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The Competition Act, 2002 as an Instrument to Regulate Anti-competitive Business Practices in Indian

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ABSTRACT

India, in the pursuit of globalization, responded to opening up its economy, removing controls and resorting to liberalization. Liberalization, privatization and globalization have resulted in higher growth rates for the Indian economy. As a natural consequence of this, Indian market has to be geared up to face competition from within and outside the country. The Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there was a need to shift the focus from curbing monopolies to promoting competition. With the enactment of the Competition Act, 2002 and the establishment of Competition Commission of India, the institutional framework to support healthy and fair competition is now in place. This act moved away from the earlier emphasis of curbing monopolies to a more particular and directed approach towards promoting competition and thereby increasing efficiency, innovation and competitiveness. The Competition Act provides a formal and legal framework for ensuring competition and preventing abuse of market power and dominance in the Indian Economy. The present Competition Law is a harbinger of a new line of economic jurisprudence in India. The abolition of MRTP Act through the enactment of Competition law makes a paradigm shift in the gubernatorial policy from prevention of concentration of economic power to encouraging competition. Thus, the Competition Commission of India has been established keeping in view of the economic development of the country, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.

Key words: anti-competitive business practices, fair competition in market, abuse of dominant position.

INTRODUCTION

A prerequisite for good competition is trade. In the 19th century, Philip Harwood, the journalist theologian defined Trade as "the mutual relief of wants by the exchange of superfluities" (Mulji, 1999). He added that Free trade as opposed just to Trade is "the unrestricted liberty of every man to buy, sell and barter, when, where and how, of whom and to whom he pleases". "To buy in the cheapest market he can find and sell in the dearest market he can find" he said was the very essence of free trade.[1]

However a note of caution is necessary. The purchase of goods in the cheapest market is no guarantee that they will be sold where they are most needed. In poor countries particularly, those most needing the relevant goods may not have the necessary income to purchase them. So the first handicap of free markets is that for a given distribution of income those who can pay the highest price will most be able to purchase the goods regardless of their relative needs. However, in this case, the real culprit is income distribution not the competitive system. A further drawback with unregulated free markets is that in certain circumstances it could be of greater benefit to the owner of superfluities temporarily to withhold goods from markets in order to extract a higher price. In the past, we have attempted to overcome these difficulties by regulating prices. But these efforts have been generally unsuccessful.

The legislative enforcement of healthy trade practices necessitates the promulgation of the Competition Law. Free competition means total freedom to develop optimum size without any restriction. The limitation, if at all necessary, is not limitation of size but of competition power.

[1] SVS Raghvan Committee, High Level Committee on Competition Policy and Law, 2000.

The ultimate reason of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods. A free press, worthy advertisement and even such modern institutions as the Internet could support a modern competitive society. Without them, competition cannot thrive in a kind of vacuum. Competition policy, in this context, thus becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare.

COMPETITION POLICY AND LAW

Competition policy is defined as "those Government measures that directly affect the behaviour of enterprises and the structure of industry" (Khemani, R.S. and Mark A. Dutz, 1996). The objective of competition policy is to promote efficiency and maximize welfare. There are two elements of such a policy. The first involves putting in place a set of policies that enhance competition in local and national markets. These would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is legislation designed to prevent anti-competitive business practices and unnecessary Government intervention. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate competition policy. The Government of India issued its industrial policy which hinted the arrival of open market era.

The attainment of technological dynamism and international competitiveness requires that enterprises must be enabled to swiftly respond to fast changing external conditions that have become characteristic of today's industrial world. Government policy and procedures must be geared to assisting entrepreneurs in their efforts. This can be done only if the role played by the Government were to be changed from that of only exercising control to one of providing help and guidance by making essential procedures fully transparent and by eliminating delays.[2]

The trade policy reforms have two main objectives. The first is to introduce foreign competition through imports. The second is to make cheaper and better quality inputs available to Indian producers and to promote the import of embodied technology. Although these are two major areas where Government controls have been reduced and the economy has been allowed to move towards market-determined prices, there are a number of areas where controls and restrictions persist. The removal of these is essential for 'getting prices right', achieving efficiency in resource use and maximising consumer welfare.

The Industrial Policy of 1991 abolished licensing in all but 18 industries, many of which were subsequently de-licensed. At present only seven industries are subject to licensing. Although the sugar industry was de-licensed in January 1999, it remains subject to a number of other controls. These controls have ensured that there are no new entrants into the industry. In 1991, Government abolished the monopoly of the public sector industries except those where security and strategic concerns still dominated. The economic factors, which have been instrumental in this process of globalisation, are the dismantling of barriers to international economic transactions, the development of enabling technologies and emerging forms of industrial organisations.

One of the significant issues arising in the interface between Trade and Competition Policies is to gain market access in countries, where barriers to entry and barriers to free and fair trade exist. Barriers with the acquiescence of Government impair the benefits that could otherwise be attained through liberalised trade.

