

Evolution of Competition Law and Policy in India

The History of Competition Law in India

Introduction

Competition Law and Policy forms an inherent part of the developing world to not only protect their domestic markets but also compete fairly and effectively in the international market. These policies have been very instrumental in fostering sustainable development as well as restricting anti-competitive behaviour which inhibits economic growth. The implementation of competition law must be in coherence with the level of overall development in a country since there is no one legal framework which would suit all the jurisdictions. In this module, we shall discuss about the evolution of the Competition Law of India and the two major acts, the **Monopolistic and Restrictive Trade Practices Act 1969 (MRTP)** and the Competition Act 2002 which formed a major role in the economic liberalization of the country as well as prohibition of the restrictive and unfair trade practices along with the control of the dominant positions in the industrial sector.

Evolution of Competition Law in India

1. Development policy after independence

The pre-independence period had witnessed a certain level of industrialization amongst a class of people who managed to attain an entrepreneurial rank despite the misery and havoc caused by the colonial rule. The country wholly adopted the Indian Industrial Policy after the independence in order to promote and protect the economic development. The new policy also clearly defined the role of State in commercial development.

Another important resolution which was passed in 1956 started the regulatory process of the government. The government actively intervened in the entire mechanism of industrialization. It laid an effective platform for the public sector to reach the summits of success by assigning core industrial sectors such as steel and coal to public sector. On the other hand, the private sectors had restricted

licensing ability. Since the government was the sole controller of all the activities taking place on the commercial front, there were high tariffs and needless to say, no freedom to compete fairly. The government supported the successful and influential entrepreneurs by granting commercial licences, as they largely contributed to the economy and secured collaborations world over. However, this scenario also led to anti-competitive behaviour amongst a group of businessmen and this was harming the interests of the public at large. This led to formation of the MRTP Act, 1969 to prevent monopolistic and restrictive trade practices which cause jeopardy to the consumer as well as the service provider.

Shaping and Sanction of the MRTP ACT, 1969

Three studies primarily influenced the shaping up of the MRTP Act.

- (a) **Hazari Committee Report on Industrial Licensing Procedure, 1955-** This study stated that the States have been biased in granting Industrial Licenses only to wealthy and influential entrepreneurs and it has resulted in an uneven growth of the industries.
- (b) **Mahalanobis Committee Report on Distribution and Levels of Income, 1964-** This study reported that the economic model was planned in a way that it supported the successful industrialists and a handful of influential groups controlled a huge chunk of income.
- (c) **Monopolies Inquiry Commission Report of Das Gupta, 1965-** According to this study, the economic power was in the hands of a few commercial houses and restrictive and monopolistic trade practices were widespread.

Seeing the irregularities in the market, extensive control of the State and the soft legal system, the Monopolies Inquiry Commission (MIC) drafted a bill. This Bill later became the Monopolies and Restrictive Trade Practices Act, 1969. It came into force on 1 June 1970. The MRTP Act had its legislative roots in the Directive Principles of State Policy which are incorporated in the Constitution of India. Sub-sections (b) and (c) of Article 39 of the Constitution mention that the state must drive its policies to ensure that:

- (b) the ownership and control of the material resources of the community are so distributed as best to serve the common good;
- (c) the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The main objectives of the MRTP Act were to prevent control the monopolies, prohibit monopolistic trade practices (MTP), restrictive trade practices (RTP) and unfair trade practices (UTP).

The Monopolistic Trade Practice (MTP) is a result of:

- unreasonable pricing
- limiting or restricting competition or no free market
- limiting development (technical and economic development by limiting production and supply)
- making unreasonable profits

Note:- Unreasonably increasing the price of certain goods in the market or selling or reselling the goods at a price which is more than the Maximum Retail Price (MRP).

The Restrictive Trade Practice (RTP) is a result of:

- Refusal to deal with the consumers
- Selective dealings
- Discrimination in pricing scheme
- Restriction of area
- Tying up the sales

Note:- Refusing to deal with a certain class of consumers in relation to goods and services and offering discriminatory prices to different consumers.

The Unfair Trade Practice (UTP) was incorporated in the statute after the act was amended in 1984. This trade practice is a result of:

- Hoarding or destruction of goods
- Promoting false and misleading promotional contests
- Bargain sale
- Misleading Advertisement and False Representation
- Free Riding over someone else's reputation

Note:- The practice of making any oral or written statement which suggests that the renovated, repolished or old goods are new.

Provisions under the MRTP relating to monopolistic, restrictive and unfair Trade Practices

Under Section 10 of the MRTP Act, the MRTP Commission is permitted to investigate into the matters related to monopolistic or restrictive trade practices

on being referred by the Central Government. The Unfair Trade Practices have been laid down in the Section 36 of the Act. The Act also lays down a provision for the appointment of a Director General of Investigation and Registration to facilitate the enquiries carried out by the MRTP Commission as well as maintain records in relation to the restrictive trade practices.

