# MONOPOLIES AND RESTRICTIVE TRADE PRACTICES

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Monopolies and restrictive trade practices operate in a field where the tricky job of reconciliation between public and private interest is indeed a tight rope walking. While the private interest, having its root in the right of the enterpreneur to advance his self-interest by practising any profession, trade or business (and that too in any manner he likes) adhors every restriction, the public interest, having the backing of the supreme law that society should not be subjected to ransom for private gains, goads the parliament and the government to be never hesitant in imposing restrictions for maximisation of social welfare. This raises the question as to the reasonableness of restrictions on the private enterprise in public interest.

"Monopoly is neither good nor bad in itself"[1] and therefore warrants no regulation. "But it has the power to be either good or bad"[2] and since "power corrupts and absolute power corrupts absolutely"[3] the power inherent in monopoly deserves to be bridled not only by remedial measures but by preventive ones as well, so that the law is not a silent spectator until bridges have actually been blown.[4] That justifies the need for regulating in public interest not only 'monopolies' but "concentration of economic power"[5] as well.

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The views contained in the paper are those of the author in his personal capacity and the Department of Company Affairs is no way bound by them.

1. Stacey A.H. *Mergers in Modern Business* p. 68.

2. *Ibid.*

3. *Report of the Monopolies Inquiry Commission*, 1965, p. 1

4. Prof. John Kenneth Galbraith while labelling the U.S. anti-trust laws as "part of the American folklore", equates the policy "to locking the stable door not alone after the horse has been stolen but after the entire stud has galloped away ? *Financial Express* 2-7-67.

5. (*i*) "Concentration of economic power is the central problem; monopolistic and restrictive practi ces, may be appropriately considered to be 'functions of such concentration" *Report of the Monopoly Inquiry Commission* 1965, p. 1.

(*ii*) Dr. Hazari, refers to "monopoly of capital" as "concentration of economic power."

Hazari, R.K, *Monopolies and their Regulation in India*, page vii.

**The State Policy—Implementation**

The political dangers of excessive concentration of economic power have been well recognised in the Indian constitution. Article 39. (*b*) and (*c*) thereof impress upon the State to secure "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and (2) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."[6] Accordingly. *Item* 21 in *list-II* (concurrent list) of the seventh schedule of the constitution expected the state to legislate on "commercial and industrial monopolies, combines and trusts". While this was the directive to the state, "the planned economy which the government decided to accept for the country as the quickest way to achieve industrialisation on the right concentration".[7] Indeed "every one of the circumstances" *viz.* allocation of resources and the settlement of priorities, which planning necessarily involves on imports which happened to be necessary concomitants "tended to produce concentration of economic power"[8].

The *Committee on Distribution of Income and Levels of Living* (popularly known as *Mahalanobis Committee*) appointed by the *Planning Commission* on 13th October, 1960, in its report dated 25th February, 1964 concluded *its chapter on Concentration of Economic Power by* that "concentration of economic power in the private sector is more than what could be justified as necessary on functional grounds and it exists both in generalised and in the specific forms."[9]

*Monopolies Inquiry Commission*, set up under the Commission of Inquiry Act, 1952, by notification dated the 18th April, 1964 to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices, in its report dated the 31st October, 1965 found : (*i*) industry wise or product-wise concentration existed in so far as a limited number of producers had a comparatively larger share of the market. In 65 out of 100 selected products, a high degree of concentration existed in the sense that the share of the three top producers happened to be more than 75 per cent of the total production ; (*ii*) in the sphere of country, wise (inter-industries) concentration, the total paid up capital and total assets of the companies

6. Art 39 (*b*) (*c*) *Constitution of India.*

7. *Report of the Monopolies Inquiry Commission*, 1965, p.6.

8. *Ibid p. 7.*

9. *Report of the Committee on Distribution of Income and Levels of Living* 1964 p. 54.

belonging to 75 business groups (with assets not less than Rs.5 crores each) accounted for about 44% and 47% respectively of the total paid-up capital and total assets of the companies functioning in the corporate sector ; (*iii*) there were attempts by monopolists to keep out fresh competitors in various way ; (*iv*) practices, such as hoarding and creating arlificial scrcaity in the market, price fixation or re-sale price maintenance, exclusive dealing contracts and tie-in-sales by manufacturers are prevalent on a fairly large scale[10].

