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JOURNEY OF COMPETITION LAW IN INDIA *

Abstract

Competition is a process of rivalry between firms to attract customers. It is situation where business enterprises strive for patronage of customers. Free and fair competition is one of the important pillars of an efficient business environment. For the interest of economy as a whole , it is necessary to promote an environment that facilitates fair competition, prohibit anti competitive behaviour and discourage market players from resorting to unfair means. In order to encourage markets to work well for the benefit of business and consumer, strong and efficient competition policy is needed. Anti trust issues in India are addressed under the Competition Act, 2002. Prior to this , competition law was enacted in 1969 i.e Monopolies and Restrictive Trade Practices Act, 1969. This article presents a description of Indian Competition Law tracing its evolution, working, reasons for the enactment of new act i.e the Competition Act, 2002, core areas of the new law.

Introduction

This article traces the journey of competition policy and law in India from the Monopolies and Restrictive Trade Practices Act, 1969 shortly referred to as the MRTP Act to the Competition Act, 2002.

After Independence in 1947, India followed policy of command and control, but the Industrial Policy Resolution of 1948 resulted in evolution of Indian Industrial Policy and thereafter there has been a shift from command and control economy to free market economy in 1991. The new Industrial Policy of 1991 envisaged Liberalization and competitive environment and thus the need for an efficient competition regime was recognized. Another watershed in industrial sector was the resolution of 1956, which emphasized on growth, social justice and self reliance and defined the parameters of government's regulatory mechanism. The industrialization was subjected to government intervention and regulation. The private sector was allowed limited licensed capacity in the core sector and the public sector was made responsible for the development and growth of core areas like steel, coal, etc.

Article 38 and 39 of the Indian Constitution which are part of Directive Principles of State Policy, mandate, *inter alia* that state shall strive to promote the welfare of people by securing and protecting as efficiently, as it may, a social order in which justice – social, economic and

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political, shall inform all institutions of national life and the state shall in particular directs its policy towards securing:

- That the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
- That the operation of the economic system doesn't result in concentration of wealth and means of production to the common detriment.

The MRTP Act of 1969 was a consequence of above mentioned mandate in Directive Principle of State Policy. The Industrial Policy Resolution of 1948 defined the broad contours of the Industrial policy and delineated the role of state in industrial development both as a business and as an authority.

Government intervention and control pervaded almost all areas of economic activities in the country. There was no competitive market, no easy entry /exit for business enterprises. Government's interventions were characterized by high tariff walls, restriction on foreign investments, quantitative restrictions[1].Governmental licensing policies and strategies favoured enterprises since they had better managerial skills to run the industry and also they were in better position to raise large amount fund. Since there was no proper system of allocating license, licensing authorities were naturally inclined towards enterprises with proved competence as against those who has still establish their ability.

Thus the system of planned and control economy restricted the freedom of entry into industry and also led to concentration of economic power in few hands or business houses. This resulted in emergence of monopolistic industries and restrictive trade practices which were detrimental to the interest of consumers.

Series of studies for the enactment of MRTPA

The first study was conducted by Mahalanobis Committee[2] appointed by government in 1960 on distribution of income and levels of living in the country. The committee in its report noted that the planned economy encouraged the process of concentration by facilitating and aiding the growth of big business. It further observed that big government institutions such as IFC (Industrial Finance Corporation), LIC etc have aided to the monopolistic growth.

Another study was known as Monopolies Inquiry Commission[3] to enquire into the extent and effects of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity. The MIC was appointed under the Commission of Inquiry Act, 1952, to:

a) Enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors of economic activity other than agriculture with special reference to

[1] PRADEEP S MEHTA, WHY INDIA ADOPTED A NEW COMPETITION LAW 3 (CUTS International, 2006).
[2] The government of India appointed a committee under the chairmanship of Professor Mahalanobis to study the distribution and levels of income in the country in the year 1960.
[3] The government of India appointed a committee under the chairmanship of Mr. Das Gupta in the year 1964.

