in employment in India and the need for all the stakeholders including the Competition Commission of India to be versed with its implications. A qualitative research methodology is adopted to examine the challenges faced in enforcing competition in the labour market through traditional tools and the measures to overcome these challenges. The anti-competitive practices resorted to by employers in the labour market have been divided into the following three parts for reaching a considerate conclusion:

1) Predatory Hiring

2) Anti-Poaching Agreements

3) Unilateral Conduct

2. Labour Markets

It is important to understand the difference between traditional product/ service markets and labour markets. Factors relevant to both these markets are different. In economics, labour falls under the category of 'factor market'. Also known as the input market, it refers to the factors of production or resources that companies require to produce their goods and services. In products markets, consumers are the buyers and businesses are the sellers; whereas in factor markets, businesses are the buyers. Anything relevant for making the final product like labour, raw material, capital, land, etc., is part of the factor market. Economic relationship of demand and supply is also different (Bhaskar, Manning and To, 2002). In a product market, high demand leads to an increase in the number of goods produced until the demand is met. However, this is not the case in the labour market where labour cannot be manufactured. Increase in wages will not automatically cause an increase in labour supply.

From a competition law perspective, the same rules should apply for the procurement of goods and services as well as the acquisition of labour. Firms that compete for hiring or retaining the same labourers are competitors in the labour markets, regardless of whether these firms also offer goods and services that are in competition with each other (Yüksel and Salan, 2019). The factors which may be relevant in delineating a relevant labour market comprise skill, education, experience, wages, relocation, mobility costs, working conditions and other non-price factors. In several industries like Information Technology, Legal, Medical, specific skills are required, and the employees need to clear several stages for gaining qualifications and licences. A labour market can be defined as a group of jobs, between which workers can switch with relative ease, located within a geographic area usually defined by the commuting distance of these workers.

Buyer Power

Buyer power plays a particular role with regard to creation or strengthening of a dominant position. It can create a dominant position directly in the procurement market concerned. The monopsony model has established itself as the standard instrument for examining buyer power. It is based on the assumption that one powerful buyer comes across many suppliers (Burdett and Mortensen, 1998). In such a situation, the buyer can reduce

his demand to cause a reduction in the procurement price. This simplistic model may fail in situations where both sides of the market are concentrated to a certain extent. The bargaining model applies in such situations, where bilateral negotiations determine the terms of the contract. Any gap between the strength enjoyed by the buyer and seller can allow the buyer to dictate the terms.

In procurement markets like the labour markets, buyer power is less often expressed in the classical sense as market power affecting the opposite market side as a whole but more often in the form of bargaining power exercised bilaterally vis-à-vis individual suppliers. It is also suggested that only a player who can influence both sides of the market can be a dominant player in these markets. Dominant position on one side of the market has also been used to prove the dominance on the other side. The European Commission (EC)[8] and Bundeskartellamt[9] have relied upon this theory in the past. In one case, dominance in procurement markets was used to prove the existence of dominance in sales markets (and vice versa).

Thus, one major source of market power in all types of markets is 'concentration', where only a few firms operate in a given market. Buyer concentration in the labour market creates monopsony or oligopsony in favour of employers. Traditional monopsony is clearly unrealistic since employers obviously compete with one another to some extent. 'Oligopsony' or 'monopsonistic competition' are the more accurate descriptions of such labour markets (Akerlof and Yellen, 1985). These can exist when only one or a few employers hire from a pool of workers.

Once market power is gained by the employers, the perils of exploitation tend to creep in. As Adam Smith recognised, businesses gain in the same way by exploiting product market power and labour market power, enabling them to increase profits by raising prices in the products market or by lowering costs in the labour market (Smith, 1776).

This exploitation is akin to the treatment of workers denounced by Karl Marx. He argued that workers were underpaid and subjected to poor working conditions (Marx, 1867). This treatment was possible to the 'reserve army' of the unemployed, replacement remained available at will for the employers. The extraction of the surplus derived by the employers by paying low wages was called exploitation. Anti-competitive practices are just more sophisticated forms of these exploitations.