**The Monopolies Commission**

The government, having considered the report of the *Monopolies Inquiry commission* decided by its *Resolution* dated the 5th September, 1956 to establish a permanent statutory body *viz.*, *Monopolies and Restrictive Trade Practices Commission*. with mandatory powers in respect of restrictive trade practices and advisory ones in respect of monopolistic practices. The *Commission* would also advise the government in matters concerning concentration of economic power such as expansion of existing concerns, diversification of business,ama lgamations and mergers *etc*. Thus in respect of product-wise concentration, facilitating monopolistic practices the *Commission's* advice, after due inquiry, is expected to enable the government to terminate practices found to be monopolistic as also to ensure that prices are not determined on the basis of monopoly position enjoyed by certain producers. Accordingly a bill *viz.*, Monopolies and Restrictive Trade Practices Bill 1967 was introduced in Rajya Sabha on 18th August, 1967. This Bill, attracted two-pronged attack *viz.*, (*a*) for its luke-warm approach and (*b*) for its draconian content. Critics belonging to the former category feel that the Bill does not contain any effective steps to curb concentration of economic power. The critics of the latter category contend that it will inhibit economic growth, exports and so on. The two sets of criticisms are discussed below : [both product-wise as also country-wise (inter-industries)]

Admittedly, the law is not panacea for all the ills. Nor it is expected to be. Other legislative,[11] and non-legislative,[12] as also

10. *Report of the Monopolies Inquiry Commission* 1965 pp. 30-32, 122 and 126-34 respectively.

11. Companies Act (inter-corporate loans & investment, curbs on managerial powers and remuneration, voting rights, proposed abolition of managing agency system), industries Development & Regulation Act (licensing geographical concentration, control of prices, production and distribution), Capital Issues Control Act, etc.

12. Government *Resolution* dated the 5th September, 1966 (encouragement to small scale and new enterprises to restore competitive conditions.

fiscal[13] and countervailing[14] measures are there to supplement its working. While it is true that even in a democratic form of government with socialist majorty it is "big business" which "controls the switch-board in the power-station of economic activity, and can bring the whole system to a stand-still when it wishes,[16] the hard fact remains that socialisation by compensation is impossible and economic and political power would still rest in the hands of those who from being owners have become creditors. Their "root and branch extirpation" might imply "destruction of so much that is valuable in tradition and experience; the probably wastage of organizing and technical ability" and even 'the chances of bloodshed and warfare.[17]" The end can be achieved by a less painful proceses, *viz.*, by their piecemeal elimination. Indeed it is the desire to compress the "slow evolution of future history" into "the compass of one's own life-time", that is labelled by Robinson as the greatest of all sins against society."[18]

### Inhibiting Industrial Growth and Exports

The criticisms of this class may be considered under the following sub-heads :

(*i*) *Attack on size :* It has been argued that legislative measnre on monopolies and restrictive trade practices is a direct attack on size. "No where else has monopoly legislation taken mere size or assets into account for the purpose of restriction and control on companies under their anti-monopoly legislation and there is no valid reason why we should do so in India[19]."

13. Personal tax, corporation tax, wealth tax, gift tax estate duty, etc.

14. Public Sector.

15. It regulates both product-wise as also country-wise (inter-industries) concentration of economic power. It also includes the provision for division of dominant undertakings with assets over one crore of rupees and groups of interconnected undertakings with assets over twenty *crores* of rupees, if their working is found to be prejudicial to public interest.

16. Robinson, E.A.G *Monopoly*, 1961, p. 286

17. *Ibid.*, p. 287.

18. *Ibid.*, p. 289.

19 Tata Industries Private Ltd., *Memorandum* presented to Joint Committee of Parliament on the Monopolies and Restrictive Trade Practices Bill, p. 1-2.

In this connection, it may be recalled that the law has taken size into account in the following contexts.

(*i*) dominant undertakings (*i.e.*, undertakings which produce, supply, distribute or otherwise control, although inter-connected undertakings, not less than one-third of total goods of any description that are produced, supplied or distributed in India or provide not less than one-third of any services that are rendered in India) and

(*ii*) any undertaking which together with not morethan two other independent undertakings, produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in India or provides not less than one-half of any services that are rendered in India. These situations would warrant the application of provisions relating to monopolistic trade practices.

(*iii*) Concentration of economic power of (*a*) dominant undertakings (as defined above) with assests not less than one crore of rupees : and (*b*) groups of inter-connected under takings (business groups) with assets not less than twenty crores of rupees.[20]

Not much objection is taken about (*i*) above, in so far as the main criterion for determining monopoly is the share in the aggregate production, supply or distribution. In U.S.A. "monopolizing"[21] itself has been prohibited by the Sherman Act 1890 and the size of the undertaking *per se* is no defence. The conditions to which the (U.K.) Monopolies and Restrictive Practices (Inquiry and Control Act 1948) supplemented by (U.K.) Monopolies and Mergers Act 1965 applies[22] have been laid down as "one-third" control over the supply of any goods or services. The Norwegian Law[23] attracts undertakings with control over "one-quarter" of the total production.

