

GUEST ARTICLE

COMPETITION LAWS AND THE INDIAN ECONOMY

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ABSTRACT

The Competition Act was meant to herald a change in perspective from prohibiting restrictive trade practices to encouraging competition. Justice Altamas Kabir here examines the provisions and raison d'être of the Act, together with the jurisprudence of the Supreme Court on the subject. He does so keeping in view the ultimate constitutional mandate that the Act seeks to fulfil – ensuring that the material resources of the community are not concentrated in the hands of a few.

On 26th November, 1949, We the People of India having solemnly resolved to constitute India into a Sovereign, Democratic, Republic and, *inter alia*, to secure to all its citizens social, economic and political justice, adopted, enacted and gave to ourselves the Constitution of India.¹ With the passage of time, the Constitution was amended several times to meet different exigencies. By the 42nd Amendment, which became effective on 3rd January, 1977, the expressions “Socialist” and “Secular” were included in the Preamble to make explicit what was earlier presumed to have been understood. However, even prior to such amendment, the Constitution had certain inbuilt guidelines for the State to secure a social order for the promotion of the welfare of the people.

Art. 38 was also amended by the Constitution (44th Amendment) Act, 1978, but even prior to its amendment on 20th June, 1979, it provided that the State had to strive to promote the welfare of the people by securing and protecting, as effectively as possible, a social order in which justice, social, economic and political, was to be taken into consideration by all institutions of national life. Similarly, Art. 39 provided for certain principles of policy to be followed by the State.

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¹ Preamble, Constitution of India, 1950.

Both the Articles are included in Part IV of the Constitution comprising the Directive Principles of State Policy and though not enforceable in a court of law, provide the guidelines for good governance in the State. Although, all the clauses of Art. 39 are designed to benefit citizens of India in general, clauses 2 (b) and (c) indicate how the Government should direct its policy to ensure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

In the said background, on account of monopolistic and restrictive trade practices, the Government of India appointed the Mahalanobis Committee to look into the distribution of incomes and levels of living. The said Committee submitted its report in 1960 giving a clear insight into the inequalities in income levels.² This led to the constitution of the Monopolies Inquiry Committee which submitted its report on 31st October, 1965. It is, therefore, the mandate of Art. 39 of the Constitution which is considered to be the genesis of competition laws in India.

Pursuant to the Report submitted by the Commission on 31st October, 1965, a Bill was tabled in Parliament to enact the Monopolies and Restrictive Trade Practices Act [hereinafter referred to as “the MRTP Act”] in order to provide that the operation of the economic system did not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith and incidental thereto.³ The main objects of the said Act were to regulate expansions, mergers and amalgamations and appointment of Directors in respect of dominant undertakings, to regulate the standing of new undertakings and to control and prohibit monopolistic and restrictive trade practices as were found to be prejudicial to public interest.

Over the years, however, with the advent of the Internet and the rapidly changing trends in commerce and industry, the provisions of the MRTP Act proved to be inadequate to contain anti-competitive arrangements, mergers, cartelization and predatory pricing affecting production and pricing of goods to

² Mahalanobis Committee Report on Distribution and Levels of Income, Government of India, New Delhi, 1964.

³ Preamble, MRTP Act.

the detriment of the common citizen. The impact of such anti-competitive measures was immediately felt in the drugs and pharmaceutical sector and also in the electronic goods sector, which had begun to expand in a big way. Attempts were made by the legislators to arm the Commission with powers to impose suitable punishment in respect of errant companies and entrepreneurs. One of the major amendments introduced in the MRTP Act, was the substitution of Chapter V with effect from 1st August, 1984, whereby the concept of Unfair Trade Practices was introduced.⁴ Chapter V was divided into Part A and Part B. While Part A dealt with registration of agreements relating to Restrictive Trade Practices, Part 'B' dealt with Unfair Trade Practices. In 1991, powers were given to the Commission to inflict penalties, including imprisonment.⁵

Despite such amendments to the Act, on account of changing global trends and the sweeping economic reforms in favour of liberalization, the Government of India constituted a High Level Committee in 1999 with Shri S.V.S. Raghavan as its Chairman to look into the working of the MRTP Act and to assess the amendments that were required to be made therein in order to deal with new situations arising on account of changes in the global market driven economy and the entry of foreign players in the Indian economy through mergers, acquisitions and takeovers and direct investments. In its report submitted in 2000,⁶ the Raghavan Committee recommended the phasing out of the 1969 Act and its replacement by a Competition Law in sync with the global trends of competition in the world economy. The Committee recommended a change in perspective from containing monopolistic and restrictive trade practices to encouraging competition. This resulted in the phasing out of the MRTP Act, and the enactment of The Competition Act, 2002, by Parliament, keeping in view the economic development of the country, to provide for the establishment of a Commission to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried out by other participants in markets in India.

The concept of competition and prevention of concentration of wealth in the hands of a few is not entirely new. The need for antitrust laws was felt in growing economies all over the world in the wake of attempts by large corporate bodies to

⁴ Monopolies and Restrictive Trade Practices (Amendment) Act 1984.

