SOME ASPECTS OF MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT

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Introduction

The background of the Monopolies and Restrictive Trade Practices Act may be traced to article 39(c) of the Constitution which declares that "The State shall, in particular, direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment." The Directive Principles of State Policy provide for proper ownership and control of material resources of the community, preventing mal-distribution as well as concentration of wealth and securing socialisation of the means of production so as to protect the common good as a matter of public policy. Consequently a committee, known as Monopolies Inquiry Commission, was constituted under the chairmanship of a retired judge of the Supreme Court to explore the basis of regulation, and make recommendations. The report was submitted in 1965, on the basis of which a bill was introduced in Parliament. The result was the Monopolies and Restrictive Trade Practices Act 1969 (hereinafter referred to as the Act). The Act received the assent of the President on December 27, 1969 and came into force with effect from June 1, 1970.

The preamble of the Act states that the objects of the legislation are to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies and for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The word 'Monopoly' is derived from the Greek expression *Mono-Polion*, meaning the exclusive control of wealth.[1] Hence, the modern connotation of the word implies exclusive possession or control of

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1. Concise Oxford Dictionary, 5th edition.

trade in some commodity. Monopoly thus understood may not be inherently against the public good, by itself. The concept may be spelt out from the vastness of the undertaking, capital structure, or the output of the product by the unit or units of industry in question in comparison with the total output of the product in the country.

The Act deals with the concepts of monopolies and restrictive trade practices. Section 2(*i*) deals with the monopolistic trade practices which are likely to have the effect of :—

(*i*) maintaining prices at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods of any description or the supply of any services or in any other manner,

(*ii*) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services,

(*iii*) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered, in India to deteriorate.

Restrictive trade practice is defined in section 2(o) as a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular :—

(*i*) which tends to obstruct the flow of capital or resources into the stream of production, or

(*ii*) which tends to bring about a manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

The various provisions in the Act are aimed at restricting or preventing such monopolistic and restrictive trade practices.

The undertakings which are brought within the purview of the Act are those which are specified in section 20. They are :

(*a*) an undertaking if the total value of:—
  (*i*) its own assets, or
  (*ii*) its own assets together with the assets of its interconnected undertakings, is not less than twenty crores of rupees.

(*b*) and a dominant undertaking
  (*i*) where it is a single undertaking, the value of its assets, or

(*ii*) where it consists of more than one undertaking, the total value of assets of the interconnected undertakings, is not less than one crore of rupees.

It is interesting to note that, the above definition posits an obligation upon the existing companies to find out for themselves whether they come within its scope or not. Section 20 is vague and immediately raises several problems :—

(*i*) Are the assets to be valued with reference to net assets or gross assets ?

(*ii*) Is the value to be calculated according to the book value or the market value ?

(*iii*) What are the guidelines for ascertaining whether an undertaking by itself or in combination with other undertakings produces one third of the total product of a particular description of goods ?

(*iv*) What is the basis for calculating the total volume of production in particular products in India ?

(*v*) Does the expression "interconnected undertakings" confine itself to undertakings registered in India, or does it include those registered outside India ?

If it is ascertained that certain undertakings are interconnected, immediately section 25 of the Act comes into operation. It restricts the appointment of the directors. A person who is a director of an undertaking within the meaning of section 20, shall not be appointed, after the commencement of this Act, as a director of any other undertaking, save with the previous approval of the Central Government. This restriction may be compared with a similar restriction contained in the Companies Act which prohibits a person from holding office as a director at the same time in more than 20 companies.[2] The restriction, however, does not extend to his being a managing agent, manager, or partner of a firm, or member of a company holding the office of managing agent of companies other than the 20 companies of which he is a director. Similarly, in the Companies Act the prohibition does not extend to directorship in bodies corporate being foreign companies because they fall outside the definition of companies in the Companies Act.[3]

The expansion of a company cannot be given effect to without notifying the Central Government in the prescribed form giving notice of intention to expand and stating the method of finance for the proposed expansion.

2. Companies Act 1956, section 275.
3. Companies Act 1956, sections 2(10) and 3.

The Act imposes restrictions on the amalgamation or merger of companies under certain circumstances. Further, amalgamation or merger must be recognised by the Central Government by virtue of a scheme approved by it.[4] This restriction really extends further, covering purchases and take-over, wholly or partly, of any other undertaking which in its turn may attract section 20 of the Act. One must naturally assume that a company is prohibited from merging or amalgamating with another company or companies or taking over or acquiring the business of any other undertaking without the consent of the Central Government. This restriction will apply to every undertaking or dominant undertaking within the meaning of section 20. Failure to obtain proper approval will attract the consequences detailed in section 26 of the Act.

