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INDIAN COMPETITION LAW: GLOBAL CONTEXT*

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Abstract

Competition law and policy can be likened to that of political democracy not only in terms of its methodology to handle the process but also with respect to the goals of the two *i.e.* maximization of public welfare. While India has opened up its economy to global market forces, it became imperative to set the definite rules for the fair play of the game(s). The rules set out in the form of Competition Act, 2002 and the notified rules and regulations indicate the role for government in a welfare state. The paper explains the meaning and context of the law and the problems associated with its enforcement.

Introduction

THE BASIC tenets of democracy and of market competition are ingrained in the same value system - freedom of individual choice, decentralized decision making and adherence to the rule of law. The common goal of both democracy and market competition is the same – 'the maximisation of public welfare'.[1] Many regard competition law as the economic analogue of political democracy and in some countries like the United States of America, competition law has been accorded the status almost of an economic constitution.[2] At the same time, the global integration of market economy has transformed national markets into one single global market;

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1. See, The objective of Competition Act, 2002.The preamble of the Competition Act, 2002 reads: "An Act to provide, keeping in view the economic development of the country, for the establishment of a 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."

2. In United States of America, it is referred as antitrust laws. The first legislation in the USA is of year 1890 *i.e.* Sherman Act and subsequently other legislation like Robinson Pittsman Act, 1932 have also been enacted to regulate the competition in a given market.

where geographical boundaries become less and less relevant to relationships between "cause" and "effect". When India acceded to the process of globalization by opening its economy to the world market, 'State'[3] was virtually giving away power of to invisible hands *i.e.* 'market forces'.[4]

New competition law – a governance necessity

Competition offers enhancement of productivity at industry level, generation of more employment and lowering of consumer prices. Proponents of free trade argue that by itself it provides all the safeguards and regulations which a welfare state[5] like India requires. Effective competition is one of the basic prerequisite for a market economy to work efficiently and strengthen it from within. Yet, competition does not happen of its own accord in a modern and technologically complex society rather it depends on both the participants in the market and also on those who shape the appropriate competition policy and guarantee its protection, which can be seen as an expression of competition culture.[6] The need of having a new set of laws and institutions was felt which had to be in tune with the New Economic Policy of 1991, *i.e.* when India embraced the idea of globalisation, liberalisation and privatisation. Consequently, the old Monopoly and Restrictive Trade Practices Act, 1969 (MRTP) was amended in year 1991 to infuse a new lease of life in the legal regime. However, the changed dynamics and myriad forces impelled to consider an altogether new legal regime. It was felt that the forces of competition need to be reinforced with a competition law.[7] With the enactment of new legislation, the idea of 'efficiency' and 'maximisation of consumers' welfare' attained the central plank of reform. Competition policy, in this context, thus becomes an instrument to achieve

3. Adam Smith referred 'State' as 'Visible Hands'.

4. According to Adam Smith, this policy is the best for promoting economic development. It is always safe to leave the economy to be propelled by an 'invisible hand', *i.e.*, the forces of competition motivated by individual self-interest.

5. The notion of welfare state is reflected from the text of preamble of the Constitution read with part IV *i.e.* directive principles of state policy (DPSP) of the Constitution. See, The Supreme Court of India decision in the matter of *Minerva Mills* v. *Union of India* (1980) 3 SCC 625 ; *D.S. Nakara* v. *Union of India*, 1983 SCR (2) 165.

6 Competition Commission of India (CCI) is the concerned regulatory authority with enactment of Competition Act, 2002. The Act became fully operational in year 2011 only which had repealed Monopoly & Restrictive Trade Practices Act, 1969.

7 The new Act was based on the report of a high level committee on competition law and policy (R. K. Raghvan Committtee) set up by the Government of India to study the Monopolies and Restrictive Trade Practices Act, 1969 and the legislative changes required for the emerging new economic scenario. The Raghavan Committee observed that competition regimes in the world today regulate: (1) anti-competitive agreements, (2) abuse of dominance, and (3) mergers, or more generally, combinations among enterprises.

efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power as envisaged in articles 38 and 39 of the Constitution.[8]