OBJECTIVES OF THE COMPETITION LAW

The Competition Act was enacted in 2002 keeping in view the economic developments that resulted in opening up of the Indian economy, removal of controls and consequent economic liberalization which required that the Indian economy be enabled to allow competition in the market from within the country and outside. The Competition Act, 2002 (hereinafter referred to as the Act) provided for the establishment of a Competition Commission, (the Commission) to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.[3]

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[2] The Industrial Policy Statement issued by the Government of India on 24 July 1991.
[3] Statement of Objects and Reasons, the Competition (Amendment) Act, 2007.

The Competition Commission of India was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Hon'ble Supreme Court. While disposing of the writ petition on the 20th January, 2005, the Hon'ble Supreme Court held that if an expert body is to be created by the Union Government, it might be appropriate for the Government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognised by the Constitution. Keeping in view the judgment of the Hon'ble Supreme Court, the Competition (Amendment) Bill, 2006 was introduced in Lok Sabha on the 9th March, 2006 and the same was referred for examination and report to the Parliamentary Standing Committee. Taking into account the recommendations of the Committee, the Competition (Amendment) Bill, 2007 is being introduced.[4]

The Competition (Amendment) Bill, 2007, *inter alia*, provides that the Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator; for mandatory notice of merger or combination by a person or enterprise to the Commission within thirty days and to empower the Commission for imposing a penalty of up to one per cent. of the total turnover or the assets, whichever is higher, on a person or enterprise which fails to give notice of merger or combination to the Commission; for establishment of the Competition Appellate Tribunal, which shall be a three member *quasi judicial* body headed by a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission; for adjudication by the Competition Appellate Tribunal of claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Act; for implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court; for filing of appeal against the orders of the Competition Appellate Tribunal to the Supreme Court; for imposition of a penalty by the Commission for contravention of its orders and in certain cases of continued contravention a penalty which may extend to rupees twenty-five crores or imprisonment which may extend to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit, may be imposed.

The Bill also aims at continuation of the Monopolies and Restrictive Trade Practices Commission (MRTPC) till two years after constitution of Competition Commission, for trying pending cases under the Monopolies and Restrictive Trade Practices Act, 1969 after which it would stand dissolved. The Bill also provides that MRTPC would not entertain any new cases after the Competition Commission is duly constituted. Cases still remaining pending after this two year period, would be transferred to Competition Appellate Tribunal or the National Commission under the Consumer Protection Act, 1986 depending on the nature of cases.[5]

The Competition Act, 2002: Substantive Prohibitions

There are three areas of enforcement that provide the focus for most Competition Laws. These are agreements among enterprises; abuse of dominance and mergers or combinations among enterprises.

Anti-competitive agreements:

Agreements between firms have the potential of restricting competition. Most laws make a distinction between "horizontal" and "vertical" agreements between firms. Horizontal agreements refer to agreements among competitors and vertical agreements are agreements relating to an actual or potential relationship of buying or selling to each other. A distinction is also made between cartels – a special type of horizontal agreements – and other horizontal agreements and between vertical agreements between firms in a position of dominance and other vertical agreements. Generally, vertical agreements are treated more leniently than horizontal agreements as, *prima facie*, a horizontal agreement is more likely to reduce competition than an agreement between firms in a buyer-seller relationship.

Horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and, in the same market. The most obvious example would be that of agreements between enterprises dealing in the same products. These agreements include agreements regarding fixing of purchase or selling prices; agreements limiting quantities, markets, technical development or investment; agreements regarding territories to be served and sources of supply; agreements regarding dissimilar treatment of equivalent transactions with other trading parties that place them at a disadvantage.

Vertical agreements, on the other hand, are agreements between enterprises that are at different stages or levels of the production chain and, therefore, in different markets. An example of this would be an agreement between a producer

[4] Ibid.
[5] Ibid.

and a distributor. Vertical restraints on competition include tie-in arrangements; exclusive supply agreements; exclusive distribution agreements; refusal to deal and Resale Price Maintenance (RPM).

Abuse of Dominance

The term dominance may be defined in the Competition Law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions". The definition should also be in terms of "substantial impact on the market including creating barriers to new entrants". This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape (like in the first example above) or result in unnecessary litigation (like in the second example above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" will be an aberration. With this suggested broad definition, the Authorities/Tribunals concerned would have the freedom to fix errant undertakings and encourage competitive market practices even if there is a large player around. Abuse of dominance is key for the Competition Policy/Law.

It is also important, as in the case of horizontal agreement, to determine what the *relevant market* is. There are two dimensions to this – the *product market* and the *geographical market*. On the demand side, the relevant product market includes all such substitutes that the consumer would switch to, if the price of the product relevant to the investigation were to increase. From the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods.