3. Predatory Hiring

In competition parlance, 'employees' are equivalent to assets of an organisation. One of the many ways in which a competitor can disrupt the functioning of an organisation is by inducing the employees including the key-managerial employees to terminate their relationships with their employer and join him. Antitrust concerns arise when this inducement is done with the purpose of harming rivals and attempting to monopolise. In the Indian context, if a competitor only hires the employees of its competitors to ensure that the competitor is unable to survive in the market such a practice would be 'Abuse of Dominance' as per Section 4 of the Competition Act, 2002.

Predatory Hiring has been held to be anti-competitive as per Section 2[10] of the Sherman Act, 1890. The meaning of predatory hiring as defined in *Universal Analytics, Inc. v. MacNeal-Schwendler Corp*[11] is still applied. As per this ruling *predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor*. In this case, *Universal Analytics, Inc*., filed a claim alleging that *Macneal Schwendler Corp*. hired five of its key technical personnel only to cause harm to them. They relied upon a memo from the executive vice-president of Macneal which read "*by hiring UAI employees, we wound UAI again*". The Court while adjudicating held though it appeared that one of the reasons for hiring these employees was to harm the plaintiff, however, due to the fact that these employees were sufficiently used by the hiring company ensured that no case of predatory hiring was made out. Two prong test was laid down by the Court which required the plaintiff to establish that (i) the hiring was made with predatory intent, (ii) clear non-use in fact.

The test laid down in *Universal Analytics* continues to be applied, though in some cases the Courts have deviated on the reasoning that as per the Sherman Act, even an attempt to monopolise is enough for its breach. In *West Penn Allegheny Health System, Inc. v. UPMC*[12], the Court held that UPMC being the dominant hospital in Pittsburgh attempted to monopolise the market for hospital services when it hired key physicians from the plaintiff. Court noticed that the salaries offered were well above the market rates and the finances available with the defendant were insufficient to pay

these salaries without suffering losses. Resultantly, the Court held it to be a clear attempt to drive out the second largest hospital system out of the market. Critics like Page (2017) have even argued that a new "bona fide intent to use" test should be adopted in dealing with such allegations.

Even before the enactment of the Competition Act, 2002, such a dispute arose between two leading beverage companies, namely 'PepsiCo' and 'Coca-Cola'. The global rivalry between the two extended to India also in the early 1990s. PepsiCo alleged that Coca-Cola was unlawfully inducing its groups of key marketing and other strategic employees to breach and/ or terminate their employment contracts with PepsiCo and enter into employment contracts with Coca-Cola. The relief of injunction sought by PepsiCo was eventually not allowed by the Delhi High Court[13] on the reasoning that '*In a free market economy, everyone concerned, must learn that the only way to retain their employees is to provide them attractive salaries and better service conditions. The employees cannot be retained in the employment perpetually or by a Court injunction'.*

The matter before the Delhi High Court was agitated under the laws of Contract and the relief sought was under the law of Torts. The findings of the Court, as such should only be read in those contexts. The unfair practice of inducing employees of PepsiCo to drive the competitor out of the market could have been agitated under the Competition Act, 2002, if applicable, and may have led to different reasoning and conclusion by the Court. Other aspects of such a hiring would have become relevant under the Antitrust laws.

Interestingly, there has been no case in the Indian context, wherein an enterprise has been found to be infringing the provisions of the Competition Act by indulging in predatory hiring. In 2016, Air India had approached the Competition Commission of India alleging that one of its rival airlines Indigo had indulged in predatory hiring by poaching its pilots. This case[14] was closed under Section 26(2)[15] of the Competition Act, 2002, holding it to be an employment issue raising no competition concern. When this case was heard in appeal[16] by the erstwhile Competition Appellate Tribunal, the principle of predatory hiring was discussed in light of Sections 4(2) and 3(3)(b) and (c) of the Competition Act, 2002, however, the Appellate

Authority was of the opinion that there was not enough data/information to establish predatory hiring. The appellants were given the liberty to approach the Commission once again, provided they could gather enough material to substantiate their claim.

The jurisprudence on predatory hiring has not evolved in India thereafter.

4. Anti-Poaching Agreements

On 20th October 2016, the Department of Justice (DoJ) of the United States released a guidance note for '*Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation.*'[17] Similarly, the Hong Kong Competition Commission and the Japan Fair Trade Commission have also released advisories[18] indicating that they have encountered a number of situations where businesses have engaged in employment-related practices which may give rise to competition concerns.