Regarding (*ii*) above, it is often argued that value of assets *per se* is not a good indicator of monopoly power. In this connection, it is pertinent to note that, in case of (*iii*) (*a*), the main criterion is dominance *i.e.* one-third share in aggregate production, supply or distribution of goods or in aggregate production, supply or distribution of goods or in provision of services in India and the value of assets is intended to grant

20. Monopolies and Restrictive Trade Practices Bill 1967 Clause 21.

21. Public Law No. 190, July 2, 1890.

22. Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. *Section 3 : S 2*, Monopolies and Mergers Act 1965.

23. Norwegian Law of 1953.

exemption to small-sized dominant undertakings (*i.e.* undertakings though having one-third share but not having assets of a minimum value of rupees one crore). The number of undertakings likely to be covered under (*iii*) (*a*), according to available information, may be around 300. As regards the rupees one crore limit it may be recalled that according to the *Monopolies Inquiry Commission* itself "the possession of one crore or more of assets would be proper measure of bigness."[24]

Application of *Chapter III* (Concentraion of Economic Power) to groups of inter-connected undertakings (business groups) with assets not less than twenty crores of rupees has been the favourite field of attack. Firstly, it is argued that assets *per se* do not form a good criterion for determining monopoly power. Secondly, it is asserted that what the *Monopolies Inquiry Commission* sought to regulate was only product-wise[25] concentration and not country-wise[26] (inter-industries) concentration. Thus the provisions dealing with concentration of economic power goes for beyond the recommendations of the *Monopolies Inquiry Commission*.

As regards the first argument it may, be mentioned that the size of assets, representing concentration of financial power, do form one of the good indicators of concentration of economic power.

Indeed the provisions concerning mergers in U.K.[27] interlocking of directorships in U.S.A.[28] and inter-company investments in Japan[29] do rely

24. Report of the *Monopolies Inquiry Commission* p. 163.

25. "Where in respect of production and distribution of any particular commodity or service, the controlling power, whether by reason of ownership of capital of otherwise vests in a single concern, or in a few concerns these concerns themselves are controlled by only a single family or a few families of business house." *MIC Report* p.2).

26. "Where a large number of concerns engaged in the droduction or distribution of different commodities are in the controlling hands of one individual or family or group of persons, whether incorporated or not, connected closely by financial or business interest." (*Ibid*)

27. (U.K.) Monopolies & Mergers Act, 1965, S.6 (1) (*b*)

28. Furthermore, in *American Tobacco Case* (328 U.S. 781 (1946) it was held that the material consideration for determining whether monopoly exists is not that the prices are raised and that competition is actual excluded but the power exists to raise prices or to exclude competition when it is desired to do so." (Koontz and Gable-p 340).

29, *Articles 11-13*. Anti-monopoly laws.

on size of assets. The recent decision[30] of the *Board of Trade* in U.K. to refer to the *Monopolies Commission* for the firsttime under the Monopolies and Mergers Act 1965. the conglomerate aspects of merger proposals to ascertain whether large conglomerates aspects of merger proposals on the ground of size are opposed to public interest emphasises the importance of size of assets. Again, the concern expressed about conglomerates' war (waged by builders of conglomerates[31] in U.S.A.) to reshape industry deserves some mention. According to the *Times* dated 7th March, 1969. the growing impact of the conglomerates has been so great that even conservative businessmen who usually complain about too such federal interference, are pleading for government help in combating their onslaught. The chances are they will get it ; the government has lately begun to act as if "conglo meritis" is a virulent disease. Half dozen agencies-including the Justice Department, the Federal Trade Commission and the Securities and Exchange Commission—have begun investigations of the phenomenon.

No doubt business groups in India cannot be strictly equated to conglomerates, in the sense that individual companies within the business group go on keeping their individual legal entities, yet, in so far as the real control in case of business groups continues to be in the hands of the few, the harmful effects of the virulent disease"-'conglomeritis cannot be knocked out of business groups.

According to Richard McLarn conglomerate mergers between large companies tend to reduce competition and aggravate inflation. One of the obvious difficulties with anti-trust laws is that, while providing for horizontal mergers with competitors and, to a lesser degree, for vertical mergers with suppliers or customers, they do not prohibit taking over of enterprises in different fields and, according to the *Times* "it is just that loophole through which the new conglomerates organisations are moving".[32] That being the position in other countries, there is little to feel perturbed about our legislation to forestalls such loopholes.

