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Comparatives and Globalization of Antitrust Laws: An Indian Perspective

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A Desk Research Project on the background of the antitrust laws in India.

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Introduction

While competition laws vary from nation to nation, there are certain core provisions underpinning nearly all competition law regimes.[1]These may be classified into three broad categories. The first consists of agreements or concerted practices between otherwise independent competitors that serve to reduce competition between them. The second group of anti-competitive practices stem from the acquisition of a dominant position in a market by a single enterprise. The third group of regulated anti-competitive conduct relates to mergers and acquisitions.[2] The history of competition law is usually traced back to the enactment of Sherman Act in 1890 in the US. This act was directed against the power and predations of the large trusts formed in the wake of the Industrial Revolution where a small control group acquired and held the stock of competitors, usually in an asset, and controlled their business.[3]

The aim of this paper is to first, evaluate and analyze origin of the Anti-trust laws specifically in India. Then it goes down to discuss the history and evolution of antitrust laws in India, Shift from MRTP Act to the Competition Act and the present law in India. Thereafter, it analyses comparatives with antitrust laws of other countries in the world. Finally, on the basis of the comparatives, it will discuss the question whether there is need to globalize the competition laws or not.

History of Anti-Trust Laws in India

While the term 'Renaissance' originally referred to a cultural movement that characterized the period from around the 14th to 17th centuries, it has also come to refer to an historic era affecting other aspects of daily life, including that of trade and competition.[4] The precursor of modern patent laws, known as the Statute of Monopolies, was passed by England's parliament in 1623.[5] In the following years,

various attempts were made to break monopolies and set laws to encourage competition and free trade.[6] Modern day competition law is generally accepted to have had its foundations in the Sherman Act (1890) and the Clayton Act (1914) – both instituted in the United States.[7]

Since independence in 1947, India adopted and followed the policies comprising what is known as 'Command-and-Control' laws, rules, regulations and executive orders. It was in 1991, that widespread reforms took place and the march from Command-and-Control economy to one based more on free-market principles commenced its stride. The Nehruvian model was a mixed economy model, but it was tilting more towards the socialistic pattern of economic growth with the objective being 'economic growth with social justice'. Despite more than a decade of independence, it was apparent to everyone including Nehru that the professed model was not yielding desired results.[8]

The first event which triggered the need for regulation was a study was conducted by Mr. Hazari, which looked on the industrial licensing procedure under the Industries (Development and Regulation) Act 1961. The report of the committee concluded that the working the licensing system has resulted in a disproportionate growth of some of the of business houses in India (1965). A concerned Government appointed a Committee in October 1960 to look into the reasons of inequality in the distribution of income and levels of living (Mahalanobis Committee).[9] The Committee noted that big business houses were emerging because of the "planned economy" model practiced by the Government and recommended looking at the industrial structure.[10] Subsequently, on account of such recommendations made by the Mahalanobis Committee, the Government constituted the Monopolies Inquiry Commission (MIC) in 1964 to enquire into the extent of an effect of concentration of power in the private sector and the prevalence of monopolistic practices in India.[11] The MIC also found that the then licensing policy in the country had enabled big business houses to secure a disproportionately bigger share of licenses resulting in pre-emption and foreclosure of capacity.[12] It also noted there was the concentration of economic power in the form of product-wise and industry-wise concentration. As a collar to its findings, the MIC drafted a bill to provide for the operation of the economic system so as not to result in the concentration of economic power to the common detriment. The bill provided for the control of the monopolies and prohibition of monopolistic and restrictive trade practices, when prejudicial to public interest.

Replacement from MRTP Act to Competition Act and Current Legal Position

"The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. [The] government has decided to appoint a Committee to examine this range of issues and propose a modern competition law suitable for our conditions"[13]

In accordance to this, Raghavan Committee was established to examine the matter. As per the Raghavan Committee, there are two elements of such a policy. The first involves putting in place a set of policies that enhance competition in local and national markets. This would include a liberalized trade policy, relaxed foreign investment and ownership requirements and economic deregulation.[14] The second is competition law legislation designed to prevent anti-competitive business practices and unnecessary government intervention. [15]In this way, competition policy describes the way in which governments take measures to promote competitive market structures and behavior. Competition policy therefore normally encompasses within itself a system of competition law. The law will seek to implement the policy by ensuring that firms operating in the marketplace do not act in a way that harms competition.[16]It is pertinent to note that Arts. 38 and 39 of the Constitution already provided the guiding light for regulating this concentration of economic power.[17]

