

Global Perspective of Anti Trust Laws: (With Special Reference to Indian Competition Act & Its Impact on Industry & Free Markets)

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Abstract

Around the globe the statutes regulating competition are known as Anti Trust laws. An anti Trust offense is a tort committed against a market rather than against a particular business or person in the market. Competition is vital for development and growth. We all know about the fierce competition prevailing in animal kingdom and the rule “survival of the fittest”. The same applies to the market albeit with a difference. In India the ‘MRTP Act’ 1969 ruled the roost for nearly four decades. It was after 1991, an urge to have a new law reverberating with the changing scenario was felt strongly. Developed countries around the world have an array of antitrust laws which are very effective. USA- Sherman Act, Clayton Act, HSR Act; UK- Enterprise Act 2002, Japan- Anti Monopoly Act and Australia- Trade Practices Act 1974 to name a few. In India, the ‘MRTP Act’ 1969, was replaced w.e.f. 1st September, 2009, with Competition Act 2002 as amended in 2007. There are myriads of issues about the free market which have lead to misconceptions about the Competition Act that is being slammed as anti Industry. The time will only tell how far competition act has passed the litmus test.

KEYWORDS: - Anti Trust laws, Competition Act, Competition Commission of India, MNCs, and MRTP Act.

1. INTRODUCTION:

Globally it is believed that competition is benign for the consumers and the business community. The World Bank in 1990 has adopted the following definition: “Competition is a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales or market share”. Competition Laws are known more popularly as Anti Trust laws globally. In USA, “it is the *Magna Carta* of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the bill of rights to the protection of our fundamental personal freedom”. This was the observation of the Supreme Court of U.S. in the celebrated antitrust case *United States v. Topco Associates, Inc.* In India the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) ruled the roost for nearly four decades. It was after the Economic Reforms an urge to have a new law which will reverberate with the changing scenario was felt more strongly. Further given the anarchist approach of MRTP Act it dawned upon the government that a new legislation has become necessary to protect the interests of Indian industry, Indian consumers, and also to regulate the entry of Multi National Corporations, [MNCs], &

Trans National Corporations [TNCs], and offer a level playing field to all the stakeholders and market players. Ministry of Corporate Affairs [MCA,] repealed MRTP Act with effect from, 1st September, 2009 with Competition Act 2002 (COMPETITION Act), as amended in 2007. Chapter III of the repealed MRTP Act which dealt with mergers, amalgamations and acquisition was deleted from 27th July, 1991. Therefore, restrictions on mergers, amalgamations and acquisitions in the country did not exist post July, 1991 until SEBI imposed restrictions on listing of unlisted companies through mergers and amalgamations. Further SEBI announced the Takeover Code 1997 and amended it from time to time to restrict takeover of listed companies. Restrictions of merger and amalgamation of banking companies, however, continued to be regulated by the Reserve Bank of India throughout. The MRTP Commission was to exist for two years up to 31st August, 2011 concurrently with Competition Commission of India (CCI) to handle cases filed prior to 1st September, 2009. After two years all pending cases were transferred to the Competition Appellate Tribunal (CAT) which adjudicated these cases in accordance with repealed MRTP Act.

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and abuse. Market power is variously known in competition arena as dominant position, monopoly power and substantial market power. There is an underlying policy in European Community that the internal markets should grow by free flow of, working people, goods, services and capital in a borderless Europe. The Competition Act, 2002 follows the philosophy of modern competition laws and aims at fostering competition, protecting Indian markets against anti-competitive practices by enterprises who always want market leadership to maximize benefits. The act prohibits anti-competitive agreements and abuse of dominant position by enterprises and regulates combinations which include mergers, amalgamations and acquisitions thus laying down certain practices from which enterprises shall have to keep away. There are multitude of issues about the free market which have given birth to the misunderstanding and misconceptions about the Competition Act which is being slammed as anti Industry. The Indian competition law regime is in a nascent stage; it is barely five years since the Competition Act has become operational, the time will only prove its worth.

2. GLOBAL SCENARIO:

Anti Trust- An anti Trust offense is a tort committed against a market rather than against a particular business or person in the market. William Markham {2000} has illustrated four classic offenses which shall help to understand the nature of antitrust.

- i] Obtaining of Monopoly power by improper means,
- ii] Preservation or enlargement of Monopoly power by improper means,
- iii] Abuse of Monopoly Power in one market to obtain Monopoly power in another market, and
- iv] Conspiring to sabotage “competition on the merits” by means of exclusionary or predatory “restraint of trade”.