With the emergence of new forms of globalization and global economic integration promises were made in relation to increased opportunities to buy, sell, and work. The liberalized policies promised for directing the assets to their 'highest and best'. Subsequent to such liberalization, firms merged and amalgamated, thereby enlarging their size, market share and resource base. Also the firms went into aggressive and competitive trade practices to entice the customers. This is where the competition laws come into picture. In a market where the players silently 'conspire against the public', questions about truthfulness and fairness of representation of products, services, advertisement, schemes and modalities for promotion of products and services are deemed to arise. As Lord Denning rightly observed, "People who combine to keep up prices, do not shout it from the house tops. They keep it quiet; they make their own arrangement in cellars, where no one can see. They will not put anything in writing not even into words. A nod or wink will do."[9] Competition law targets these forms of economic conduct which interfere with the effective operation of competitive markets, which are aimed to deceive the unaware, innocent buyers. At the same time, competition law eliminates obstacles to innovation, expansion and promotes competition as a value.[10] Competition law tries to ensure that the interest of an individual or a group of individual should not subvert the broader community interest.

The economic reforms in 1991 helped India in leaving behind the slow growth rate of 3 per cent to reach an annual growth rate of more than 8 per cent. With the enactment of the Competition Act in 2002, India entered into the club of market economies which used legislative instrument to promote market efficiency, attract foreign investment, and propel economic growth. India enacted the Competition Act, 2002 as part of the second-generation economic reforms. The Act aims to prevent practices having 'appreciable adverse effect on competition',[11] 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 a given 'relevant market'.[12]

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8. Art. 39 B of the Constitution imposes an obligation on the state that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.

9. *RRTA* v. *W.H.Smith and Sons Ltd.*, L.R. 3 R.P. 122.

10. Exception IPR related provision in Competition Act, 2002

11. S. 3.

12. S. 2 (r) of the Act defines 'Relevant Market'. It reads as :- 2 (r) "Relevant market" means the market which may be determined by the Commission with reference to the *relevant product market* or the *relevant geographic market* or with reference to both the markets;

The Competition Act 2002 – Essence

The regulatory provisions of the Act can broadly be divided into three categories:

(a) The Act prohibits horizontal and vertical anti-competitive agreements[13] between enterprises.

(b) The Act also prohibits abuse of dominant position by an enterprise.[14] Under the Act an "abuse of dominance" violation requires proof of "abuse" and proof of "dominance". While dominance of an enterprise is its capacity to act independent of competitive forces in a relevant market, abuse consists in behaving unfairly or discriminatorily.

(c) The Act also regulates 'combinations' which cause or are likely to cause an 'appreciable adverse effect'[15] on competition in India. This includes combinations that have taken place outside the country where the adverse effects of the same occur in India.[16]

The year 2011 has seen the burgeoning of this field with a series of significant developments paving the way towards shaping competition law and policy. The most notable event in this past year was the implementation of the merger control regime, brought into force by the merger control provisions of the Competition Act, 2002. Namely, sections 5, 6, 20, 29, 30 and 31, these provisions deal with combinations which till this time were not notified. These sections were notified in May, 2011 and set out the review process and procedure of notice at length which are not found in the Act. These regulations along with the notified provisions of the Act form the method of merger control in India today.

Sections 5 and 6 are the operative provisions of the Competition Act. Section 5 sets out certain thresholds and parameters for the parties and for the group regarding the acquisition of an enterprise or the merger and amalgamation of enterprises that will then trigger the filing requirements if the jurisdictional thresholds are met. Section 6 of the Act prohibits combinations that cause or are likely to cause an appreciable adverse effect on competition within a relevant market in India and treats such transactions as void. Notifications of combinations are mandatory. Acquisitions of one or more enterprises by one or more persons, or mergers or amalgamations of enterprises, are combinations if they meet the thresholds based

13 S. 3. See, *Belaire Owner's Association* v. *DLF Limited and HUDA, available at* : http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf

14 S. 4.

15 The "appreciable effect" test is similar to that under chapter I of the UK Competition Act, 1998, modeled on art.85 of the EC Treaty.

16 See, ss. 5 and 6.

on assets and turnover as per the Act.[17] In India, it is the threshold of assets and turnover that determine if the combination is to be covered under the prohibition of the Act.[18] After 2007, a mandatory obligation has been cast on the merging enterprise to notify a proposed transaction to the Commission.