The thrust areas of the MRTP Act 1969 are: the prevention of concentration of the economic power to the common determinant, the control of monopolies, prohibition of restrictive trade practices, the prohibition of monopolistic trade practices; and the prohibition of unfair trade practices. The MRTP Act was the operative competition law of India until it was repealed in the year 2009. A discussion of the MRTP Act is important at this juncture to (a) determine the context in which Indian legislature enacted new competition legislation (b) the kind of cases that were brought under MRTP Act and finally, (c) to understand the competition law jurisprudence painstakingly developed over the last four decades by the Supreme Court and the MRTP.[18] The MRTP Act aimed at preventing (a) economic power concentration in a few hands and curbing monopolistic behavior and (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect consumers as well as to avoid concentration of wealth.[19]

The main difference and the need for the shift from the MRTP Act to Competition Act, 2002 was the legislative objective. The aim of MRTP Act was to prevent economic concentration and restrictive trade policies, while the objective of Competition Act is to promote competition with fair means.

The shift was triggered because of many reasons mainly; it is a generally accepted principle that competition law has extraterritorial application in all the cases where the overseas conduct of defendant distorts competition in the domestic market. However, the Supreme Court repeatedly refused to acknowledge this principle and had held that the wording of MRTP Act did not provide for extraterritorial jurisdiction.[20] MRTP Act did not define certain key terms37 such as abuse of dominance, cartels, collusion, price fixing, bid rigging, boycotts, refusal to deal and predatory pricing.[21] It is often argued that lack of definition was immaterial. Because the general nature of MRTP Act could have covered all anti-competitive practices e.g. RTP was defined in fairly general terms to include all trade practice that prevents, distorts or restricts competition and therefore there was no need for a new law[22]. It is true that the generic nature of MRTP Act was very wide but this generic nature caused ambiguities in the interpretation and application of the MRTP Act and ambiguities resulted into atmosphere of general business

uncertainty on key issues.[23] A perusal of the MRTP Act will show that there is neither definition nor even a mention of certain offending trade practices which are restrictive in character. Some illustrations of these are: [1] Abuse of Dominance, [2] Cartels, Collusion and Price Fixing, [3] Bid Rigging, [4] Boycotts and Refusal to Deal, and [4] Predatory pricing.[24]

Because of the reasons mentioned above, the parliament decided to enact the new Competition Act in 2002. The Competition Act is drafted, as are most of the competition laws in the world, in fairly general terms and is not limited to regulation of commercial acts of private parties. The Competition Act prohibits or regulates (A) Anticompetitive agreements (u/s 3 of the Act) (B) Abuse of dominant position (u/s 4 of the Act) (C) Combinations (u/s 5 & 6 of the Act).[25]

As a quasi-judicial body, the CCI is bound by principles of rule of law in giving decisions and the doctrine of precedents. [26]As per the Competition Act the Commission is duly empowered to receive documents and testimonial by way of evidence and therefore is well suited to adjudicate disputes before it on the basis of material adduced by parties and by application of the principles of evidentiary proof under the Evidence Act. This is important since unlike the United States, a suit for anti-competitive practices cannot be brought in a civil court. Nor does intent in cartel like conduct take the case outside the jurisdiction of the CCI. Further, the scope of investigation of the Federal Trade Commission (FTC) and the Department of Justice (DOJ) are slightly different; however, in India all cases relating to anti-competitive practices can only be investigated by the CCI.[27]

Current Legal Position of Antitrust Laws in India

There are three areas of enforcement that provide the focus for most competition laws in the world today: [1] Agreements among enterprises. [2] Abuse of dominance Mergers, and [3] combinations among enterprises.[28] There are specifically four compartments in the new act i.e. Anti- Competition Agreements, Abuse of dominance, Combinations Regulation and Competition advocacy.