⁵ Monopolies and Restrictive Trade Practices (Amendment) Act 1991.

⁶ Report of the High Level Committee on Competition Policy and Law (Chairperson: S.V.S. Raghavan), Government of India, New Delhi, May, 2000.

corner the market resources, both in the sphere of manufacture and marketing of goods, by means of agreements and mergers which effectively stunted the growth of competition. With big corporations controlling the manufacture and sale of goods, it was within their control to fix prices of goods and even resort to predatory pricing to eliminate smaller and new entrants into the trade. In fact, Canada and the United States were the first two countries to introduce antitrust measures, with Canada enacting the Combines Act in 1889. Soon thereafter, the United States of America enacted the Sherman Antitrust Act, 1890, which got its name from its author, Senator John Sherman, who was the Chairman of the Senate Finance Committee. The important feature of the enactment is that the very first section provides that every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade and commerce among the several States or with foreign nations, were declared to be illegal with penal consequences. S. 2 also makes mobilization of trade a felony with penal consequences. Several countries followed suit in enacting their own competition laws in order to meet the changing world-wide economic challenges, including trade agreements such as GATT or TRIPPS, in the form of settlements or otherwise.

In India, the Competition Act 2002, came into operation on 13th January, 2003, with the primary object of preventing practices which have an adverse effect on competition, promoting and sustaining competition in the markets, in order to protect the interests of the consumers and to ensure freedom of trade carried on by different stakeholders in the Indian market. Chapter II of the Competition Act may be referred to as the soul of the Competition Act as it spells out the *raison d'être* for the promulgation thereof. It deals with the prohibition of certain agreements, abuse of dominant position and regulation of combinations, each of which is anathema to the concept of competition and contrary to the objects to be achieved in terms of the Preamble and Arts. 38 and 39 of the Constitution.

S. 3 of the 2002 Act prohibits anti-competitive agreements. S. 3(1) prohibits agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which influence or are likely to cause an appreciable adverse effect on competition within India. S. 3(2) provides that any agreement entered into in contravention of the provisions of s. 3(1) shall be void. S. 3(3) deals with some of the prominent areas which are adverse to the concept of competition under a good market economy. They can be classified into the vice of cartelization, beginning with mergers and combinations and anti-competitive agreements in general, which directly or indirectly determine purchase or sale prices or limit or control production, supply, markets, technical development, investment or provision of services.

Other anti-competitive trade practices such as tie-in-arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance are also covered under s. 3(4).

In the Explanation to s. 3(4) the aforesaid types of agreements have been defined. "Tie-in arrangement" is defined to include any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. "Exclusive supply agreement" includes agreements which restrict in any manner the purchaser in his business dealings from acquiring or otherwise dealing in any goods other than those of the seller or any other person. "Exclusive distribution agreement" has been defined to include any agreement to limit, restrict or withhold the manufacture or supply of any goods or to allocate any area or market where such goods could be sold. "Resale price maintenance" has been defined to include any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser would be the prices stipulated by the seller unless it is clearly mentioned that prices lower than those prices may be charged.

S. 4 of the 2002 Act deals with one of the major anti-competitive factors which is faced by relatively junior entrants into a particular section of the market. It takes cognizance of the abuse of dominant position by the big corporations in controlling the market by limiting or restricting the production of goods or technical or scientific development relating to goods or services to the prejudice of the consumer, or using its dominant position in one relevant market to enter into or protect other relevant markets. As the very expression denotes, "dominant position" has been defined to mean a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competition forces prevailing in the relevant market or affects its competitors or consumers or the relevant market in its favour. "Predatory prices" has been described as the sale of goods or provision of services at a price which is below the cost, as may be determined by regulations, with the intention of reducing competition or to eliminate the competitors.

Being a comparatively new Act, the law relating to competition is yet to grow and develop and as a result we still have to fall back on decisions under the MRTP Act. What is yet to crystallise into competition law in the context of the Competition Act 2002, is the shift in perception from the practice of "cease and desist" to encouraging competition. One of the other major aspects of the Competition Act is contained in Chapter VII of the Act which deals with Competition Advocacy which entitles the Central Government to make reference to the Competition Commission for its opinion on the possible effect of such policy of competition and on receipt of such a Reference, the Commission is required to

give its opinion to the Central Government within 60 days of the Reference being made and the Central Government is, thereafter, required to formulate the policy, as it deemed fit.

One area of doubt which persists is regarding the nature of anti-competitive Agreements. It has been held that any agreement to control production and supply with the object of influencing the pricing of the goods or to enter into tie-in arrangements and agreements which confer exclusive right of supply, are anti-competitive in nature and are, therefore, unlawful.⁷ Closely linked with the concept of anti-competitive agreements is the concept of abuse of dominant position and the abuse thereof by imposing unfair conditions of price, predatory pricing, denying market access and in general using dominant position in one market to gain advantages in another market.

The Competition Act also prohibits horizontal agreements if they are agreements to fix prices or to limit production and supply or to encourage bid rigging or collusive bidding⁸ as they all have a directly adverse effect on competition. The Act also discourages vertical agreements such as tie-in arrangements and exclusive supply and distribution agreements.⁹ The entire objective of the Competition Act as a successor to the MRTP Act is to prevent anti-competitive acts which would have an adverse effect on competition, to enable certain individuals and groups from exercising dominant control over market forces, influencing the pricing of goods, to the severe prejudice of the common citizen.