Competition Commission of India

The Act also seeks to establish Competition Commission of India as one of the chief regulatory body to enforce the provision of the Act. The CCI is mandated to eliminate practices having an adverse effect on competition, promote and sustain competition in markets, protect the interests of consumers, ensure freedom of trade carried on by other participants in markets in India, undertake competition advocacy for creating awareness and impart training on competition issues.[19] Section 32 of the Act further gives the CCI, the power to enforce Indian competition law against foreign entities whose actions have 'appreciable adverse effect' on competition in the relevant Indian market. Section 32 is a statutory embodiment of the 'effects doctrine' and is the brainchild of the US courts. The US courts have held "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders." Since then it has come to be recognized in almost all competition law regimes.

Unlike the MRTP Commission under the MRTP Act, 1969, the CCI has extraterritorial jurisdiction *i.e.* it has the power to inquire into activities which has been prohibited under the various provisions of the Act and which distort the competition in a given market. It can investigate and inquire into an agreement, abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India. This is notwithstanding that an anti-competitive agreement has been entered into outside India, a party to such agreement is outside India, any enterprise abusing a dominant position is outside India, a combination or party to a combination is outside India. It marks a significant departure from the earlier law of the land, as the MRTP Commission had no statutory extraterritorial jurisdiction. It was specifically held by the Supreme Court of India that the MRTP Act does not have extraterritorial operation and cannot apply to goods intended to

17 For an overview of Merger Control under Indian Competition Law refer Avinash Sharma, "Merger Control under India's New Competition Law: A Comparative Perspective" 32(12) *ECLR* 602-614(2011); R Prakash, "Merger Control under Competition Policy" 87 *Sebi & Corporate Laws* 37 (2008).

18 See, s. 6.

19 S. 18.

be exported to India or where neither party to the agreement is carrying on business in India.[20]

Today the slogan "bigger is better" has become the success mantra in this globalised economy. Amidst all these developments, maximum welfare of consumer remains the focus of every policy, legislation and trade negotiations *etc.* An ideal definition of 'Global Consumer Welfare' would mean the availability to consumers, irrespective of their nationality, of access to low-priced, high quality products, and an option to choose among differing products, and the availability to producers of an internationally stable transactional environment.[21] In case of the Boeing and McDonnell Douglas merger, there were enquiries conducted by both the US Department of Justice and the European Commission because the proposed merger would have had effects in both the US and Europe. While the US approved the merger, European Commission turned it down because of possible anti-competitive effects. After intense negotiations, further due diligence and restructuring the merger was approved.

In situations like this, where big companies with a lot of market power merge or come together in some other form, there arise questions of '*abuse of dominant positions*'.[22] It is noteworthy that the Indian Competition Act does not define the concept of dominance and it is neither prohibited. It is the abuse of dominance position which is prohibited in the given market scenario under the Indian market. In the matter of *United Bands* v. *Commission,*[23] European Court of Justice defined a dominant position as: 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers'. However, the concept of dominant position relates to a factual situation[24] and attaches a special responsibility

20 *Haridas Exports* v. *All India Float Glass Manufacturers Association* (2002) 111 Company Cases 617.

21 Joseph Wilson, "Globalization and the Limits of National Merger Control Laws" 10 *Kluwer Law International, International Competition law Series* at 18.

22 *Supra* note 14.

23[1978] ECR 207, 215 (ECJ).

24 *See,* Bodson / PFG judgment of 4 May 1988, ECR II- 2479, para 25.Also see, Aparna Viswanathan , "From Commanding Heights to Competition: A Comparative Analysis of India's Competition Act 2002 with UK/EC Law" 14(7) *ICCLR* 229-36 (2003).

to enterprises not to allow its conduct to impair genuine undistorted competition on the common market.[25]

However, cross-border enforcement of competition law is different from simple implementation of domestic laws. In India, if any merger were to have an appreciable adverse effect on competition in India, then the CCI would pursue an investigation across borders, communicate and interact with other foreign authorities and eventually some form of solution will have to be carved out wherein the competitive interests are preserved. If an entity violates Indian competition law outside India, the CCI will have to pursue enforcement measures across borders.