The MRTP Commission received complaints from the consumers, trade associations as well as individuals either directly or through different departments of the government. The Director General of Investigation and Registration investigated a case preliminarily when a consumer files a complaint. He was then required to submit his findings to the MRTP Commission for further investigation under the relevant provisions of the MRTP Act, 1969. The following flow chart shows the process of investigations carried out by MRTP in cases of complaints filed by consumers.

Amendments

The 1984 Amendment

The MRTP Act was amended in the year 1984 as there were no provisions to protect the consumers against unfair practices such as misleading advertisements which were conducted by the industries. **The Sachar Committee**, 1978 had recommended that there must be separate provisions under the Act enumerating different unfair trade practices so that it becomes convenient for the producers, suppliers and consumers to identify them and take action against them.

The 1991 Amendment

The MRTP Act has been framed in a manner which is effectively able to deal with different type of irregularities prevalent in the market. Before 1991, the MRTP Act effectively regulated the functioning and growth of the large sized companies with an overall worth of more than Rs. 100 crores. It supported them in seeking approvals from the Government when establishing new subsidiaries, maintenance of existing companies, mergers and acquisitions etc.

The provisions which facilitated the approvals for the establishment of new subsidiaries, expansion and maintenance of the existing companies from the government, concentration of wealth and power of the monopoly companies and mergers and acquisitions were removed from the Act after the amendment in 1991. The major emphasis was laid on the identifying

Monopolistic, Restrictive and Unfair Trade Practices in order to protect the interests of the registered consumers, producers, suppliers and industries of every size and rank.

Limitations of the MRTP Act and the birth of Competition Act, 2002.

Many difficulties were faced while implementing the MRTP Act since its birth in 1969 in relation to the provisions which were considered generic, obsolete and insufficient in dealing with several other offending trade practices. There were several rulings of the Supreme Court as well as the MRTP Commission which expressed the need for stronger provisions. Different cases that came under the MRTP Act revealed the inadequacy of the legislation with regard to practices like **bid rigging, cartels, collusion** and **price fixing, predatory pricing** and **abuse of the dominant position**.

Many lawmakers and scholars argued that even though there were general provisions against restrictive and monopolistic trade practices, which may also cover all the other anti-competitive practices, there was a strong need for identifying specific anti-competitive behaviours in order to protect the consumers and punish the wrongdoers in an effective manner. Another important factor which changed the thought process of the Government mainly after the 1991 economic reforms was the marked changes in the international and domestic trade. A stronger and an adequate law was needed to cope up with the progressive changes on the economic and trade front and this gave birth to Competition Act 2002, which attempts to promote free and fair competition in India.

Difference between MRTP Act, 1969 and Competition Act, 2002

MRTP Act,1969	Competition Act,2002
Based on Pre-1991 control regime	Based on Post-1991 reforms
Procedure Oriented	Result Oriented
Offending trade practices such as cartels and bid-rigging are not explicitly mentioned in the Act.	Offending trade practices defined explicitly.
Unfair Trade Practices covered	Unfair Trade Practices removed
Rule of Law approach	Rule of Reason approach
No Competition Advocacy	High importance for Competition Advocacy

Competition Act, 2002

Overview

As discussed above, with the changing perspectives of 'true competition' in the globalised economy, it became crucial for India to adopt a competition policy system wherein the objective is shifted from preventing monopoly to one that promotes free competition amongst the market players. From a broader perspective, the changes could also be viewed as an attempt from the side of Indian legislature to modify the Indian Competition laws to be in tune with that of the other leading jurisdictions of the world. As mentioned earlier, it was also extremely important to remove prevailing trade barriers and restrictions hindering competition in India in the liberalized era. The result was a new bill in the Parliament. The Competition Bill was passed by the Parliament in 2001 and it became the Competition Act, 2002. It received the assent of President of India on January 13, 2003 and was published in the Gazette of India on January 14, 2003. The Competition Act was partially enforced on 20 May, 2009 when the provisions relating to anticompetitive agreements and abuse of dominant position were notified. In May 2011, the combination regulations were also notified and became operative from 1 June, 2011.

The Competition Act, 2002 in its preamble states the following objectives:

- Prevent practices having adverse effect on competition.
- Promote and sustain competition in the markets.
- Protect the interests of consumers.
- Ensure freedom of trade carried on by other participants in markets, in India

The Act provided for the establishment of Competition Commission of India (CCI) and it started its operations on October 14, 2003. The Competition Commission of India (CCI) is a quasi-judicial body. The Commission inquires into the alleged infringement of the provisions of the Act either on its own or on the receipt of the information by any person or a reference made to it by the Central Government, State Government or a statutory authority. The orders of the CCI passed under the specific sections mentioned under Section 53A of the Act can be appealed before the Competition Appellate Tribunal (COMPAT) and the orders of the COMPAT can be appealed in the Supreme Court.