Anti Trust Laws & Court Views- Two theories namely Structural theory and Dynamic competitive theory are advocated behind the issues related to Anti Trust Laws. Structural theory deals with degree of market concentration. It suggests that higher concentration causes less competition. Dynamic competitive theory on the other hand attaches importance to relative efficiency and performance of the company.

Noerr-Pennington Doctrine:

It is a doctrine of US antitrust law set forth by the US Supreme Court, which lays down that no offence shall be deemed to be committed if the business undertakings lobby to influence the Government for passage of certain antitrust laws which is likely to reduce the competition. Thus the business community having vested interests can influence the government to get certain bill passed or amended to suit their convenience.

A bird's eye-view of Competition Laws:

- **In UK** the Monopolies and Restrictive Trade Practices {Enquiry & Control} Act 1948 was replaced by the Competition Act 1998 and finally the Enterprise Act 2002. These laws made the system more comparable with European Union.
- **In Japan** the Anti Monopoly Act {AMA} is meant to regulate the monopolies, unreasonable restraint of trade like cartels, bid rigging, resale price maintenance and encourages the business activities & competition.
- **In Australia** the Trade Practices Act 1974 is still the best device to regulate the restrictive trade practices and promotes the competitive business environment.
- **European Community** there is an underlying policy that the internal markets should grow by free flow of working people, goods, services and capital in a borderless Europe. The main policy areas are:-1] Cartels and other anticompetitive arrangements to be prohibited. 2] Monopolies & Dominant market positions are put under scanner, 3] Mergers with potential threat are regulated, 4] State aid to be given by EU member States to Companies to be monitored.
- **In USA** the following legislations and guidelines are followed:
i] Sherman Act 1890, ii] Clayton Act 1914, iii] Hart-Scott- Rodino {HSR} Act 1976
iv] The Racketeer Influenced and Corrupt Organisations Act {RICO Act} 1970, and
v] Merger guidelines.

Sherman Act was the first piece of legislation in USA to limit cartels and monopolies. It is the oldest and most important Federal antitrust Law and aims to promote competition.

Clayton Act of 1914 empowers the Federal Trade Commission {FTC} to prohibit the acquisition by one company of the stock of other company if it affects the competition adversely. The Act also prohibits Price Discrimination, Exclusive Agreements to sale the goods of only one company, Mergers & Acquisitions affecting the competition. A glance at the Sherman Act & Clayton Act however shows that Sec 7 of Clayton Act allows greater regulations of mergers than Sherman Act, Sec 2. The test used for a merger approved is based on **Herfindahl- Hirshman Index (HHI)** for market concentration which is the sum of the squares of the market shares of all firms in the industry.

The Hart-Scott-Rodino Act of 1976 {HSR} contains three titles, Title I explain the powers of Department of Justice to issue civil investigation demands in relation to Anti Trust Laws. Title II represents pre merger notification laws and Title III deals with powers of state attorney.

Under the Racketeer Influenced and Corrupt Organisations Act {RICO Act} 1970, either Government or Private Plaintiff can initiate action. RICO may be invoked in non competitive situation also. Finally **Merger guidelines** are a set of internal rules framed by Anti Trust division of the United States Department of Justice {USDOJ} in conjunction with Federal Trade Commission {FTC}. They broadly deal with the challenges of potential mergers or threat to the competition.

3. EVOLUTION OF COMPETITION LAW { INDIAN SCENE}:

MRTP Act 1969- Without understanding the scheme of the erstwhile Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act), the discussion on the Competition Act in the Indian context will be meaningless. It is well known that India had inherited an economy in a ravaged condition after independence. The transformation of backward industrial economy into an advanced industrial economy was almost a Herculean task before the planners. The Government was towing the line of mixed economy at that time. No doubt there was perceptible growth in industrialization however it also brought on its trails concentration of wealth and economic power. This led to widening of the disparities between the “*Haves and Have-nots*” in the society. The Government therefore set up in 1965 the **Monopolies Inquiry Commission (MIC)** under the chairmanship of K.C. Dutta with a view to finding out the causes, nature & extent of concentration of Economic power in the country and to suggest the remedial measures. The Commission observed that over the years certain business houses had built a vast industrial empire and were trying to expand it by adopting trade practices which were distorting the competition and promote nearly monopoly. This was destroying the basic fabric of socio-economic justice enshrined in the Constitution. The Commission framed a draft bill which was introduced in the Parliament and after being referred to joint select committee became the MRTP Act which came into force w.e.f. 1st June 1970 and underwent several amendments.