Section 26, which falls under Part A of Chapter III, fixes a time limit for every undertaking to which that part applies, for applying to the Central Government for registration within sixty days from the commencement of the Act. This time limit is unrealistic. A company has to get clearance not merely from the Licencing Committee but also from the Monopolies Commission. The procedure as notified by the Government on December 5, 1970, involves complicated steps. For example, a merger in which companies with assets exceeding Rs. 20 crores are involved must secure prior approval of the Central Government under section 23. This application is thereafter referred to the Commission. It is interesting to note that section 30 permits a period of seven months for disposal of the application. It will be realised that a programme of merger is decided upon after careful review of various factors, including the one which deals with the price structure. As such, a delay of seven months may well create new problems as well as upset the basis of price calculation. By this time the details of merger may leak out and become matter of common knowledge. In any event, the element of secrecy is likely to be jeopardised. It appears that section 30(4) in a sense adds to the delay by empowering the Central Government to dispose of the application within ninety days. That time could, of course, be extended for reasons to be recorded in writing. Hence it is easy to visualise a situation where the Central Government finds it difficult to refuse to give the stamp of approval to a merger.

The problems created by this portion of the Act merit immediate consideration. It will be observed that the Act covers a wider field, by using the expression "merger or amalgamation" in sharp contrast to section 6 of the United Kingdom Mergers Act 1965, which confines itself to the word "merger". In company law parlance, by amalgamation we understand the union of two companies or one being absorbed into and fused with another company. In either case a new corporate legal personality is

4. Monopolies and Restrictive Trade Practices Act 1969, section 23.

formed to carry on the business of the old company. A merger is spelt out by bringing two units of an industry under common ownership or control, if the effect of the arrangement prevents or restricts competition between the enterprises. In this context, buying out the assets of the competitors will amount to a merger but in India, section 30 of the Act makes no reference to what may be called a chain reaction of mergers. Let us assume a merger inter parties in 1969, again in 1970, immediately after the Act came into force, and lastly in June 1970. How then is a period of sixty days to be fixed? Such problems arise under the U.K. Mergers Act 1965 and section 7(7) thereof takes care of it. All mergers finalised within a period of two years are treated singly with reference to the last of the dates. It is submitted that a similar provision is necessary in India.

Procedure

The *modus operandi* of the Monopolies Commission must also be specifically laid down. One can naturally expect that the Commission in its formative years will lean heavily upon the existing procedure in the U.K. where the following steps are being followed :[5]

(*a*) The reference by the Board of Trade is advertised so that members of the public get an opportunity to furnish material information to the Commission.

(*b*) An exploratory discussion then follows between the panel of commissioners and the representatives involved in the enquiry.

(*c*) Thereafter the Commission issues questionnaries to suppliers of the goods under reference.

(*d*) Independent enquiries are made by the expert staff of the Commission.

(*e*) A financial investigation is then commenced by the accounting department of the Commission.

(*f*) A clarification hearing follows next where details are discussed.

(*g*) Then the public interest enquiry is set in motion by a letter from the Commission.

(*h*) The Commission in the U.K. has the rolled up function of judge and jury. The Commission does not cite witnesses for cross examination.

The public interest hearing is then commenced and the entire industry is alerted to submit statements. The report is finalised and signed by the Commission after hearing evidence from the representatives of the industry. In this connection the procedure in India is pegged by the relevant sections of the Act. Section 12 confers powers under the Civil Procedure Code on the Commission regarding summoning of witnesses, discovery of

5. Valenine Korah, *Monopolies and Restrictive Practices* 47 (1968).

documents, receipt of evidence, issue of commissions for examination of witnesses, etc. Section 13 empowers the Commission to pass conditional orders. Section 15 saves patents rights of persons as well as the right to export out of India. The orders of the Commission are appealable under section 13 or 37 to the Supreme Court. While writs may be filed directly in the Supreme Court under article 32 of the Constitution of India, it is submitted that the writ jurisdiction of the High Courts cannot be invoked because the Commission cannot be construed to be a 'court' inferior to a High Court. However, it will be open to the High Courts to consider the *vires* of the Act *vis-a-vis* the Constitution of India.

Chapters IV and V of the Act respectively deal with these aspects. Monopolistic practice is defined in section 2(i) and (o), while a trade practice is dealt with *inter alia* by section 2(u). Sections 31 and 32 detail 'monopolistic trade practices'. Section 33 is the king pin of Chapter V and it is very wide in its content. Even persons who are not parties to the agreement may be affected by it, thus bringing the agreement within the mischief of the section. Section 6(1) of the U.K. Act of 1956 confines itself to the parties to the agreement. It is noteworthy that section 33 does not apply to goods and services agreements to which the Government is a party or which are authorised by law or approved by the Government. The rigour of the chapter is seen from the insistence on a list of cancelled agreements. The Commission is empowered by section 42(4)(c) to prohibit the parties from entering again into like agreements. Even trade-mark licences, 'know-how' agreements and the like attract registration under section 33(3) even though they stand exempted under section 8 of the U.K. Act. Provision is made for an "out of bounds" register containing information which it is not desirable to disclose in the public interest or the disclosure of which will cause substantial damage to the legitimate business interests. This all-embracing section does not even spare 'gentlemen's agreements'.