These advisories frown upon any agreement between competing firms which restricts employment from rival firms, sharing of remuneration details, fixing wages to lessen competition by stagnating transfers. Employees have been treated as consumers in the labour market and any agreement between firms to restrict movement of labour has been held to be causing an adverse effect on the employees by restricting their choice, salaries and other benefits.

In September 2010, the Antitrust Division of the US DoJ filed a complaint[19] against Google, Apple, Adobe, Intel, Pixar and Intuit before a district court in San Jose, California, alleging that their agreements not to solicit/ hire each other's employees through 'cold calling' violated antitrust law. Cold calling is any solicitation for employment (by phone, email, letter or otherwise) directed to an employee who has not applied for an open position. Companies executing these agreements agree to notify each other when making offers to each other's employees. The top executives of these companies were alleged to be involved in this conspiracy. The DoJ held that these agreements eliminated a significant form of competition to attract skilled employees, distorting the labour market and causing employees to lose opportunities for better jobs and higher pay. The companies agreed to pay US$ 415 million (Rs. 2,755 crore) claims in the class action lawsuit. Consequently, Apple and Google's board of directors were hit with a

shareholder derivative lawsuit for breach of fiduciary duty and harming the company by engaging in illegal anti-poaching agreements (Choukse, 2016). Some of the recent updates issued[20] by the US DoJ show how no-poaching agreements are addressed by the US Antitrust Agency.

On 3rd April 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG[21] and Westinghouse Air Brake Technologies Corporation (Wabtec). As per the complaint, these companies along with a third company Faiveley entered into no-poach agreements in 2009 and continued till 2015. These agreements were stated to be in violation of Section 1[22] of the Sherman Act. Private lawsuits were also filed by current and former employees of the companies. The defendants also moved a motion to dismiss the complaint and argued that no-poach agreements should be assessed under the rule of reason. This motion was dismissed[23] and the defendants agreed to pay US$ 48.95 million in settlement.[24]

The DoJ has even extended the applicability of no-poach agreements to franchisor-franchisee agreements[25], where the franchisor restrains the franchisee from poaching employees from the other franchisee of the same franchisor. DoJ maintains that a franchisor and franchisee are not automatically deemed to be a single entity and can be separate entities capable of conspiring within the meaning of Section 1 and such naked, horizontal no-poach agreements between rival employers within a franchise system are subject to the per se rule. The decision in this case is still awaited.

The principle of no-poaching is not limited to an agreement to not hire from competing firms but it also extends to 'wage-fixing'. Akin to a cartel which decides the prices or supply, in a 'wage-fixing' agreement the competitors try to reduce their costs by deciding upon the salaries and perks payable to their employees. Most recently, on 31st July 2018, the Federal Trade Commission (FTC) and the Texas Attorney General charged Your Therapy Source, a Dallas-Fort Worth[26] company that provides therapist staffing services to home health agencies, with unlawfully colluding to limit pay for therapists and inviting other competitors to do the same.

The European Union Member States have also been averse to no-poaching and wage-fixing agreements. Undue restrictions placed on anaesthesiologists by 15 hospitals in the Netherlands through a

non-solicitation agreement were held to be in violation of the Dutch Competition law. The hospitals agreed not to poach each other's trained anaesthesiologists with an additional restriction on employing any anaesthesiologist for a period of 12 months after his/her leaving a hospital part of the agreement.[27] In 2010, in Spain, eight transportation companies were penalised for implementing co-ordinated strategies which included conditions on hiring employees.[28] They were held liable under Article 1 of the Competition Act of Spain and Article 101 of the Treaty on the Functioning of the European Union. In yet another case of wage-fixing, arising from the same cause of action in 2016, modelling agencies were fined by both Italian and British Competition Authorities.[29]

No-poach agreements also surreptitiously get a nod from the antitrust agencies at the time of approval for mergers. In most mergers notified pursuant to an agreement between the parties, there is usually a non-solicitation clause. This non-solicitation is used to restrain the acquired party from dealing with past clients and at the same time used to restrain the acquired party from poaching employees transferred to the acquirer. Such clauses may seem to be non-ancillary to the combination notified but a deeper look into such agreements may warrant scrutiny of the antitrust authorities.