One notable feature of the Competition Act is the specific exclusion of intellectual property rights by virtue of Sub-Section (5) of Section 3 which seeks to protect the right of any person to restrain any infringement of, or to impose reasonable conditions for protecting his rights under the Copyright Act, 1957; the Patents Act, 1970; the Trade and Merchandise Marks Act, 1958; the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000 and the Semi-Conductor Integrated Circuits Layout-Design Act, 2000, though the same could also prove to be anti-competitive.

Disputes under the MRTP Act and the Competition Act are centred on unfair trade practices and abuse of dominant position in the matter of creating an artificial demand of goods in the market and a resultant increase in the price

⁷ Aamir Khan Productions Pvt. Ltd. v. Union of India, 2010(112) Bom LR 3778 (Bombay High Court).

⁸ S. 3(3), Competition Act 2002.

⁹ S. 3(4), Competition Act 2002.

thereof and settlements and mergers. One of the early cases in this regard was that of Tata Engineering & Locomotive Company, Bombay, reported in 1977 (2) SCC 55, where the requirement of registration of an agreement under Section 35 of the MRTP Act, 1969, was under consideration and it was held by the Supreme Court that the decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will *per se* be a restrictive trade practice. It was held that territorial restriction on sale through exclusive dealership agreements did not come within the vice of restrictive trade practice.

One may also refer to the decision of the Supreme Court in *Raymond Woollen Mills Ltd. v. MRTP Commission & Anr.*, reported in 1993 (2) SCC 550, wherein it was called upon to consider the powers conferred on the Commission under s. 37(1) of the above Act.

The Supreme Court came to the conclusion that something more than “cease and desist” orders were required to be issued. It was held that there was no indication in the price list that the rates prescribed were only maximum recommended rates as no minimum rates were fixed. The Supreme Court held that with the change in rates it was for the manufacturer to encourage competition. The concept of restrictive trade practice was also considered and it was observed that the said Act was not restricted to registration of the agreement only but for the purposes of the Act in general.

The concept of malpractice relating to formation of cartels resulting in price escalation of essential goods and public services was also considered by the Supreme Court in *B.S.N. Joshi & Sons Ltd. v. Ajoy Mehta & Anr.*¹⁰ and the said practice was strongly deprecated. In fact, the learned Judges of the Supreme Court who decided the matter were distressed to see how the formation of the cartels had been encouraged resulting in the sharp increase in the rate of transportation of coal and the escalated costs being passed on to the consumers.

Though the Competition Act came into force on 13th January, 2003, the formation of the Commission was delayed and was completed in 2009. It inherited the cases which were pending before the MRTP Commission and some original references have also been received by the Commission which is still at a stage of infancy. Apart from the decision rendered under the MRTP Act, the law under the Competition Act is yet to develop. However, the effects of the promulgation of the Competition Act has had a positive effect on commercial dealings and in

¹⁰ (2009) 3 SCC 458 (Supreme Court of India).

reducing bid-rigging, cartelisation and predatory pricing and the same is evident in respect of consumer goods in common use such as mobile phones, electronic goods, vehicles and essential food items, where competition is high. At the end of the day, it is the consumer who benefits from competition in terms of availability, affordability and quality.

Having a competition law in place is one thing, to implement its provisions is another. There is no denying the fact that the Indian economy is passing through a phase of sharp inequalities between those who have and those who have not. The huge disparity between different groups of people from the bottom rung of the ladder to the top is a harsh reality. While at one end of the spectrum, we witness an almost vulgar exhibition of opulence, at the other end of the spectrum there is a sense of despair, not knowing where the next meal is to come from. Of course, there are many reasons for such disparity, but with the introduction of regulatory measures in curbing anti-competitive acts, there has been a shift in perception from curbing monopoly and unfair trade practices, to encouraging competition for the benefit of the common citizen. There will no doubt be obstacles in implementing the policy of competition, with big corporations exploring ways and means of avoiding the restrictions imposed on their manner of functioning, but sustained effort, which will include the support of the public exercising restraint, is bound to ensure that anti-competitive measures are eliminated to a large extent and the concentration of commercial power is not limited in the hands of a few, who, by virtue of their dominant position, are able to control the Indian markets with the active help of foreign players to whom India, as one of the fast emerging economic forces, is a very attractive market.

As has been recently commented upon by the Supreme Court, the existence of two distinct sections of society, resulting in huge inequalities and discrimination, is quite prominently visible.¹¹ The Competition law is meant to provide a bridge between those two aforesaid groups and the same can be achieved through innovative ideas, both of the executive and the persons entrusted with the implementation and realisation of the objects of the Competition Act, 2002, in order to meet the mandate of the Constitution to provide justice, social, economic and political and to ensure that the ownership and control of the material resources of the community, are so distributed so as to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production in the hands of a few to the common detriment.

¹¹ Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 (Supreme Court of India).