30. *London Financial Times* dated 29.1.1969.

31. Multipurpose, multi-industry companies that specialise in hodge podge acquisitions.

32. *Times* dated 7.3.69, p. 45.

As regards the second argument that *Monopolies Inquiry Commission* did not recommend control over country-wise (inter-industries) concentration, it may be mentioned that *Monopolies Inquiry Commission* did point out such consequences of concentration of economic power as call for regulation of countrywise (inter-industries) concentration.[32a] Furthermore, in his dissenting note, Shri R.C. Dutt clearly said "we need not strike at concentration of economic power as such, but should do so only when it becomes menace to the best production, in quality or quantity, or to fair production".[33] He is categorical in saying" Proliferation in different industries resulting in inter-industries concentration should be discouraged specially so in respect of groups which have reached a certain size.[34] It is pertinent to note that, on the basis of *Monopolies Inquiry Commission* figures, the Act covers 33 business groups out of 75 listed by the *Commission*.[35]

*(ii) Rationale of Big Companies*

Giant corporations and oligopolies are often defended for (*a*) economics of mass production to give rise to optimum scale firms and (*b*) for their allocation of resources for research and development to technological progress and economic growth.

According to Asim Choudhari, "although still possessing many adherntes, this defence of the giant corporation and oligopoly has recently failed from favour, perhaps mainly for lack of empirical support.[36] Charles Rowley, while mentioning the argument that concentration will lower automatically unit production costs to the lowest level prior to concentration process categorically says that "evidence from (U.K.) Monopolies Commission reports does not substantiate this belief".[37] Again according to Michael Keeling, "Although very large firms are necessary to secure economics of scale in any sorts of production (chemical, steel, motor vehicles), when a market becomes the concern of a small number of producers the danger of monopoly practices are always present. This is a point at which intervention by government,

32*a*. Report of the Monopolies Inquiry Commission pp. 135-138 and 193-198

33. Report of the Monopolies Inquiry Commission, p. 197.

34. *Ibid* p. 198

35. *Ibid* p.

36. Choudhari Asim, *Oligopoly and Industrial Research in India.* Monopolies and their Regulations in India, 1966, p. 1

37. Rowley, Charles K. *The British Monopolies Commission* 1966 p. 131.

can be of use and no cry about 'control' or 'inter ference with business' should put us off".[38] The argument at (*b*) above is based on Shumpeterian hypothesis[39] finds little support in India. To quote Asim Choudhari again : "The New Defence of oligopoly in U.S is that research and development activity is an increasing function of the size of the firm. In India this argument can hardly be advanced for, according to a C.S.I.R. study, the expenditure on research and development negligible even in the larger firms. This is due to the absence of competition, foreign collaboration, lack of research consciousness and concern with high profit margin. Even those companies which have large uncommitted accumulated surpluses do not seem to be interested in research and development[40]". What is true about big companies in India is true about gaint business houses which, on account of trader's mentality are more keen to diversify investible surplus into unrelated fields rather than activise quality control and research effort. No wonder if the giant business houses in India "instead of fostering research and development activities have been a sort of deterrent to the growth of such activities.[41]"

In any case, it may be mentioned that the law on the subject does not impose any absolute embargo on the growth of existing monopolies. Nor does it visualise any arbitrary freeze to the expansion of the business houses. All that it provides for is government approval to ensure that the growth of large sized dominant undertakings and major business groups is not against public interest. Of course, it has to be ensured that the time lag between submission of the proposals for expansion and the approval thereof is kept to the minimum.

*(iii) Indian Pygmies and Foreign Giants*

Comparison is often drawn between the Indian giants and the foreign giants and, finding that Indian giants figure no where in comparison with foreign ones, it is argued that they are just pygmies and consequently no control at all is necessary on their expansion.

38. Keeling Michael, Morals in a Free Society. *Economic Man* London, 1967 pp 117-118.

39. 'As soon as we go into the detail and enquire into the individual items in which progress was most conspicuous, the trial leads not to the doors of those firms that work under conditions of comparatively free competition but precisely to the doors of the large concerns" Shumpeter, J. A. *Capitilism, Socialism and* Democracy, 1961 p. 82.

40. Choudhari Asim, *op. cit.* p. 1

41. Choudhari, Asim, *op. cit* p 5

The true position becomes apparent the moment it is realised that, the object of the legislation being to ensure that Indian pygmies are not crushed by the unfair competition coming from the Indian giants, the comparison between Indian giants and the foreign giants is a fallacy. The comparison has necessarily to be between the Indian small firms, the Indian medium firms the Indian big firms and the Indian giant ones.