The word agreement itself in section 33 should be read along with section 2(a) of the Act including arrangements which may not be legally enforceable. Thus, this section goes beyond the normal connotation in a similar context available under the Contract Act.[6] The object of section 33 may be to eliminate the evils of hoarding and cornering of goods. But it also causes hardship. For example, restrictive dealership covenants prohibiting a dealer from dealing in a competing product will now be covered by this section. Sole selling agency agreements, already covered by section 294 of the Companies Act 1956, may also come within the mischief of section 33 of the Act. Allocation of trade and

6. For judicial interpretation of this aspect see *Re British Basic Slag, Ltd.'s Agreements*, (1962)3 All. E. R. 247; *Re Tyre Manufacturers' Agreement*, (1966)2 All. E. R. 849.

the stipulation of exclusive dealership in a product may not always be a restrictive trade practice. On the other hand, it may facilitate a better market survey, evaluation of the cost of the product leading to better quality and consumer cost of the product. Exclusive dealership may afford better servicing facilities to the consumer, as for example in the case of machinery, motor vehicles and tractors.

Section 35 presumes a trade agreement made by a trade association as though it is made between all its members. This interpretation is at par with that placed on the articles of association of a company under the Companies Act 1956. Section 36 exempts agreements from registration if they have no substantial economic significance. However, if a restrictive trade practice is prejudicial to public interest, the Commission may direct that it should be discontinued or should be suitably corrected. Agreements between buyers are exempted by section 37 while section 38 lists restrictions which are not prejudicial to public interest. But a stipulation which is illogical and has no pertinent or reason, it is submitted, may be struck down on the analogy of English case law[7] Section 38 b) is concerned with the advantages derived by the consumers which would otherwise be denied to them without the restrictions. Mutual exchange of technical information and coordination of research by smaller units of industry are contemplated. Section 38(c) imposes a restriction to curb activities of monopolists. Section 38(d) stipulates the necessary restriction to negotiate fair terms from a dominant seller or buyer. The relevant territorial market referred to in the section is the home market and not the world market. Section 38(e) prohibits removal of restrictions, protecting employment etc. Section 38(f) protects the level of export earnings while section 38(g) concerns itself with restrictions not opposed to public policy. Section 38(h) is a residuary clause dealing with restrictions not adversely affecting competition to any appreciable extend in relevant trades and industries. In fine, section 38 deals with presumptions which spell out a restrictive trade practice assumed to be prejudicial to public interest.

According to section 39, any term or condition of a contract for the sale of goods to the wholesaler or retailer or any agreement between a person and a wholesaler or retailer dealing with such a sale shall be void, to the extent to which it purports to establish or provide for the establishment of minimum prices legitimately chargeable on resale of goods in India. Section 41 empowers the Commission to exempt certain classes of goods from the purview of sections 39 and 40. Chapter VIII deals with offence and penalties for the contravention of the Act. The last Chapter deals with miscellaneous provisions concerning the powers of the

7. *Re Chemists' Federation's Agreement*, (1958)3 All. E.R. 448.

Central Government to impose conditions and restrictions regarding granting of approval under the Act. This Chapter also provides for an appeal by the aggrieved person against the order of the Commission.

A background of distrust regarding the infrastructure of some private sector companies, appears to be the outcome of the Hazari Report and the Dutt Committee Report But the interesting fact is that the evils of monopoly have notbeen rooted out. Monopolies in the public sector are in a sense protected by article 305 of the Constitution. The arbitrary increase of the price of raw materials in the public sector undertakings inevitably raises the consumer cost of the end-product.[8] Further, the big units in diverse industries are likely to be only in the public sector and if the ultimate aim is (as it should be) to protect the interest of the consumer, it is not understood as to how the State could be complacent about the disturbing trend in price scheduling in that sector. Rising prices cannot be exclusively the result of monopolistic and restrictive trade practices in the private sector. The disturbing trend of deficit financing requires serious consideration. Again the advantages of large scale production and the effective use of by-products should be carefully noted in considering schemes for mergers under the Act. In fine, while the object of the Act is laudable, it should be judiciously applied in the best interest of the consumer.

8. Hindustan Steels raised the price of Naphthalene from Rs. 600 per tonne in 1967 to Rs. 1,800 in 1969.