Competition Policy for free and fair Competition-Rationale and Implications

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Abstract : India, like many developing countries undertook economic reforms upholding a free competitive market economy as opposite to the control and command economy. As the integration of the global economy increases, it becomes impossible to protect or insulate domestic firms and industries from external competitive pressures. Rapid liberalisation has created several problems for these countries in terms of competition. The primary focus of competition policy is to deter and provide remedies for various anti-competitive practices so as to ensure free and fair competition in the market. Through the instant paper the researchers have endeavoured to highlight the role of competition policy in ensuring free and fair competition. Further implications for ensuring free and fair competition particularly in the developing countries particularly India has also been discussed in a suggestive note.

***Index Terms-* Free Market, Liberalisation, Competition, Anti-Competitive Practices, Competition Policy**

I. INTRODUCTION

Competition policy has become a prime element in maintaining both the proper efficient functioning of markets and its competitive pressures. The liberalization of economy has increased the requirement, relevance and importance of competition policy. While liberalization invites competitive forces as a default, in the absence of safeguards, this may also provide for the opportunities for unfair competition. Competition policies been accepted as a tool for addressing competition problems occurring in economies in transition, which are now characterized by extensive privatization and deregulation. Even more vigorous regulation of anti-competitive practices may be need to tackle the problems as existing firms/organizations could counter the anti-competitive practices. Abuse of market dominance by MNCs is also a vice of liberalization as with the resources the MNCs have to engage in forms of competition they could easily drive out domestic rivals. Thus, it is important and necessary to safeguard competition even in an economy which is liberalized.

II. HISTORY OF INTERNATIONAL COMPETITION LAW

Competition law is that body of legislation supposed to stop market distortion caused by anti-competitive practices on the part of businesses. Within the US, North American nation and therefore the international organization, competition law is additionally called antitrust legislation[1].

Predatory evaluation, that involves a monopoly or market charging associate immoderate worth for one thing that the buyer has very little selection aside from to purchase; worth fixing, that involves collusion between would-be competitors to line similar costs for products; bid rigging, that involves colluding to pick the winner of a go for advance; and selling, that involves commerce a product at such a coffee worth that smaller firms area unit unable to contend and will be forced out of the market. Though specific legislation varies from one country to a different, those practices area unit typically prohibited by competition law[2]. The earliest competition law is recorded to have been levied in 50 B.C. to guard the grain business within the empire prohibiting blockage of provide ships.

Primary concepts of competition can be dated back to the 18th century. It was first brought merely as an absence of any type of restraint on trade by Adam Smith in his book ‘Wealth of Nations’, published in 1776. However, the modern economic theory can be dated back to the late 19th century i.e. 1890 which led to the drafting of Sherman Act in the US and came to be known as the very first anti-trust legislation.[3]

Eventually every country got inspiration from America. They took the experience from the legislation so drafted and made their own law in this field bearing a fruitful result. For now, almost all the countries have adopted their own competition law to

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[1] William H. Rooney et al., Getting Closer? The Application of Competition Laws to Regulatory Bodies in the USA and the EU, 7 Journal of European Competition Law & Practice , 267-273 (2016)
[2] Whish, R. and Bailey, D. (n.d.). Competition Law
[3] Canada had its first competition law in 1889 and some other states of the US too had adopted such laws

regulate the market efficiently. Since it has given the world a coherent system of competition law, the United States can be provided with the title of 'cradle of Anti-trust laws'.[4]

2.1 USA

The modern competition law finds its origin from the legislations of the United States. The Sherman Act was brought in 1890 due to the alarming concerns regarding the formation of trusts by the companies regulating in the American market. The US Congress had drafted the Sherman Act in 1890, the Clayton Act in 1914 and the Federal Trade Commission Act in 1914. The Sherman Act of 1890, even though it was short and simple, has emerged as the most important one.

The Sherman Act established a fundamental principle which had put a bar on the formation of the agreements by one or more competitors that restricts competition in the market.

After the Federal Trade Commission (FTC) Act was implemented in 1914, a whole new administrative body was established to regulate unfair business practices in the market. Not only had this but the new Act also empowered the Authorities to go with the investigation and to stop all the deceptive practices and unfair strategies of competition.[5]

2.2 United Kingdom

The competition laws in the UK has seen several changes in the past years and the existing law was drafted in two different statutes: the Competition Act of 1998 and the Enterprise of 2002.