- the factors responsible to such concentration and monopolistic and restrictive practices;
- their social and economic consequences, and the extent to which they might work to the common detriment; and

b) Suggest such legislation and other measures that might be considered necessary in the light of such inquiry including in particular any new legislation to protect essential public interest and the procedure and agency for the enforcement of such legislation.

The MIC submitted its report in 1965 to the government of India wherein it underscored the that there was high concentration of economic power in most of industrial items in India. The committee also noted that dominant positions allowed firms to manipulate prices and output and even non dominant producers and manufacturers engaged in restrictive practices. Further the committee observed that big business houses were at an advantage in securing industrial licenses to open and expand undertakings. New comers were at disadvantage since they had limited access to funds, the requirement of which had gone up considerably due to economies of scale based on contemporary technologies. Foreign enterprises and owners of new technologies preferred to deal with established business.[4] The government policies were found to be chief cause of economic concentration.

Monopoly power was defined by the MIC as the ability to dictate price and control the market[5]. Monopolistic practices noticed by the MIC prompted it to state the "Every monopolistic practice is on the face of it a restrictive practice"[6]. The MIC came with a list of Restrictive trade practices that were prevalent in contemporary India – Hoarding, artificial shortage of products, resale price maintenance, exclusive dealings, price fixation, and price discrimination. Instances of cartelization, boycott was also brought to its notice.

Having noted special economic conditions prevailing in India, the MIC set out objectives for the legislative recommendations in terms of achieving highest possible production with least damage to people at large while securing maximum benefits[7]. In order to achieve these objectives an independent body in form of autonomous commission was recommended which would act as watchdog to curb concentration of power.

The Planning Commission of India subsequently appointed Hazari Committee[8] to review the operation of existing industrial licensing system under Industrial (Development and Regulation) 1951. The report of the committee concluded that the existent licensing system had resulted in disproportionate growth of some of the big houses of in India. Following this the government appointed the Industrial Licensing policy Inquiry Committee[9] to inquire into the working of licensing system in India. The committee submitted its report two years later and stated no specific instructions were given to licensing authorities for preventing concentration and monopolistic tendencies. Accepting the fact Industrial Licensing policy favouring the large

[4] Amitabh Kumar, "The Evolution of Competition Law In India", Vinod Dhall (ed.), Competition Law Today (*Concepts, Issues and the Law in Practic*e), Oxford University Press, 2007.
[5] Monopolies Inquiry Commission Report pg.125, Government of India, New Delhi 1965.
[6] Monopolies Inquiry Commission Report pg.126, Government of India, New Delhi 1965.
[7] Monopolies Inquiry Commission Report pg.159, Government of India, New Delhi 1965.
[8] The Planning Commission of India appointed a committee under the Chairmanship of Dr.R.K.Hazari to review the working of Industrial licensing in the year 1967.
[9] The government of India appointed a committee under the chairmanship of Mr. Subimal Dutt in the year 1967.

industrial houses stated that it was not necessary to grant multiple licenses to the same house in any given industry. The committee also observed that licensing was unable to check concentration and consideration of preventing monopolies doesn't seem to have entered the picture at all. Thus industrial licensing system specifically meant to implement the industrial policy of the government failed miserably to achieve the objective of planned economic development. The committee also recognized the fact that industrial licensing was a negative instrument and as such could only play a limited role in industrial development. It was finally suggested by the committee that Monopolies and Restrictive Trade Practices Bill as proposed by MIC be passed as an effective Legislative regime.

The model of the act was given by Monopolies Inquiry Commission set by the government in 1964. The MIC drafted a bill to provide for operation of economic system so as not to result in concentration of economic power to the common detriment.