The Act has four vital planks:

- ★ Prevention of concentration of Economic power to the common detriment and control of monopolies;
- ★ Prohibition of Monopolistic trade practices;
- ★ Prohibition of Restrictive trade practices;
- ★ Prohibition of Unfair trade practices;

MRTP Commission Regulations 1974, MRTP Rules 1970, MRTP (Classification of goods) Rules 1971, MRTP Information Rules 1971, were framed and amended from time to time. The Act covered both goods and services but did not apply to Government Companies, Financial Institutions, Trade Unions and Co-operative Society etc, There are diverse opinions whether the Act was successful in achieving its objective, but many would agree that it was instrumental in curbing the restrictive trade practices and promoting competition to a large extent.

Competition Act 2002:

Considering the fact that scope of MRTP was inadequate in the changing world trade scenario, the Indian Government formed Raghavan Committee (RC), to advice on competition law. Based on the recommendations of RC, Government enacted the Competition Act, 2002 to protect interests of consumers and to ensure freedom of trade in markets which came into force from 13th January, 2003. The Act was implemented in stages on 31st March, 2003, 19th June, 2003, 14th October, 2003 and 28th August, 2009. The act was amended in 2007, and established Competition Commission of India {CCI} for the purpose of i} Preventing any practice having adverse effect on the competition. ii} Promote competition in the markets iii} Protect consumer’s interests and iv} Ensure freedom of trade for other market participants. The composition of CCI having both regulatory & adjudicatory authority was surrounded by controversies as violating the doctrine of separation of powers as envisaged in the Constitution and challenged before the Supreme Court of India. Finally in the year 2007 a bill was introduced in the

Parliament and Competition Appellate Tribunal {CAT} was created thus separating both the functions. The Competition Act has been credited to be one of the most important legislative developments in India in the era of Liberalization, Privatization & Globalization. It has been held as “close to state of art” by the Organization for Economic Cooperation & Development {OECD} and World Trade Organization {WTO}.

Salient Features of 2007, Amendment,

- The Act prohibits anti-competitive agreements like **i]** Horizontal Agreements to fix prices; limit production and/or supply etc., **ii]** Vertical Agreements: conditional purchase/sale, exclusive supply arrangement, and resale price maintenance etc.,
- Though all the **combinations #** (like mergers, acquisitions/amalgamations), are not totally banned, the Act prohibits only those likely to cause adverse effect on competition. All mergers and acquisitions leading to the formation of a combination, requires the prior approval and mandatory notice is required to be served on CCI within thirty days, failure invites heavy fine.
- CCI has the powers to order division of the enterprise enjoying dominant position.
- The major functions of CCI are to eliminate practices having adverse effect on the competition, promote and sustain competition, protect interests of the consumers and ensure freedom of trade carried on by all market participants.
- CCI has the powers to enquire into any violations *suo motu* or on a complaint of any person, or reference by the Central or State government. The sectoral regulators like TRAI can also make a reference to the CCI and vice versa.
- CCI shall be an expert and advisory body with functions of a market regulator.
- Imposition of penalty by the Commission for contravention of its orders and in certain cases of continued contravention may extend to Rs 25 crore or imprisonment extending to 3 years or with both.
- CAT a 3 member quasi judicial body was established inter-alia, to adjudicate claims of compensation, and dispose of appeals against orders of CCI. Appeal against orders of the CAT lies to the Supreme Court.

Threshold limits of Combination are:

- Joint assets of enterprises > Rs 1000 Crore/joint turnover > Rs 3000 crore.
- If either/both enterprises have assets/turnover in and outside India, > USD 500 million including at least Rs 500 crore in India or turnover > USD 1500 million including at least Rs 1500 crore in India.
- Joint assets of enterprises > Rs 4000 crore or joint turnover > Rs 12,000 crore, if the firm being acquired or remaining after merger or created due to amalgamation belongs to a group. In case such firm has assets/ turnover in and outside India, then the joint assets of the group > USD 2 billion, including at least Rs 500 crore in India or turnover > USD 6 billion including at least Rs 1,500 crore in India.

4. PERFORMANCE OF CCI:

In order to appraise the working and performance of CCI and to gauge its impact on Industrial and competition scenario, it will be most appropriate to cast a glance at the important cases dealt by CCI. As per Annual Report 2012-13, it received 271 information/complaints under section 19 (1), achieved disposal rate 48.07%. No references either by Central, State Governments or Statutory Authorities, are pending.