The Supreme Court ("SC") in a case decided under the Act observed that "The primary purpose of competition law is to remedy some of those situations, where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of a market responsive to consumer preferences. [29]

The Act's objective is 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 on by other participants in markets. The constitutional validity of the Act was challenged in the SC soon after its enactment.[30] The act lays down the function and divided the competition authority into two: [1] Competition

Commission of India (CCI) as an administrative expert authority [2] The Competition Appellate Tribunal (COMPAT) to carry out all its adjudicatory functions. Act also lays downs the methods to control several anti-competitive practices and its extra-territorial reach.

Comparatives

As opposed to the Indian framework comprising single legislation and single agency, the US enforcement framework comprises multiple agencies and legislation. In the US, two federal agencies bear the major responsibility of enforcing, the Antitrust Division of the US Department of Justice ("DoJ") and the Federal Trade Commission ("FTC"). The former is part of the executive branch of the government and the latter is an independent administrative agency, similar to the CCI. The Sherman Act is the oldest federal antitrust statute, enacted in 1890 and deals primarily with anti-competitive agreements and monopoly exercised by firms. The Clayton Act, 1914 deals with specific business practices including mergers, price discrimination and tying, exclusive supply etc. The DoJ and FTC independently enforce the Sherman Act and the Clayton Act. However, if the violation entails criminal prosecution, then the DoJ has the exclusive authority to prosecute.[31]

The EU competition law framework originates from the Treaty on the functioning of European Union ("Treaty"). The Treaty covers a wide variety of subjects; however, the substantial legal development has come in the area of competition law covered by Articles 101 and 102. The Treaty is generally applicable to agreements and conduct between the EU member states through each constituent state of the EU also has their respective national competition agencies and legislation. The Treaty did not specify the institutional structure for the competition law enforcement and the same was framed by the European Council ("Council"). The Council entrusted the European Commission ("EC") with the duty to ensure compliance with the Treaty and enforcing, implementing and developing the European community's competition law and policies. The Indian competition law framework is similar to the European enforcement structure and the provision of the Act as well as the powers and functions of the CCI have been broadly fashioned on the applicable provisions of the Treaty and the powers of EC. Though the Act has much in common with the US and EU enforcement structure, yet the systems differ significantly in the matter of levels and quality of enforcement.[32]

One difference between the UK Act, EC Law and the Indian Act is that according to the UK and EC laws, the conducts specified may amount to abuse dominant position where as according to the Indian Act the conducts specified shall amount to abuse of dominance||. While the Indian Act specifically enumerates practices resulting in denial of market access 'and using dominant position in one market to enter into or protect, other relevant markets 'as conducts amounting to the abuse of dominance, they have not been mentioned in the UK and EU laws. Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a comparative disadvantage, is mentioned in the UK and EU law but has not been included in the Indian Act.[33]

'The present Act is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have a somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite pari materia to the Indian legislation. In the United Kingdom, the Office of Fair Trading (OFT) is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in the United States deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries are progressive, applied rigorously and more effectively. The deterrence objective in this anti-trust legislation is clear from the provisions relating to criminal sanctions for individual violations, the high upper limit for an imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies.'[34]

Globalization of Competition Law or Not?

In light of the comparatives discussed above, there exists an urgent need to indentify whether the world needs a globalized competitive law or not. Over 120 jurisdictions in the world have now adopted the competition law framework. Many of these jurisdictions seek to regulate the anti-competitive behavior and share common characteristics and features like prohibition on certain type of behavior in horizontal agreements, between the firms (cartels aimed at market sharing price fixing, limiting the production), vertical restraints between firms operating at different level if the market and excessive aggregation of market power.

However, much social, economic, cultural and political difference in these jurisdictions makes it difficult to reconcile the benefits and maintain consistency in removing the hindrances to competition with the need to set global competition laws and policies. Also, how competition law applies across the jurisdiction, remains the grey area. Factors leading to the need of competition law are that many countries already have an existing legal framework or legislation on competition law, however a large set of countries have opted out to legislate on competition law in order to protect competition and rely either on the market itself (promotion of free trade) or other types of subsidiary laws. On the other hand, there are countries which have implemented unilateral, regional or bilateral arrangement to create some common order with regards to the competition law. Therefore, till what extent competition law can be said global?