Inception of Indian Competition Law

In order to ensure fair competition in market, it was necessary to curb abuse of market power. It was realized that competition must be supported by a legislation which preclude any attempt at subversion of free trade and competition. The bill drafted by MIC became the first competition law of India – Monopolies and Restrictive Trade Practices Act, 1969. It genesis is traceable to Directive Principles of State Policies[10] which aims at securing social justice with economic growth. The gist of the act was directed towards:

- Prevention of concentration of economic power to the common detriment;
- Control of monopolies;
- Prohibition of monopolistic trade practices;
- Prohibition of restrictive trade practices;

Under the act big business houses and dominant undertakings were required to be registered with the government. A regulatory authority called MRTP Commission has been set up with the objective of curbing monopolies and restrictive trade practices. Over the period of time it was realized that the objectives of MRTP, Act could not be achieved to the desired extent. Accordingly a high powered expert committee known as Sachar Committee[11]was set up by the government. The committee was asked to report on following:

- To consider and report on what changes are required to be made in the MRTP Act so as to make it more effective wherever necessary.
- Any matter incidental or ancillary to the administration of the MRTP Act trade, commerce and industry.

Recommendations of Sachar Committee

The Sachar Committee looked into practical difficulties of the operation of law and found that the role assigned to the MRTPC was limited and mostly advisory. Thus it was imperative to make the MRTPC more effective and independent. The committee also recommended for inclusion of government undertakings under the purview of MRTPC except for expansions, setting up of new undertakings, mergers. The committee sought to include unfair trade

[10] Article 38 & 39 of the Indian Constitution.
[11] The Government of India appointed a committee under the chairmanship of J. Rajinder Sachar in the year 1977.

practices like misleading advertisements into the existing law because consumers had no safeguards against such practices. To quote the Sachar Committee: Advertisements and sales promotions have become well established modes of modern business techniques. Advertisements and representations to the consumers should not become deceptive has always been one of the points of conflict between business and consumers".

In country like India vast majority of consumers are illiterate and have very limited purchasing power and as such they get exposed to false or misleading information and left with only options of substandard, adulterated, unsafe and less useful products. The Sachar Committee therefore recommended widening the scope of MRTP Act to include unfair trade practice like misleading and deceptive trade practices within its ambit so that consumers, manufacturers, buyers can conveniently identify the practices that are prohibited. Subsequently the MRTP Act was amended and unfair trade practices were brought within its ambit.

On the basis of the Sachar Committee report the MRTP Act was amended. The amendments made to the provisions[12] dealing with Restrictive Trade Practices in 1984 brought in the principle of deemed illegality to a host of trade practices for which registration was made compulsory. The 1984 amendments incorporated provisions relating to Unfair Trade Practices in section 36 A which dealt with cases of misrepresentation as well as misleading advertisements.

Following the adoption of economic reforms in 1991, far reaching amendments were introduced. The 1991 amendment removed the need for prior government approval to establish new undertakings or the expansion of already existing undertakings or mergers. The amendment further removed exemption granted to government enterprises and cooperative sector. The focus was on curbing monopolistic, restrictive and unfair trade practices. The idea of size as a factor to overcome concentration of power was given up.

Brief Outline of MRTP Act

The MRTP Act is an important piece of economic legislation designed to ensure that operation of economic system doesn't result in concentration of economic power to the common detriment. The act was passed by parliament on 18 Dec, 1969 and came into force from 1st June, 1970. MRTP Act regulates three types of prohibited practices – Restrictive Trade Practice, Unfair Trade Practice and Monopolistic Trade Practice.

Restrictive Trade Practice - A restrictive trade practice is one which prevents, distorts, restricts competition or which tends to obstruct the flow of capital. Like manipulation of prices, imposition of unjustified restrictions or costs on consumers can be regarded as restrictive trade practice.

Some restrictive trade practices as listed in the MRTP Act are as follows:

- Refusal to deal.
- Tie up sales.
- Full line forcing.

[12] Section 33 of the MRTP Act.

- Exclusive dealings.
- Concerted practices.
- Price discrimination.
- Area restriction.
- Discriminatory pricing.
- Resale price maintenance.

Unfair Trade Practice – The 1984 Amendment Act brought unfair trade practice within the ambit of MRTP Act. An unfair trade practice means trade practice which for the purpose of promoting any sale use or supply any goods or services, adopts unfair method, or unfair or deceptive practice. Following are the categories of unfair trade practices in India:

- Misleading advertisements and false representations
- Bargain sales.
- Offering gifts or prizes with the intention of not providing them.
- Promotional contents.
- Hoarding or destruction of goods
- Product safety standard.