Competition Advocacy- It encourages the players across the various sector of economy not to attract penal provisions of Competition Law. CCI holds workshops, lectures,

interactive meetings, for industry, consumers and students to spread awareness. It also organized Round table of CEOs. Signed MOUs; with Federal Antimonopoly authority in Russia & Federal Trade Commission of USA. **Received- “Observer” status from OECD Competition Committee**

Landmark Cases: CCI decided many cases; some of the important cases are discussed below in brief-

- * **Coal India Limited (CIL) & Suppliers of Explosives²**- Government-owned coal producer, CIL, made a complaint to the CCI alleging anticompetitive practices and abuse of a dominant position, contending that the main explosives suppliers in India had formed a cartel controlling around 75% of the market since 2005. The Competition Commission of India (CCI), India has fined ten explosives companies a total of 600 million rupees (approximately USD 11.5 million/ EURO 8.7 million) for rigging bids put out by Coal India Limited (CIL). The CCI imposed a fine on the explosives manufacturers representing 3% of their average three-year turnover.
- * On July 3 2012 in **M/s Kansan News Private Ltd v M/s Fast Way Transmission Private Ltd-** CCI fined Fast Way group of companies @ 6% of its average turnover for the past three preceding financial years for violating Section 4 of the Competition Act 2002 and abusing its dominant position in the cable television service sector in the Punjab and Chandigarh regions. The order was passed based on information filed by M/s Kansan News Private Limited, the operator of news and current affairs television channel broadcast in the states of Punjab, Haryana, Himachal Pradesh and Chandigarh. CCI’s decision represents another strong order *against abuse of dominance in the media sector.*
- * **Cement Cartel Case:** The case was referred to CCI by Builders’ Association of India on 26th July 2010. CCI on 20th June 2012, passed an order, on alleged cartelization by cement manufacturers and imposed hefty penalties on 10 cement manufacturing companies (ACC, Ambuja, Ultra Tech, JP Associates, India Cements, JK Cement, Century Textiles, Madras Cements, Binani Cement and Lafarge India), for violation of Section 3 and 4 of the Competition Act 2002. The penalty stands at Rs63bn and ranges between 3%-8% of current market cap for large players and 7%-13% of current market cap for mid-sized players. CCI also passed a “cease and desist” order.
- * **Informant: Santuka Associates Pvt. Ltd., Cuttack Opposite Party: All India Organization of Chemists and Druggists Association, Mumbai and USV Ltd., Mumbai.**

AIOCD & USV Ltd were abusing its dominant position by limiting and restricting the supply of pharmaceutical drugs in India. AIOCD had entered into various MOUs with the associations of pharmaceutical manufacturers like IMDA and OPPI in terms of which i] a drug manufacturing company can appoint stockist only in consultation with the concerned state/district chemists and druggists association, and ii] the second stockist should be a bonafide member of the association affiliated with AIOCD. **Decision:** - CCI held AIOCD guilty on the following counts: i] Regulating the number of stockists by issue of “NOC” ii] Delaying/withholding the approval for launching a new product in markets. iii] Boycotting of pharma companies has the effect of limiting or controlling the supplies of drugs in the markets and resultantly in non-availability to the consumers. CCI imposed penalty on AIOCD, IDMA and OPPI @ 10% of the

average of the total turnover of the receipts for the preceding 3 years 2008-11 and passed “cease and desist” order.

★ ***Suo-moto Case No.02/2011 (Re. Aluminium Phosphide Tablets Manufacturers:***

The matter relates to anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets (ALP) required for preservation of food grains by Food Corporation of India (FCI). The CMD of FCI while drawing attention towards rise in cost of procurement had requested the Commission to make inquiries, in the matter. There are four manufacturers of the ALP in India - United Phosphorous Limited (UPL), Sandhya Organic Chemicals Private Limited (SOCL), Excel Crop Care Limited (ECCL) and Chemicals Limited (ACL). CCI found their act and conduct to be anti-competitive and as violative of the Act and imposed average of penalty @ 9 % of three years of average turnover. CCI also passed 'cease and desist' order.

★ ***Surinder Singh Barmi & Board for Control of Cricket in India (BCCI):***

The informant was a cricket fan who alleged certain irregularities like Grant of franchise rights for team ownership; Grant of media rights for coverage of the league; Award of sponsorship rights and other local contracts related to organization of Indian Premier League (IPL). CCI held BCCI is a *de facto* regulator of the sport of cricket in India and organizing cricket events and was thus an “enterprise” under the Competition Act. In its order of 8 February, 2013, CCI found BCCI abusing its dominant position in contravention of Section 4(2) (c) of the Competition Act, 2002 and imposed a penalty of approximately Rs. 52 crore.