The European Commission permits non-solicitation clauses if they are directly related and necessary for the implementation of a merger.[30] In *Kingfisher/Großlabor*[31] merger, the sale-purchase agreement was supplemented with non-solicitation restrictions on two managers of *GroBlabor*. The EC accepted the reasoning provided by the parties to hold that such restrictions were necessary and in line with the objectives of the deal. Likewise, in the *Imperial Chemical Industries/Williams*[32] merger for the acquisition of the home improvements division of Williams, the EC allowed the restriction on soliciting certain employees of Williams for a period of two years after the closing of the deal.

At present, the Competition Commission of India also analyses the non-compete clauses forming part of the proposed combination. Such non-solicitation clauses are part of the non-compete agreements and depending upon the scope of restrictions, the Commission may approve such clauses. The rationale is to allow the acquirer to derive the maximum benefits

arising out of the combination. Due consideration is provided to the scope of these restrictions based on the time span and the geographic area for such restrictions. As per the guidance note[33] published by the Commission, usually, the time period should not exceed 3 years and the scope should be limited to the current activities and the area covered by the acquired party. The Commission also initiated a consultation to decide if non-compete obligations should even be assessed at the time of competition assessment. The applicable law on the assessment of non-compete obligations in merger notifications may even change in the future.

India hasn't witnessed any case wherein two rivals have entered into a no-poaching agreement independent of a combination as contemplated under Section 5 of the Competition Act.

5. Unilateral Conduct

The power of enterprises to control the activities of their employees/ affiliates gives rise to unilateral anti-competitive conduct in employment. Sports authorities which usually have a monopoly over the administration of a particular sport have been found to be on the wrong side of the competition law, both in India and globally.

On 12th July 2018, the Competition Commission of India penalised the All India Chess Federation (AICF) for banning four registered players due to their participating in an unapproved tournament.[34] The chess federation was affiliated to the World Chess Federation and solely responsible for all chess activities in India. The players were always subservient to the federation as the ratings and selections were controlled by the AICF. This order in itself was sufficient to caution all sporting bodies against unilateral control over player participation in independent tournaments.

Internationally also, such restriction on players from participating in sporting events is frowned upon and penalised by antitrust authorities. In December 2017, the European Commission came down heavily on the International Skating Union (ISU) for imposing severe penalties up to a lifetime ban on athletes participating in speed skating competitions that are not authorised by the ISU.[35] It was held that these rules that are in place since 1998 restricted the commercial freedom of athletes and potentially foreclosed the market for competing organisers. This action was brought

up by two Dutch ice skaters who were threatened by the ISU with a life ban on participating in a league in Dubai. The ISU was directed to stop its illegal conduct within 90 days or pay up to 5 per cent of its average daily worldwide turnover in case of non-compliance.[36]

Following this in January 2019, another leading world sporting body the *Fédération Internationale de Natation* (FINA) allowed its swimmers to participate in race meetings organised by independent organisers.[37] FINA, recognised by the International Olympic Committee (IOC) for administering international competition in water sports, was under pressure after independent suits were filed against it by the threatened swimmers and the independent league organisers for violating antitrust law. Blocking any new competitive league from entering into the market by not allowing premium players from participating was again the cause of action.

The Board of Control for Cricket in India (BCCI) has also indulged in unilateral conduct to restrain its players from participating in rival cricket leagues or in cricket tournaments deemed to be unapproved as per the guidelines of the International Cricket Council. In 2007, when Zee Entertainment Enterprise attempted to foray into the world of cricket by organising a domestic league tournament named the Indian Cricket League (ICL), the BCCI took swift action and banned all players who participated in the league. State members were not allowed to provide grounds for matches and broadcasters who showed allegiance to this competing league were not allowed to participate in its own telecast rights bidding. The effects of abuse of dominant position by the BCCI were felt in real and the Indian Cricket League could not survive with such restrictions in the market. The league was ultimately disbanded in 2009.