Monopolistic Trade Practice (MTP) - The definition of monopolistic trade practice was amended by the 84th Amendment Act. MTP is a trade practice which has the effect of

- Maintaining the prices of goods or charges for services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or any other manner.
- Unreasonably preventing or lessening competition in the production, supply or distribution of goods or in supply of any services.
- Limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed or any services rendered in India to deteriorate
- Increasing unreasonably the cost of production of any good.
- Increasing unreasonably the prices at which goods are or may be sold or resold.
- Preventing or lessening competition in the production, supply or distribution of any goods or maintenance of service by adopting unfair methods or deceptive practices.

MRTP Commission – Under the MRTP Act a commission has been established to inquire into monopolistic as well as restrictive trade practices. The powers of commission includes following:

- To direct an errant undertaking to discontinue a trade practice and not to continue the same.
- To pass cease and desist orders.
- To grant temporary injunction, restraining an errant undertaking from continuing an alleged trade practice
- To award compensation for loss suffered or injury sustained on account of RTP, UTP OR MTP.
- To direct parties to agreements containing restrictive clauses to alter the same.
- To direct parties to issue corrective advertisements.

- To recommend to the central government, division of undertakings if their activities are prejudicial to public interest or constitutes MTP or RTP.

An individual consumer or a registered association of consumers or a trade association can approach MRTP Commission with a complaint or reference of MTP, UTP or RTP. The MRTPC can inquire into any such practice on complaint or reference made by the central government or Director General or suo motu.

From MRTP to Competition Act,2002

MRTP Act was enacted at a time when India followed the policy of command and control for the administration of economic activities. There had been a considerable see change in the milieu with subsequent move towards Liberalization, Privatization and Globalization(LPG). Although major amendments were made in the MRTP Act in 1991 but were inadequate to deal effectively with emerging economic trend. Competition law in other countries regulate competition in the markets by addressing anti competitive practices but MRTP Act fell short of addressing competitive issues. It lacked provisions to deal with anti competitive practices that may accompany the operation and implementation of WTO agreements. Some anti competitive practices such as abuse of dominance, cartels, collusion, predatory pricing, price fixing, bid rigging etc have not been defined.

With the focus on curbing monopolies and not on promoting competition , the MRTP Act became outdated in light of international developments relating to competition law. Promotion of competition was the required concern and thus the government of India constituted a High level committee[13] on competition Policy and Law. The TOR encapsulated " a suitable legislative framework , in the light of international developments and the need to promote competition , relating to competition law including law relating to mergers and demergers. Such a legislative framework could entail a new law or appropriate amendments to the MRTP Act, 1969".

The committee submitted its report to the central government on 22nd May, 2000. The Raghavan Committee made necessary recommendations on both policy and law of competition. Committee noticed that the word 'competition' has been used sparsely in the MRTP Act[14]and effectively finds at few places. Lack of precise definition has led to different and contradictory judicial pronouncements. It was further noted by committee that 'Cartels' are not mentioned or defined in any of the clauses of section 33 (1) of the MRTP Act. The MRTP Act doesn't have provisions on merger control since 1991 and thus the necessity of having specific merger control provisions was recognized like other modern competition laws. The committee emphatically stated that " the MRTP Act in comparison with competition laws of many countries, is inadequate for fostering competition in the market and trade and for reducing , if not eliminating , anti competitive practices in the country's domestic and international trade[15]". On the basis of this analysis , the Raghavan Committee found it expedient to have a new competition law.

[13] Government of India appointed a committee under the chairmanship of S.V.S.Raghavan in the year 1999.
[14] P.68 of the Raghavan Committee report.
[15] Ibid.

The committee wanted the focus of the new law to be on preventing anti competitive practices that reduce welfare. Free markets produce desired outcomes only when protected from abuses. Therefore the only legitimate goal of competition law is the maximization of economic welfare[16].

The committee observed that government enterprises should be brought under the purview of competition law with only exception of sovereign functions of government. It was also recommended by the committee that there should be no distinction between ultimate consumer and intermediate consumer.