To be considered dominant, a firm must be in a position of such economic strength that it can behave, to an appreciable extent, independently of its competitors and customers. Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently. The current market share is a necessary but insufficient pre-requisite for dominance. In spite of having a large market share a firm may be constrained by the threat of competition from potential entrants and by the purchasing power of its own customers. Entry barriers could result from absolute advantages such as patents (legal) and access to certain inputs.

The abuse by any dominant firm may be discriminatory, exclusionary or exploitative. There are two kinds of prohibitions of abuse of dominant positions. The first relates to actions taken by an incumbent firm to exploit its position of dominance by charging higher prices, restricting quantities, or, more generally, using its position to extract rents. Second, the second relates to actions by an incumbent in a dominant position to protect it position of dominance by making it difficult for potential entrants and competitors to enter the market. Predatory pricing / disciplining existing rivals (a firm with market power prices below cost so as to drive competitors out of the market and, in this way, acquire or maintain a position of dominance) and actions that make it difficult for potential entrants to enter (exclusionary / anti-competitive behaviour).

The exclusionary practices involve vertical agreements. Such arrangements are common business practices and infringe the law only, if they reduce competition. These have been discussed in the previous section. In this section only those vertical restraints that have the potential for foreclosing competition by hindering entry into the market are discussed. These could result from the following types of arrangements:

Exclusive Dealing and Purchasing: Under such arrangements a retailer agrees to purchase or deal in the goods of only one manufacturer making entry difficult for new manufacturers.

Exclusive / Selective Distribution: Under such arrangements the manufacturer supplies one or a selected number of retailers making entry difficult for other retailers.

Tie-in Sales, Full-line Forcing, Quantity Forcing and Fidelity Discounts: Tie-in sales make the purchase of one product conditional on the sale of another (tied) product. Full-line forcing is an extreme form of the former where the retailer must stock the full range of the manufacturer's products. Under quantity forcing the retailer is required to purchase a minimum quantity of a certain product. Under fidelity discounts, the retailer receives discounts based on the proportion of its sales coming from the manufacturer. Such arrangements could make entry difficult for both manufacturers and retailers.

Slotting Fees: This requires the manufacturer to pay a fee to get its product stocked. Such arrangements could make entry difficult for manufacturers.

Non-linear Pricing and Franchise Fees: These involve payment of non-cost-related discounts to existing retailers or franchise fees, thus raising the sunk cost of entry and making entry difficult for other retailers.

REGULATIONS OF COMBINATIONS

Mergers are a legitimate means by which firms can grow and are generally as much part of the natural process of industrial evolution and restructuring as new entry, growth and exit. From the point of view of Competition Policy it is *horizontal mergers* that are generally the focus of attention. As in the case of horizontal agreements, such mergers have a potential for reducing competition. In rare cases, where an enterprise in a dominant position makes a *vertical merger* with another firm in a (vertically) adjacent market to further entrench its position of dominance, the merger may provide cause for concern. *Conglomerate mergers* should generally be beyond the purview of any law on mergers. A merger leads to a "bad" outcome only if it creates a dominant enterprise that subsequently abuses its dominance.

It is to establish whether the higher concentration in the market resulting from the merger will increase the possibility of collusive or unilaterally harmful behaviour. Collusion is more likely in industries producing relatively homogeneous products and characterised by small and frequent transactions, the terms of which cannot be kept secret. The merger is likely to be unilaterally harmful when the two merging firms produce similar products in a concentrated differentiated product market.

Vertical mergers are measures for improving production and, distribution efficiencies. The process internalises the benefits of supply chain management and, as such cannot be perceived as injuries to competition. Vertical mergers can be treated, as a process by which there is a transmission of a good or a service across departments such that the commodity can be sold in the market without much adaptation. This implies that firms choose to bypass market transaction in favour of internal control.

The competition law deals with all activities having adverse effect on competition i.e. agreements, abuse of dominance and combinations which may lead to exploitation and exclusionary effects in market. it tries to evade unnecessary concentration of market power in few hands to the detriment of the consumer as well as the market.

CONCLUSION

The competition law acts in minimising the adverse effect on competition in market through the anti-competitive agreements, abuse of dominance and the regulation of combinations. Although significant steps have been taken to increase competition in various sectors of the economy, a number of important things need to be done that are essential for a competition policy. The Competition Commission of India must act as per procedure established by law. It must imbibe the principle of natural justice in its actions. As a watch-dog for the introduction and maintenance of competition policy, it must act to promote and sustain competition in India and for the protection of consumers. It has to promote the introduction of the required changes in the policy environment and once this is done, it will perform a pro-active advocacy function for competition. Competition Law is dealing with anti-competitive practices, particularly cartelisation, price-fixing and other abuses of market power and should regulate mergers. It is important to ensure that such legislation does not itself become anti-competitive and this is a real danger. It is necessary to ensure that the law is precise and discretion is kept at a minimum.

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