The BCCI was ultimately penalised by the Competition Commission of India and was directed to pay Rs. 522.4 million for abusing its dominant position for imposing restrictions that denied access to the market for '*Organisation of Professional Domestic Cricket League/ Events*'.[38] However, the interest of the players was never the consideration for the decision of the Commission in this case. Consequently, even though the Order was passed and the appeal is pending, the BCCI did not hesitate in banning,

in May 2019, a first-class cricketer Rinku Singh for participating in a T-20 tournament in Abu Dhabi without the prior permission of the BCCI.[39]

The cases in the sports industry signify that unilateral conduct is possible when employers possess some labour market power that allows them to dictate terms. Labour market power in many ways is similar to a product market power. In the case of product market power, one seller or very few sellers having the product can determine the price of the product. Similarly, in case of employment which is governed by only one or few employers, it allows the employers to exert some pressure on the employees.

Another situation where unilateral conduct harms the employee more may arise in sectors governed by the Government. Independent workers could be dictated when their employment is dependent. The farming sector in India is a prime example of such a situation. As per the Agricultural Produce Market Committee (APMC) regulation, farmers could only sell their crop to buyers who were licensed by the State Government. This restricted the free flow of the farmer's crop as well as his will to engage with different traders. Consequently, buyers could exert pressure and decide the terms. In September 2020, the Parliament of India enacted two Acts, which allow the farmers to sell their produce directly to anyone in the country without an intermediary. Though the actual effects of these legislations are yet to be recognised, they have significantly increased their options and removed the adverse buyer power that was prevalent in favour of the traders. It is interesting to note that these legislations have faced agitation by the farmers themselves, mainly on the issue of continuity of Minimum Support Price (MSP).

Labour Issues in Gig Economy

In addition to these traditional setups, anti-competitive practices are also applicable in gig economies. It is often defined as labour that provides organisations or individuals access via online platforms to pool of workers willing to carry out paid tasks (Valenduc and Vendramin, 2016). This normally takes the form of fragmented micro-tasks provided through platforms that connect online-based workers with hiring firms. A platform is a business which creates interactions between producers and consumers and provides an open participative infrastructure that facilitates the exchange of goods and services (Parker, Alstyne and Jiang, 2016). As such,

it can be considered an online labour-brokerage that acts to coordinate the market of a worker with a requester (Collier, Dubal and Carter, 2017). The process, therefore, enables independent workers to provide services through online platforms rather than traditional employment.

Independent contractors seem to be hired under the garb of freedom and independence. Online business platforms like Uber, Swiggy, Ola, Zomato, Amazon, Urban Company, etc., employ independent workers without any protection derived from labour laws. At the same time, they may be entirely controlled by employers/customers. The ability of these platform owners to dictate the terms of the transaction and review the relationship based on subjective ratings given by the customers allows unprecedented power to the employers. Independent workers cannot even avail the benefits of collective bargaining.

In a United States case in 2016, an Uber customer initiated antitrust suit[40] against the company alleging price and wage-fixing conspiracy with its drivers. It was claimed that Uber decides the price of the ride, the share of the driver and the allocation of customers to each driver. Cartelisation through the hub and spoke arrangement was the alleged modus operandi of the company. Uber refuted these allegations by contending that it is only a software company that provides its platform for customers and independent drivers to connect. That they neither provided transportation services to the customers nor employed the drivers. The case never proceeded to trial due to the arbitration clause, however, Uber commissioned two economics papers to suggest that the control exercised over the drivers benefits 'consumer welfare'.

Like the traditional markets, consumer welfare appears to have gained importance over labour welfare and used as a defence. These platforms are looked upon as providing services that make lives convenient. Antitrust agencies are also hesitant in intervening by suggesting that these markets are at nascent stages and the actual scope is yet to be realised.[41]

Interestingly, even in the gig economy space, the antitrust cases have been brought by customers with allegations of cartelisation and not by the workers dealing with unilateral conduct by the companies. The discussion in the introduction on the lack of employee-initiated antitrust litigation is relevant here also. India witnessed strikes[42] and protests against unfair

treatment by cab ride apps but no antitrust litigation was initiated by the drivers. Again the lack of resources and ignorance regarding the applicability may be the reasons.