The committee recognized the primacy of rule of reason test to ascertain anti competitive behaviour as among other modern competition laws. Competition cases are tried by courts in many countries , but Raghavan committee didn't find it suitable for India, given the inexperience of the judiciary in dealing with free market problems. According to committee , a specialized agency is preferable in developing countries[17].

According to committee the main objective of competition authority should be to administer the competition law and engage pro actively in governmental policy formulation. The body should be manned by experts in various fields and it should have extra territorial reach with power to punish and impose fines.

Great emphasis was laid on competition advocacy as a role of competition authority as there is great unawareness of competition law among stakeholders and the governments in India.

Based on the report of the Raghavan Committee , the new Competition Law of India was enacted. While moving the bill it was stated:

" The central government constituted a High Level Committee on competition Policy and Law. The Committee submitted its report on 22 nd May,2000 to the Central Government. The central government consulted all concerned including the trade and industry associations and the general public. The central government after considering the suggestions of the trade and industry and the general public decided to enact a law on competition".

New Anti trust law of India - The Competition Act,2002

The new competition law i.e Competition Act,2002 was enacted in January,2003 after taking into consideration the recommendations of Raghavan Committee. The new law tried to cover the deficiencies in the earlier law to cope with changed economic scenario in the country. The Competition Act seeks to prevent practices having adverse effect on competition, promote and sustain competition in markets, protect the interest of consumers and ensure freedom of trade carried on by other participants in the market. Key areas of new law are:

- Anti competitive agreements.

- Abuse of dominance.

[16] P.29 of the Raghavan Committee report.
[17] P.57 of the Raghavan Committee report.

- Combination Regulations.

- Effects Doctrine

- Competition Advocacy.

Explicit definitions have been accorded to the concepts of abuse of dominance, cartels, bid rigging, predatory pricing which were not there in the MRTP Act. Secondly the new law provides a specific criterion for assessing whether a practice has an appreciable adverse effect on competition.

Anti Competitive Agreements - The act frowns upon agreement which causes or is likely to cause an appreciable adverse effect on competition within India. Both the horizontal and vertical agreements are covered in the act. Horizontal agreements are the agreements among competitors and vertical agreements are related to potential relationship of selling and buying to each other. Agreements between two or more enterprises which are in same stage of production chain are horizontal agreements. For instance if parties to the agreement are both producers or retailers they will be considered to be at same stage of production chain. The act deals with those agreements between enterprises which have an appreciable adverse effect on competition.This means that all restrictive agreements are not held to be anti competitive. The rule of reason test is used for determining the illegality of an agreement except the following four types of agreements :

- agreement determining prices,

- agreement limiting or controlling quantities,

- agreement to share or divide market,

- agreements to rig bids.

These agreements between same or similar enterprises are presumed to have appreciable adverse effect on competition and are per se illegal. If any vertical agreement has the character of distorting competition it will be placed under the surveillance of the competition law.The objective of the rule of reason test is to determine whether on merits the activity promotes or restrains competition.

Abuse of Dominance - Dominant position has been suitably defined in the Competition Act as ' the position of strength enjoyed by an undertaking in the relevant market in India which enable it to operate independently of competitive forces prevailing in the relevant market or affects its competitors or consumers or the relevant market in its favour [18]". The elements that constitutes dominant position are :i) A position of strength, ii) Position must be in relevant market in India (both product and geographical market) iii)Such position gives the enterprise the power to operate independently of competitive forces in the relevant market. Thus dominant enterprise is one which has the power to disregard market forces i.e competitors , consumers and and has power to take unilateral decisions.

[18] Section 4 of the Competition Act, 2002.

To ascertain whether or not an undertaking holds a dominant position the relevant market should be specified since dominance doesn't occur in abstract market. The new law i.e the Competition law effectively defines relevant product market and relevant geographic market. Just because an enterprise holds a dominant position doesn't mean it is violating the anti trust law. The bigness of an enterprise is natural and is essential to industrial efficiency and innovation in production and marketing[19]. The provisions of Competition Act intervenes when the bigness of enterprise stifles competition in the market. Few practices of abuse of dominant position are:

Predatory Pricing - Sale of goods or provisions of services at a price which is below the cost as may be determined by regulations of production of the goods or provisions of services with a view to reduce competition or eliminate competitors[20].