5. MRTP ACT V/S COMPETITION ACT:

Any discussion on Competition Act will eventually invite reference to the erstwhile MRTP Act as a natural corollary. Many people even today feel that Competition Act is like “*old wine in new bottle*”. It is therefore necessary to compare the main provisions of MRTP Act and Competition Act to clear the air of misgiving.

- ★ At the outset the background and the circumstances leading to the passage of both these Acts are diagonally opposite. MRTP Act was passed in the economic situation when some conglomerates owned by handful of business dynasties were commanding monopoly in their sphere of activities, coupled with the monopolistic position being enjoyed by the Public Sector. This was really bad for the growth of the industry and worst for the consumers. It was the era of License Raj i.e. ID&RA Act, while Competition Act was passed after more than three decades, and post economic reforms 1991.
- ★ The Government set up the Monopolies Inquiry Commission (MIC) under the chairmanship of K.C. Dutta in 1965 with a view to finding out the causes and suggest the remedial measures about the nature & extent of Concentration of Economic power with few business houses/industrial empires that were trying to expand by adopting the trade practices, distorting the competition to gain monopoly position in the country.
- ★ As the scope of MRTP was found not in sync with the changing global trade scenario, Raghavan Committee (RC) was appointed to advice on Competition Policy and Law. The Competition Act was enacted to provide, keeping in view of the economic development of post 1991, for the establishment of a Commission to prevent practices having adverse effect on competition.

- * While MIC focused on ill effects of concentration of economic powers in few hands, the thrust area for RC was to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade for all players in markets, in India, and for matters connected or incidental there to.
- * MRTP tried to regulate the ill effects of i) Prevention of Concentration of Economic power to the common detriment and control of monopolies; ii) Prohibition of Monopolistic trade practices,(MTP) iii) Prohibition of Restrictive trade practices (RTP) and iv) Prohibition of Unfair trade practices (UTP), the Competition Act was framed for the purpose of a) Preventing any practice having adverse effect on the competition b) Promote competition in the markets c) Protect consumer's interests and d) Ensure freedom of trade for other market participants.
- * The MRTP Act was a command and control law while Competition Act is more or less a regulatory mechanism, aimed to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade.
- * The Competition Act discards the concept of dominant undertaking envisaged by the MRTP Act, harps on the concept of Combination and provides that an entity having dominant position is not *per se* bad unless such dominance is declared illegal as per provisions of the Act.
- * The Competition Act regulates the operation and activities of combination which includes acquisitions, merger, joint venture, take-over or amalgamation by acquisition of control, acquisition of shares etc. The erstwhile MRTP Act laid emphasis on the Dominant undertakings which generally controlled market share.
- * The Competition Commission of India (CCI) set up under the Competition Act was like MRTP Commission under the MRTP Act but with a difference in the operational methodology. While prior permission was necessary by dominant undertakings for mergers, takeovers, acquisitions etc., CCI's role is to supervise or oversee such cases.
- * MRTP Commission decided many landmark cases during its tenure which lessened the impact of MTP, RTP & UTP; though CCI gave commendable performance in last few years of its operation, it will have to face litmus test in the coming years to prove its utility & worth.

6. CONCLUSIONS:

Compared to developed countries of the world, the enactment of Competition Law in India has been belated at least by a decade. The delay can be attributed to the late introduction of economic reforms which were introduced nearly 10-15 years behind the schedule. It is feared that the current provisions of the Act will impede all M&A deals falling in its ambit, hamper FDI inflow and affect the growth of the economy in general. It could result in loss of transactions; delay the opportunities for absorption of advanced technologies and growth. To set at rest these doubts, the Ministry of Corporate Affairs has clarified time and again that the objective of the CCI is to check the monopolistic and restrictive trade practices followed by certain industries through illegal tie-ups and M&As. Further taking a glance at the working of CCI as discussed in Para 4, it can be inferred that performance of the Commission is commendable. To create an impact on the targeted areas as envisaged in the preamble of any enactment particularly which is in the nature of economic legislation; at-least a gestation period of ten years is necessary. Barely a period of five years has elapsed

from the coming into effect of Competition Act. The developed countries have a nearly perfect system to regulate the economy and free markets, besides the degree of honesty and integrity is very high as compared to Indian scenario. Nevertheless it can be safely construed that in the years to come, Indian markets will grow and occupy an enviable position in the global map.

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