One antitrust litigation against an online platform that has received some attention from the Competition Commission of India in the e-commerce sector is against 'Make My Trip'. In two separate information(s) filed by the Federation of Hotel & Restaurant Associations of India and Treebo Hotels, the Commission ordered[43] detailed investigation after observing that the exclusionary practices adopted by the platform *prima facie* appear to be anti-competitive and abuse of dominance. The informants in these cases are also hotel owners and hotel management companies.

The antitrust investigation initiated against Amazon and Flipkart by the Commission on the complaint filed by Delhi Vyapar Mahasangh[44] comes closest to resembling an employment-related antitrust litigation. The members of the informant society comprise many Micro, Small and Medium Enterprises (MSMEs) traders who rely on the trade of smartphones and related accessories. These traders alleged discrimination in favour of the preferred sellers of Amazon and Flipkart. Though not employment in the traditional sense, the relationship between the traders and the platform for connecting with the buyers is akin to the labour market in the gig economy.

All the above situations arise in cases where the market is concentrated allowing the concentrated player more power to unilaterally decide the terms and conditions.

6. Conclusion

Importance of competition in employment has not been fully appreciated by the regulators. Whilst the authorities have focussed on the traditional factors influencing competition, labour market power and its consequences have largely been ignored. Unlike the new challenges posed by technology, labour market power has existed from the times when antitrust laws were coined to break big trusts in the United States. Those big trusts like the e-commerce giants in the modern era exerted similar pressures in the employment sector. Disintegrating the highly concentrated trusts may have even indirectly had an impact on the free flow of labour without

stringent terms and conditions in the past. However, the recent cases of anti-competitive practices in the labour market require a course correction.

Imbalance in labour market power is also against the principle of equality and can have far-reaching consequences like political conflicts. A recent tragedy in the Indian Film Industry has even raised questions on the onerous terms of a contract[45] on the mental health of individuals. Impact on the economy is akin to the impact caused by product power imbalances. The modern economic landscape dominated by e-commerce does not allow the employers the benefits of the traditional labour laws. Collective bargaining as a remedy has also failed.[46] The onus is upon the antitrust regulators to share the burden and in combating the adverse effects of power imbalance in the labour market. The relation between labour antitrust claims and consumer welfare needs an immediate focus of the regulators.

The current competition framework seems adequate to address any anti-competitive conduct in the employment sector. It is primarily the focus which needs to be stretched towards this matter in addition to the traditional topics of antitrust discussions. Recent trends have shown the inclination of several jurisdictions to venture into the systematic scrutiny of competition issues in employment.

The world is witnessing convergence of economies allowing unprecedented movement of both skilled and unskilled workers. The antitrust regulators have the opportunity to play an instrumental role in ensuring that the balance is maintained in the labour market and anti-competitive practices in employment are not excused behind the veil of economic growth.

Endnotes

1 See Belgian Football Association v. Jean-Marc Bosman; R.F.C. de Liège v Jean-Marc Bosman and others; UEFA v. Jean-Marc Bosman; Judgement of the Court of 15 December 1995, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415

2 See Anderson v. Shipowners' Association of Pacific Coast 272 U.S. 359.

3 See 15 U.S. Code § 17.

4 Press Release Number: 16-1230, available at: https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals

[5] Competition Commission Advisory Bulletin, available at: https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf

[6] Report of Study Group on Human Resource and Competition Policy, available at: https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html

[7] Details of the session available at: https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm

[8] See Commission Decision of 3 February 1999, Case No. IV/M.1221- REWE/Meinl.

[9] See Cf. Bundeskartellamt decision of 30 June 2008, B2-333/07, – "Edeka/Plus.

[10] Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

[11] See 914 F.2d 1256 (9th Cir. 1990).

[12] See 627 F.3d 85, 2010 U.S.

[13] See Pepsi Foods Ltd. and others v. Bharat Coca-Cola Holdings Pvt., 81 (1999), DLT 122.

[14] Case No. 108 of 2015.

[15] Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under Section 19, the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

[16] Appeal No. 32 of 2016 decided on 29th April 2016.

[17] Antitrust Guidance For Human Resource Professionals, Department of Justice, Antitrust Division, Federal Trade Commission (October 2016).

[18] Supra Notes 5 & 6.