Need of a competition policy

Having enacted a competition law in India, does India have a competition policy covering all the major sector of economy to stimulate growth and achieve the desired result? Massimo Motta has defined the expression 'competition policy' in a very lucid manner as "the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society".[26] Competition policy is concerned with those activities in a given scenario wherein firms with market power are able to harm consumer welfare in various ways, for example, by reducing output, raising prices, degrading the quality of products on the market, suppressing innovation and depriving consumers of choice. Competition policy is defined as "those Government measures that directly affect the behaviour of the enterprise and the structure of the industry". Thus, competition policy is a comprehensive term and it is difficult to draw a boundary around it. It is also important to point out that a draft National Competition Policy is being considered by the government for the revamp of all the sectors of economy.[27] As a general proposition, competition law consists of rules that are intended to protect the process of competition in order to maximise consumer welfare. The basic purpose of

25 "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market."See, Case 322/81 *Nederlandsche Banden-Industrie Michelin NV* v. *Commission* [1985] 1 C.M.L.R. 282, para 57 and Case T-210/01, *General Electric / Commission*, judgment of 14 December 2005, ECR II -5575, para 549.

26 Massimo Mota, *Competition Policy: Theory and Practice* 30 (Cambridge University Press, 2004). Also see, Vijay Kumar Singh, "Competition Law and Policy in India: The Journey in a Decade" 4 *NUJS Law Rev* 523 (2011).

27 See, Draft National Competition Policy 2011 (India) *available at*: http://www.mca.gov.in/Ministry_hn/pdf/Draft_National_Competition_Policy.pdf. Also see, Revised Draft National Competition Policy 2011 (India) *available at*: http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_ Policy_2011_17nov2011.pdf

competition law is to promote competition through the control of restrictive business practices.

Competition authorities and their interface with other regulatory authorities

The era of post-regulatory world - where the economic activities are de-regulated, de-controlled – has given birth to the numerous regulatory authorities for specific sectors like TRAI for telecom sector, SEBI for Financial & Securities market, RBI for monetary purposes, IRDA for Insurance sector *etc.*[28] The role of competition authority and various other regulatory bodies (sector specific) can be complementary but, sometime the interface between the two could cause a kind of 'ripple' over various issues.[29] The CCI has an overarching mandate and responsibility in certain matters: "it shall be the duty of the CCI to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India."[30] Besides this, section 60 of the Competition Act, 2002 indicates a kind of supremacy of the legislation over other statutes[31] in competition enforcement while seeking a kind of harmonious symbiotic working with other enactments.[32] The conflict of jurisdiction of CCI with other regulatory authorities is bound to happen. In this context, how the regulatory authorities would co-operate and co-ordinate with each other on several issues in near future, a policy framework and guidelines by the competent authorities will always be welcomed.

Conclusion

While more than 100 countries have adopted competition law into their legal systems, the reasons for adoption of competition laws vary; these are usually on

28 S. 2 (w) of the Competition Act 2002 defines statutory authority as: any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefore or any matter connected therewith or incidental thereto

29 Ishita Gupta, "Interface Between Competition and Sector Regulators" *available at* : http://www.cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf

30 S. 18 of the Competition Act 2002.

31 S. 60 of the Competition Act, 2002: –"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

32 S. 62 of the Competition Act, 2002: – "The provisions of this Act shall be in addition to, not in derogation of, the provisions of any other law for the time being in force".

account of formation of cartels, meeting with requirement of bilateral and plurilateral trade agreements and in addition, to take care of cross border competition dimensions or concerns. It is important to note that proliferation of competition law has taken place irrespective of the stage of economic development of the country including economic, social and political policies pursued by it.

In the area of merger and acquisition, the challenge is quite open before the regulatory authorities. The inability of national instruments or policy to deal with cross- border mergers of transnational combination had given birth to a new debate *i.e.* creation and evolution of new global institutions to regulate and promote the idea of welfare and humanity. The enforcement agencies across the world find it difficult to enforce their competition policy in cases of cartels[33] because such illegal collusion is surrounded by "Wall of Silence".[34]

Now, what is the impact of this competition policy overall on the consumer culture in SAARC nation, needs to be seriously researched and studied. Have the small retailers and manufacturers been able to maintain their presence in a given market (either geographic or product market) or the big giant retailers/corporate retailers have systematically wiped them out? If so, how the consumer culture is being transformed over the period which is the wider concern of any such legislation.

In South Asia, India has been pioneering the reform on the entire front (be it legal, political, social or economic). Similar is the case with the enactment of competition law. However, only a decade has passed, but the impact of Indian Competition Act, 2002 on our neighbouring economies which are more open to investment regime like Sri Lanka, Bangladesh- needs serious research.

33 S. 2 (c) - "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

34 See, Murphy, "Canadian Draft Immunity Information Bulletin released in February" *European Competition Law Review* 326(2000).