With increasing globalization and liberalization there exist the need of some common principles and groundwork that exist as the basis or grandnorm for international framework on competition law. Competition law and competition policy are not synonymous. Competition law is generally taken to refer to the laws that regulate private

anti-competitive conduct. Whilst competition laws vary from nation to nation, there are certain core provisions which underpin nearly all competition law regimes.[35] These include: prohibitions on anti-competitive cartel activities (such as price fixing and market sharing by competitors); anti-competitive conduct by dominant firms; and mergers that substantially reduce competition.[36] Competition policy is a much broader and less defined concept. Most often it is used to refer to the rules and policies that determine the conditions of competition within a nation.[37] Thus with vast variety of competition laws in the world, a uniform law cannot be framed however, certain guideline or policy could be set for consistency and uniformity while dealing with competition laws. The history saw many attempts of internationalization of competition law, first there was formation of competition rules in the draft of Havana Charter. A key aim of the draft charter included a proposal to introduce provisions dealing with restrictive trade practices. In particular, where such trade restrictive practices interfered with the trade liberalization aims of the charter, the Draft Charter sought to impose obligations on member countries of the proposed ITO to prevent firms engaging in the activities which may restraint competition, limit access to markets or foster monopolistic control in international trade. However, United States objected the need of internationalization of the competition policy in the world, and so the Charter failed and ITO never materialized. Further attempt was seen to internationalize when UN ECOSOC recommended the inclusion of draft convention that would have an established international agency with the responsibility for receiving and investigating complaints about convention. Finally in 1981 the United Nations of General Assembly adopted the UNCTAD's set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (Set of Principles), which aims to ensure favorable treatment towards the developing countries by offering them protection from restrictive business practices of multinational firms. It requires the multinational firms to take into consideration the restrictive trade practices of the countries in which they are operating. However, these set of rules and principles by the UNCTAD was voluntary and not binding. In 1996, the world saw significant step towards inclusion of globalized competition policy on the agenda of WTO (World Trade Organization). However, it gained support form only Canada, European Union and Japan, United States of America was still against the multinational completion law as it saw this policy to be too interventionist, sought a non-binding, bilateral solution. In future such attempts of inclusion of Globalized competition law policy failed to be included under the WTO setup. Further in 2000, the 4th United Nations Conference adopted a resolution and recognizing the importance of bilateral and multilateral initiatives and dealt with the issue of cooperation with antitrust authorities. It also asked UNCTAD to examine the possibility of developing a model cooperation agreement on competition law and policy, based on UNCTAD's set of principles. Accordingly UNCTAD released the model law in 2010 which is aimed to control or eliminate restrictive agreements or arrangements among enterprises or mergers and acquisitions or abuse of dominant position of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade and economic development. OECD also has played important role in this regards OECD's Competition Law and Policy Committee (CLPC) and Joint Group on Trade and Competition (JGTC) are both engaged in programme dealing with competition policy.

Globalization has increased multinational corporate expansion and greater international competition has in turn competition has in turn increased the risk of cross-border anti-competition conduct. Competition problems have therefore become increasingly 'global' as the firms compete in international markets in response to greater international competition. Past attempts to develop multilateral competition rules have not been successful. However, as business is now conducted, almost as a matter of course, in globally integrated market particularly with the increasing aid of technology), the need for the development of some form of 'global competition law has arguably become more essential.'

There is no doubt that the global nature of the business presents significant legal challenges for companies operating on the international stage. In the context of competition law, those challenges came into sharper focus as the prevalence (and perhaps publicity) of international mergers and cross-border cartel activity has increased. The number of countries with domestic competition laws has also increased, creating more need of compliance.

Those in favor of a global competition regime will argue that many of these challenges would be substantially reduced if one set of international competition was adopted. A common set of the rules should, in theory, provide certain set of rules will itself be challenging and ensuring that a common set of rules will be applied in the same way in each country will be almost impossible. The creation of an international body to administer is unlikely to proceed as countries are concerned about losing their sovereignty over these issues. Hence there shall be more problems with regards to implementation of the laws when a multinational and uniform competition law policy will be evolved. Therefore the present system is indeed appropriate however the way to look forward can be changed in these following ways.