[19] United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar (Case: 1:10-cv-01629).

[20] See No-Poach Approach, https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach

[21] United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation.

[22] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

[23] 2019 WL 2542241 (W.D. Pa. 2019)

[24] https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete

[25] See Harris v. CJ Star, LLC, 2:18-cv-00247, Richmond v. Bergey Pullman Inc., 2:18-cv-00246, Stigar v. Dough Dough, Inc., 2:18-cv-00244.

[26] In the Matter of Your Therapy Source, LLC, a Texas limited liability company; Neeraj Jindal, an individual; and Sheri Yarbray, an individual. FTC MATTER/FILE NUMBER: 171 0134.

[27] BM3366 (Court of Gerechtshof's - Hertogenbosch) HD 200,056,331, 05.04.2010.

[28] VS 0120/08 Transitarios.

[29] Associazione Servizi Moda or Assem, coordinated prices relating to models' salaries, transfer costs, image rights and agency commissions between 2007 and 2015, after leading agency IMG successfully filed for immunity.

[30] Commission Notice on Restrictions Directly Related and Necessary to Concentrations, OJ C 188 (04 July 2001), 2001/C 188/03 20.

[31] Case No. IV/M.1482 – Kingfisher/Großlabor (12 April 1999).

[32] Case No. IV/M. 1167 – ICI / Williams (29 April 1998).

[33] Guidance Note on Non-Compete Restrictions, available at: http://cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf

[34] Case No. 79 of 2011.

[35] Antitrust: International Skating Union's restrictive penalties on athletes breach EU competition rules, Press Release, available at: http://europa.eu/rapid/press-release_IP-17-5184_en.htm

[36] Appeal filed by ISU pending before the General Court [Case T-93/18].

[37] PR 1 - FINA meets with NFs on Athlete participation in international competitions, Press Release, available at: http://www.fina.org/news/pr-1-fina-meets-nfs-athlete-participation-international-competitions

[38] Case No. 61 of 2010, CCI.

[39] BCCI Press Release. Retrieved from http://www.bcci.tv/news/2019/press-releases/18134/rinku-singh-suspended-by-bcci-for-3-months

[40] Meyer v. Kalanick 2d Cir. 2017.

[41] Case No. 20 of 2018, CCI.

[42] Ola, Uber drivers threaten strike across NCR from September 1, https://www.hindustantimes.com/delhi-news/ola-uber-drivers-threaten-strike-in-ncr-from-september-1/story-HAX3eUsGue5RK07HeNrI3L.html

[43] Case No. 14 of 2019 and Case No.1 of 2020, CCI.

[44] Case No. 40 of 2019, CCI.

[45] Yash Raj Films submits copies of Sushant Singh Rajput's contract to Mumbai Police, https://economictimes.indiatimes.com/magazines/panache/yash-raj-films-submits-copies-of-sushant-singh-rajputs-contract-to-mumbai-police/articleshow/76481918.cms

[46] Uber, Ola drivers strike in India, demanding higher fares, https://in.reuters.com/article/uber-ola-strike/uber-ola-drivers-strike-in-india-demanding-higher-fares-idINKCN1MW1X1

References

Akerlof, G. and Yellen, J. **(**1985). A Near-Rational Model of the Business Cycle, with Wage and Price Inertia. *Quarterly Journal of Economics,* Supplement, 100:5, pp. 823–38.

Albæk, S. (2012). Consumer Welfare in EU Competition Policy, in Caroline Heide-Jorgensen (eds.), *Aims and Values in Competition Law.* DJØF Publishing. Available at: http://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf

Bartz, D. (2018). Knorr, Wabtec agree to end pacts not to poach workers. *Reuters.*

Bhaskar, V., Manning, A. and To, T. (2002). Oligopsony and Monopsonistic Competition in Labour Markets. *Journal of Economic Perspectives,* Volume 16, Number 2, Spring, pp. 155–174.

Bork, R.H. (1978). *The Antitrust Paradox.*

BundesKartellamt (2008). Buyer Power in Competition Law. Background paper.

Burdett, K. and Mortensen, D. (1998). Wage Differentials, Employer Size, and Unemployment. *International Economic Review*, 39:2, pp. 257–73.