(*iv*) *Exports*

If, however. the comparison between the Indian giants and the foreign ones is sought to be drawn to compare the capacity of Indian firms to compete with foreign giants in international market, it would mean arguing for perpetuation of monopolies till the Indian giants assume the size of foreign ones. In any case, it is important to note that *Part C* of the *Chapter III* of the Act carries a special directive to the *Monopolies Restrictive Trade Practices Commission* as also to the Central government to have regard to "the requirements of overseas market" whilecons idering any proposal concerning expansion, mergers and amalgamations, takeovers *etc.* Similarly the definition of the term public interest in relation to restrictive trade practices makes a specific mention of 'export business'. Attention is also invited to another provision[42] specifically laying down that "no order made under this Act with respect to any monopolistic or restrictive trade practices shall operate so as to restrict, the right of any person to export goods from India, to the extent to which the monopolistic or restrictive trade practice relates exclusively to the production, supply, distribution or control of goods for such export". Thus it is evident that the fear of the economic lawyers that the export ptotential of Indian giants would suffer if they are not allowed to grow further to the size of foreign giants, is rather unfounded.

**Regulatory Measures**

It is often argued that "various legislative measures which in effect constitute countervailing forces against the so-called monopolies and concentration of economic power" already exist in India. The legislative measures relied upon in this connection are : Industries (Development and Regulation) Act, 1951, Capital Issues (Control) Act, 1947, Companies Act, 1956, Tariff Commission Act, 1951, Essential Commodities Act, 1955, Foreign Exchange Regulation Act, 1947, Import and Export (Control Act, 1947 and Banking laws (Amendment) Act, 1968.

42. *Clause* 18, of the *Bill*.

While it is not intended to deal in detail with the provisions of each of these Acts to show that they do not answer the problems purported to be tackled by the Monopolies and Restrictive Trade Practices Act, it would be pertinent to refer to the views of two expert bodies which looked at the problem of concentration of economic power *vis-a-vis* various laws already in existence. The *Mahalanobis Committee*, while concluding that concentration of economic power in the private sector was more than what could be justified as necessary on functional grounds, categorically stated that this was "despite all the contervailing measures.[43] The *Monopolies Inquiry Commission* was still more emphatic "We are convinced that the existing powers of the government have not been able to check the growth of concentration of economic power in private hands or to eliminate the evils of monopolistic and restrictive practices. The experience of other countries when faced with similar situations shows that a body specially entrusted with the duty of looking after these matters can be of great use in preventing excessive concentration of economic power or the evils resulting therefrom and also evils that frequently result from monopolistic and restrictive practices."[44]

## Restrictive Trade Practices

The provisions concerning restrictive trade practices have not escaped the two-pronged attack. Those who criticise the legislation for its lukewarm approach want all restrictive trade practices to be declared *per se* illegal. They, however, forget that all restrictive trade practices are not against public interest. No doubt, the American Courts, interpreting the Sherman Act of 1890, have applied the rule of *per se* illegality to the most important categories of restactive business agreements, yet the fact remains that the category of *per se* violations of anti-trust is made up of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.'[45] Again, while in the British legislation there is a general presumption against collective retraints on competition, it is assumed that some restrictive agreements have redeeming virtues.[46] According to *London Financial Times*, in some cases, restrictive agreements "can obviously serve the public interest

43. Report of the Committee on Distribution of Income and Levels of Living 1964, p 54.

44. Report of the Monopolies Inquiry Commission, 1965, p. 140.

45. Stevens, R.B. and Yamey, B.S., *The Restrictive Practices Court*, 1964, p. 51

46. *Ibid.*

by increasing efficiency and helping along the rationalisation of industry."[47] The Indian legislation proceeding on the pattern followed by the (U.K.) Restrictive Trade Practices Act, 1956, does raise a presumption that restrictive agreements areagainst public interest unless the agreement is shown to fall within any of the categories considered to be in public interest and unless its meritsoutweigh the detriment flowing from it. In the circumstances, there is hardly any justification to call the approach as a lukewarm one. Nor can the provisions be called unduly stringent as they do provide for inquiry by *Commission*. It is only after the agreement is found to be prejudicial to public interest and "cease and desist order" is contravened that the penalty for its contravention follows.

It is evident from the above discussion that the criticisms of both the categories of critics, are hardly justified. Indeed, the Act has tried to tread the middle path both in respect of regulation of concentration of economic power as also regarding monopolistic and restrictive trade practices.

47. *Competition versus Corporation*, London Financial Times, dated 7-3-1967.