Refusal to supply

Limiting supply

Entry barriers

Regulation of Combinations and Mergers- Sec 5 and 6 of the Competition Act provides for regulation of combinations so that such combinations do not have an adverse effect on competition. As per the competition act combinations include mergers and amalgamations beyond threshold limit and thus those fall below the limit are not considered in the expression 'combinations' and are outside the purview of the act. It is voluntary on part of parties to notify their proposed agreement or combination to CCI if the aggregate asset of combining parties exceeds Rs.1000 crores or turnover in excess of Rs.3000 crores.. The threshold are set so high that many mergers that may raise competition concerns will escape scrutiny under the act[21].

The Act makes it voluntary for the companies concerned to notify their proposed combination to CCI but CCI is also empowered to investigate a combination on its own knowledge without waiting for concerned merger parties to approach it within specified time. The CCI has the power to reject or modify a combination if it causes or likely to cause an appreciable adverse effect on competition within relevant market in India.

There are several factors listed in the act that are to be considered for the purpose of determining whether a combination would have an appreciable adverse effect on competition. Some anti competitive mergers may be allowed on the grounds of public interest, economic development, possibility of firm failing business etc.

Effects Doctrine - The Competition Act has extra territorial ambit. It extends beyond the geographical contours of India to deal with practices or anti competitive acts that have appreciable adverse effect on competition in relevant market in India. The CCI has the power to inquire into any anti competitive practice if it has or likely to have appreciable adverse effect on competition in relevant market in India notwithstanding:

[19] D.P.Mittal ,Competition Law and Practice,Taxman Publication, (3rd Edition, 2011).
[20] Section 4 (b) of the Competition Act.
[21] M.Aggarwal, Mergers & Acquisitions in India: Implications for competition, Pradeep S. Mehta (ed.), Towards a Functional Competition Policy for India, CUTS and Academic Foundation, 2006.

- an agreement has been entered into outside India

- any party to such agreement is outside India

- any enterprise abusing the dominant position is outside India

- a combination has taken place outside India

- any party to combination is outside India

- any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

These provisions are based in 'effects doctrine' which states if an action or practice is outside the border of India but has an impact on competition in relevant market in India, it can be brought within the ambit of Competition Act, provided the effect appreciable adverse.

Competition Advocacy - Section 49 of the Competition Act deals with Competition Advocacy.Competition advocacy is one of the important pillar relied upon by competition authorities across the world for promoting competition culture. In line with Raghavan Committee's recommendations the act extends the mandate of CCI beyond merely enforcing the law. Competition advocacy includes activities of competition authorities involved in promoting competition apart from enforcement of competition. CCI is enabled to participate in formulation of country's economic policies. Competition Act mandates CCI to promote competition advocacy, create awareness, impart training on competition issues. To promote competition advocacy and creating awareness about competition issues , the act provides for the establishment of Competition Fund.

MRTP Act versus Competition Act

MRTP Act,1969	**Competition Act, 2002**
Based on command and control system	Based on liberalized system
Based on size as a factor	Based on conduct as a factor
Dominance per se void	Abuse of Dominance is illegal
No combination regulation (post 1991 Amendment)	Combination regulations beyond threshold limit
No advocacy role on part MRTPC	Competition advocacy - an statutory mandate under sec 49.
No penalties for offense	Penalties
Genesis -Art 39 (b) & (c) of Indian Constitution	Genesis - Item 21, List III of 7th Schedule of Indian Constitution.

Conclusion

Keeping in mind the need for students from diverse backgrounds to know about history of competition regime in India, this article deals with different facets of competition law - its evolution, metamorphosis from previous avatar of Monopolies and Restrictive Trade Practices Act, 1969, current jurisprudence - Competition Act, 2002. There is a growing trend of countries adopting competition law and some are in line of updating or modifying already existing law to suit changing economic scenario. Advanced and developed nations have had robust competition regime but India has joined the club only a few years ago. This this law is still at nascent stage in the Indian context.