Carstensen, P. C. and Elgar, E. (2017). *Competition Policy and the Control of Buyer Power: A Global Issue*. Edward Elgar Publishing Ltd.

Choukse, V. (2016, November 29). No cold-calling please: How hiring practices can be an antitrust violation. *The Financial Express.* Retrieved from: https://www.financialexpress.com/opinion/no-cold-calling-please-how-hiring-practices-can-be-an-antitrust-violation/458705/

Collier, R.B., Dubal, V.B. and Carter, C. (2017). Labor Platforms and Gig Work: The Failure to Regulate. *IRLE Working Paper No. 106-17*. Available at: http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf

Davis, R.T. (2018). Talent can't be allocated: a labor economics justification for no-poaching agreement criminality in antitrust regulation. *Brooklyn Journal of Corporate, Financial & Commercial Law*, Vol. 12, Issue 2.

Jerry, R.H. and Knebel, D. E. (1984). Antitrust and Employer Restraints in Labor Markets. *Industrial Relations Law Journal,* Vol. 6, No. 2, pp. 173-254.

Krueger, A. B., and Posner, E. A. (2018). A Proposal for Protecting Low Income Workers from Monopsony and Collusion. Policy Proposal. The Hamilton Project.

Laitenberger, J. (2017). Enforcing EU Competition Law: Principles, Strategy and Objectives. Fordham University, 44th Annual Conference

on International Antitrust Law and Policy. Available at: http://ec.europa.eu/competition/speeches/text/sp2017_11_en.pdf

Marinescu, I. and Hovenkamp, H.J. (2019). Anticompetitive Mergers in Labor Markets. *Indiana Law Journal*, 94: 1-32.

Marx, K. (1984). *Das Capital, Volume 1-The Process of Production of Capital.*

Naidu, S., Posner, E. and Weyl, E.G. (2018). Antitrust Remedies for Labor Market Power. *Harvard Law Review,* Vol. 132, No.2, p. 537-601.

Noll, R. G. (2005). 'Buyer power' and economic policy. *Antitrust Law Journal*, 72(2): 589-624.

OECD (2019). Collective Bargaining 4.0: using labour law to extend coverage to new forms of work, on the level. Available at: https://oecdonthelevel.com/2019/11/13/collective-bargaining-using-labour-law-to-extend-coverage-to-new-forms-of-work/

Page, N. (2017). The Predatory Hiring Standard for Section 2 Violations of the Sherman Antitrust Act. Northern Illinois University Law Review, Vol. 8 No. 2.

Parker, G., Alstyne, M.V. and Jiang, X. (2017, March). Platform Ecosystems: How Developers Invert the Firm. *MIS Quarterly,* Vol. 41, No. 1.

Scheelings, R. and Wright, J. D. (2006). 'Sui Generis'?: An Antitrust Analysis of Buyer Power in the United States and European Union. *Akron Law Review*, Vol. 39, Issue 1.

Shibata, S. (2019). Gig Work and the Discourse of Autonomy: Fictitious Freedom in Japan's digital Economy. *New Political Economy.*

Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations.* Pp. 82-85

Steinbaum, M. (2019, June). Antitrust, the Gig Economy, and Labor Market Power. *Law and Contemporary Problems,* Vol. 82, p. 45.

Stutz, R. (2018, July 31). The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice. Available at SSRN: https://ssrn.com/abstract=3332642 or http://dx.doi.org/10.2139/ssrn.3332642.

Valenduc, G. and Vendramin, P. (2016, April 26). Work in the Digital Economy: Sorting the Old from the New. *ETUI Research Paper - Working Paper 2016.03*. Available at SSRN: https://ssrn.com/abstract=2770405 or http://dx.doi.org/10.2139/ssrn.2770405

Weil, D. (2017). *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Harvard University Press, 3rd Edition, p. 93-98.

Yüksel, B. and Salan, M. (2019, July 11). A Brief Analysis of Competition Law Enforcement in Labor Markets and the Approach of the Turkish Competition Authority. *Kluwer Competition Law Blog*. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2019/07/11/a-brief-analysis-of-competition-law-enforcement-in-labor-markets-and-the-approach-of-the-turkish-competition-authority/