The Enterprise Act, 2002, had been drafted focusing on putting a restraint on the mergers and replacing the old provisions of the Old Fair Trading Act of 1973. It also brought the punishment of a maximum of 5 years for all those individuals responsible for the serious cartel offences.[6]

2.3 Australia

Competition law prevailing in Australia is Part IV of the Commonwealth Trade Practices Act, 1974 (TPA) but the law that is implemented in the states and union territories of Australia are known as Competition Code of (the State or Territory) and Competition Policy Reforms Act.

The TPA was passed with the objective of enhancing and improving the welfare of its citizens with the help of provisions for consumer protection, fair trading and promotion of competition.[7]

2.4 Russia

European Union competition law has been a major source for all the changes happened in the Russian competition law.

Federal Monopolies Service mainly focuses on the international cooperation[8] pursuant to which Russia shares tight relations with the Competition Authorities and Eurasian Economic Union (EAEU) and Commonwealth of Independent States (CIS).

2.5 China

For the purposes of supporting anti-trust monopoly law with the help of honest competition review system, competition laws were drafted in China. The government works on the revision and improvement of the antitrust laws.

To improve the standards and procedures for enforcing, in the year 2017, the Ministry of Commerce came out with the plan of revising the Measures for the Centralized Examination of Operators. This had been done with a view to incorporate the provisions of guidelines, methods and regulations with respect to the multiple operators.[9]

III. WHY THE MRTP ACT WAS REPLACED?

The government of India had set up 3 committees/studies to keep a check on India's economic growth, the first one was set up in 1951, and the committee was chaired by Dr. R K Hazari. The committee concluded that the licensing policy then implemented had resulted in unwarranted growth of some big corporations in India.

The second committee was made in 1960 and chaired by P. C. Mahalanobis. The committee focused on studying distribution and levels of income, the committee reported that the top 10% of the population secured about 40% of the income. The committee further noted that due to the five-year plans proposed, big business houses were emerging.

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[4] Suresh T. Vishwanathan, Law and Practice of Competition Act, 2002, I" cd, 2003,p.3
[5] Csongor István Nagy, EU and US Competition Law (Taylor & Francis) (2016)
[6] Amended by the Robinson-Patman Act.
[7] Sec 2 of TPA.
[8] Hg.org, https://www.hg.org/legal-articles/infamous-antitrust-cases-6025 (last visited Sep 7, 2019)
[9] (1613) 2 Bulstr. 136

The third and final study was named Monopolies Inquiry Commission (MIC) and as the name suggests, the commission was set up to inquire about the extent and effects of concentrated economic power in private hands. The commission was set up in 1964 and chaired by Mr. Das Gupta, after drafting its final report in 1965, the commission noticed that the concentration of power exists in the economy product-wise as well as industry-wise and that industrial houses were controlling large no. of companies. To make things work for the best, the MIC drafted a bill suggesting ways to de-centralize the power from private hands. The bill controlled monopolistic and restrictive trade practices. The bill after being amended by parliament became the Monopolies and Trade Practices Act, 1969.

Amendments to the MRTP act were done, some crucial ones in 1991. Before the amendments, the act had pre-entry restrictions for companies with assets more than 100 crores. Even though the act allowed the government to govern mergers and acquisitions that were anti-competitive. after 1991 amendments The Supreme Court in Hindustan lever limited - Tomco merger case noticed that the MRTP Act did not encourage the central government to pre-emptively stop mergers that seem anti-competitive, and even after the amendment the law had the power of government to direct mergers, prejudicial to the economy to sever, but the commission only had the power to enquire but the severance orders were passed by the government only, making the role of the commission merely advisory.

The MRTP Act was enacted in India at a time when the whole administrative paradigm was "Command and control", But India adopted a new policy in the late '80s and implemented it to a much greater extent in the ‘90s that is the LPG (Liberalization, Privatization, and Globalization). Thus MRTP act was not useful a tool to regulate the market and ensure and secure the promotion of competition. The MRTP Act, though a competition law, could not be effective in the absence of other legal sanctions passing on the element of competition. The need for new legislation after 1991 due to the shift to the policy of LPG in the administrative paradigm led to the enactment of The Competition Act, 2002.[10]

IV. ANTI-COMPETITIVE PRACTICES

Anticompetitive practices mean activities like fixing price, collective boycott, favoring certain companies, and tailored rules for competition and are usually grouped into two types:

1) Trade deals between competitors also referred to as horizontal agreements and vertical agreements

2) Monopolization, also referred to as single firm conduct[11]

4.1 Horizontal Agreements

These are deals or agreements between some competing enterprises that are at the same stage of production and in the same industry field which may result in reduced competition. Market allocation is a form of cartel arrangement that divides markets by territory or by customers among competitors. It is one of the most anti-competitive practices as it eliminates competition in the relevant market. Price fixing - It is a collusive agreement on prices by the competitors at any level in the production-distribution process to be charged to some or all customers. Output restrictions are another obstacle, under this kind of arrangement, the enterprises producing or supplying the same products or services agree to limit their supplies to a lower proportion of their previous sales. It can be judged by a sudden fall in the supply for creating the artificial crisis. Bid rigging is also troublesome as it is an agreement between enterprises engaged in identical or similar production or trading of goods or provision of services that has the effect of reducing competition adversely affecting or Exploiting the method of bidding. Some cartels even choose to boycott It is a joint action by competitors to use the combined market power to force a supplier, competitor, or customer to agree to an action that harms competition. It involves any agreement which tends to limit or is likely to confine by any method the persons to whom goods are sold or goods are purchased.

4.2 Vertical Agreements

These are the arrangements between enterprises that are at different the magnitude of the production and in different industries. Predatory pricing is an anti-competitive measure that occurs when a firm with market power sells its products below cost to drive competitors out of the market or make an obstacle to entry into the market for new members of the competition. The reduction in price does not provide benefit to the consumer for the short period. It is disadvantageous for consumers in the long run if the seller can maintain the price at their will Transfer pricing is a practice of either under-invoicing or over-invoicing taking place between a parent company and its subsidiaries. The aim of under-invoicing is to lower the costs of the subsidiary so that its prices are reduced and it can eliminate its competitors from the market (disguised predatory pricing). Tied selling is also a measure that has an arrangement where the sale of one good to the customers is dependent on the conditions of the purchase of another good. It usually occurs where monopolistic dominance of general scarcity in the market for some goods or services prevails. Exclusive dealing is a vertical agreement by which a retailer or a wholesaler is bound to purchase from a supplier on the condition that no other supplier will supply in a given area. Such agreements tend to have an adverse effect on competition, since they restrict the access of other rivals to

[10] Dr. S. Chakravarty, Why India Adopted a New Competition Law, CUTS International, 2006

[11] https://www.ftc.gov/enforcement/anticompetitive-practices

distributors. Refusal to make agreements is also a method used which includes any agreement which restricts or is likely to restrict by any method from supplying and purchasing to the persons to whom goods are sold and from whom purchased. Such practices without reasonable justifications are prohibited as they are anti-competitive when they prevent third-party firms from entering the markets.[12]

V. SINGLE FIRM CONDUCT

It is unlawful for an organization to monopolize or conceive to monopolize trade which means a firm with market power cannot act to keep up or acquire a dominant position by excluding competitors or preventing new entry. It's necessary to notice that it's not hot for an organization to own a monopoly, to charge, "high costs", or to undertake to realize a monopoly position by aggressive strategies. An organization violates the law as long as it tries to keep up or acquire a monopoly through unreasonable strategies. The economic construct of monopoly focuses on the amount associate degreed size of corporations in a business. It says the smaller the amount of corporations in associate degree business, and therefore the larger those corporations square measure, the more monopoly power that exists therein business. It says monopoly power will arise naturally out of the market by corporations turning into the sole firm in associate degree business supported this idea, the greater the market share a firm has, the bigger its monopoly power. The political construct focuses on the restriction of competition by the government and says monopoly power is manifested by many little producers against only 1 or a number of giant producers or is command by one giant producer against alternative, smaller producers. The political construct says as long as a firm is being protected from competition by the government no matter what its size then that firm has monopoly power.

As examples, Microsoft, Wal-Mart, and the Indian Railways are considered monopolies supported the economic construct because of their giant size and market share in their individual markets.[13]

VI. CURRENT DRAWBACKS OF THE COMPETITION ACT, 2002

This very Act was framed to have an initiative to develop a commission which will keep a check on ill practices that have adverse effect on competition, to protect and save small companies and protect the interest of the consumer. However, since the inception of the legislation there has always been some discontent towards the legislation as far as its success was concerned, and due to this very reason the Government of India had constituted a nine member committee to review the legislation.

Now, the target as commenced by Competition Act, 2002 primarily points to one main task of the Commission that's to confirm that enough competition in a very specific business is maintained. To know whether or not the Act has been productive or not, first, we need to concisely understand how the corporations or business eliminates the competition from the market. It's been established that competitor's area unit meant to compete with each other for the business of their customers, and to not work with each other for the business of their customers, and to not work with each other to distort the method of competition.

Industry, in general, takes bound steps that aim at eliminating the varied competitors to their business. This may be done by adopting numerous strategies. One of the foremost common strategies employed by businesses to curb the competition is forming cartels. The two most typical sorts of the combined area unit horizontal cartels and vertical cartels. Horizontal cartels are the agreements between freelance undertakings to repair costs, divide markets, limit output, and fix the result of purportedly competitive tenders, the foremost obvious target for any system of competition law.

This is a largely used style of the cartel. The opposite one is the Vertical cartel, which suggests agreements between undertakings at completely different levels of the availability chain: manufacturer and distributor; distributor and merchant. For instance, an agreement between manufacturer and distributor to sell products of only that manufacturer and not of his rival. Besides these, there are alternative strategies to counter the competition within the market like bundling, predatory evaluation, margin squeeze, and mergers, etc. this text can try and analyze however such practices area unit employed by firms in the country to avoid competition and whether or not Competition Act has been ready to stop an equivalent or not.

Coming to Competition Commission of India (CCI), its success is also very limited. After levying fines of Rs 13,981 crore since the formation of CCI, but till date it has only recovered Rs 96 crore. And its first case with DLF is still pending in court. [14]

Since 2009, when the Indian Commission was formed, till March 2016, the body ordered 277 investigations and issued 632 orders. Of these, 360 were challenged in the Competition Appellate Tribunal (Compat) and 114 were sent back to the commission, largely on technicalities. Of the remaining, 30 orders were overturned.[15]

The ultimate objective of any law is to line out rules so as to resolve the conflict between the parties. Competition Act was enacted with identical thought. But, since it's unable to satisfy its major objective of consumer welfare, queries ought to be asked concerning its viability. It's not been ready to perform up to the expectations because of factors like non-availability of requisite technical experience, lack of personnel, and lack of infrastructure. Thus, an imperative want is there to review the operating of CCI and thenceforth to scrap or revamp it as per the wants.

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[12] Competition Policy for Free and Fair Competition – Rationale and Implications Dr. Navdeep Kumar

[13] Two Theories of Monopoly and Competition: Implications and Applications Brian P. Simpson National University

[14] Deepali Gupta, ET bureau, CCI verdicts fail to act as deterrents to malpractice

[15] Neha Jain, How the Competition Act failed to achieve the legislative intent

VII. CONCLUSION AND SUGGESTION

India, in view of the new economic perspective, has chosen to enact a new competition law called the Competition Act, 2002. The competition law is one of the parts of competition policy. The Competition Act aims at promoting competition through prohibition of anti-competitive practices, abuse of dominance and regulation of combinations. The Competition Act, 2002 is definitely an improvement upon its predecessor in multiple ways. While devising it, most of the inadequacies of MRTP Act had been considered. There was a policy shift from curbing monopolies to promoting competition, Hence, the Competition Act aims at doing away with the rigidly structured MRTP Act.

'Economy of procedure' is the keystone for increasing ease of doing business. The ultimate test for a strong Competition Law regime lies in the amelioration of consumer harm and increase in competitiveness of markets, rather than cases reaching up to Courts. Even though setting precedents on some vital issues is important, in most matters the focus must be weeding out anticompetitive conduct effectively. Commitments and settlement mechanisms are flexible. It would provide an opportunity to the Commission to provide broader spectrum of remedies for meeting the long-term goal of promoting and sustaining competition in markets, all ultimately leading to economic growth and development.