The Competition Act 2002 covered four major aspects of competition law and as mentioned earlier, the CCI begin to execute them in different phases. The four aspects are Anti-competitive agreements (Section 3), Abuse of dominance (Section 4), Combinations regulation (mergers and alliances (section 5 and 6) and

Competition advocacy (Section 49).

In the first phase, the CCI focused exclusively on competition advocacy. The Commission took extensive advocacy measures by creating awareness and imparting training about competition issues in many different forums.

In phase 2, the CCI started undertaking adjudication works relating to anti-competitive agreements and abuse of dominance. Anti-competitive agreements implies any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Abuse of dominant position refers to situations wherein any enterprise or group inter alia imposes unfair or discriminatory condition or price in purchase of goods or service, limits or restricts production of goods or provision of service.

Belaire owner's association Vs. DLF (2001)

In **Belaire Owner's Association Vs. DLF**, the CCI issued an order against DLF Ltd. imposing a penalty of \$ 124 million at the rate of 7% of the average turnover of the company for the last three preceding year. DLF Ltd, a leading real estate company was found abusing its dominant position and imposing unfair conditions in its agreement with their customers. The CCI found that DLF unilaterally decided to increase the size of the building from 19 floors to 29 without seeking any approval and delayed its completion to the extent where the buyers did not obtain possession of their flats long after the contract mentioned. The competition tribunal had stayed CCI's penalty order in Belaire case. Furthermore, it directed DLF to give an undertaking to deposit the entire fine with 9 percent interest in case the company lost the case. The ruling conveyed that consumer welfare might be a significant determinant in future abuse of dominance cases. The ruling also initiated the idea of government planning in real estate as a regulator to safeguard the interests of the consumers. The decision was appealed before the COMPAT.

Santuka Associates v. All India Organization of Chemist and Druggists (AIOCD)

Santuka Associates had filed a complaint with the CCI in May 2011. According to the complaint, the trade association of nearly 750,000 retailers and wholesalers across India was engaged in widespread anticompetitive activities. These allegations included limiting new entrants into the market, charging the manufacturers a fee to be listed in the Associations' Product Information Service(PIS), fixing prices, and boycotting any manufacturer that did not adhere to these imposed restrictions. The CCI found that this was a prima facie case and

even though the informant withdrew the complaint, the CCI pursued the case ahead on its own. The CCI found that: AIOCD's requirement that any new entrant into the wholesale or retail business must first obtain a statement of non-objection from the AIOCD was an illegal moderation limiting the distribution of pharmaceutical products. Moreover, the requirement of fees in order for a drug manufacturer to have its drug listed on the PIS was a restriction on the entry of new drugs in the market and also raised the prices of the drugs to recoup the cost of the fee. The AIOCD's boycott of manufacturers who did not comply with these imposed conditions not only inflated the price of drugs but also questioned the availability of various drugs to the consumer. The CCI fined the AIOCD about US\$50,000.

In phase 3, the CCI started enforcing provisions relating to combinations (mergers, acquisitions, etc.). Certain types of transactions which meet a specified financial threshold under the Act are referred to as combinations and must be notified to the CCI. They are subject to review by the CCI for probable adverse effects on the competition. Such transactions cannot be completed until the CCI has explicitly approved the transaction. The transactions, according to this Act, may be in the nature of acquisitions of shares, voting rights, control or assets, mergers and de-mergers and amalgamations that meet the set financial thresholds. The enforcement provisions under the Act, relating to anti-competitive agreements (Section 3 of the Act) and abuse of dominant position (Section 4 of the Act) were notified by the Government, effective from 20th May 2009 and the Competition Appellate Tribunal as provided for under the amended Act to hear the appeals was set up.

Notice of acquisition filed by Walt Disney Company (Southeast Asia) Limited (August, 2011)

The CCI approved the proposed combination of Walt Disney Company (Southeast Asia) Private Limited (the "Acquirer") and UTV Software Communications Limited within 25 days of receiving the notice in August 2011. This was the first case in the broadcasting sector wherein the CCI approved the sanction on grounds that the broadcasting sector is highly competitive, innovative and dynamic and large number of players with strong competition was existing in that sector.

Additional Features of the Competition Act includes 'Effects Doctrine' which

gives the CCI power to inquire into anti-competitive practices taking place outside India but having an appreciable adverse effect on competition in India. Section 32 empowers regulators to extend jurisdiction beyond the “principle of territoriality”. CCI has yet to use this provision and it will be interesting to witness how the case law evolves.

The Competition Act 2002 has also specifically exempted certain acts from the purview of the provisions discussed above. This includes the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of her or his intellectual property rights protected under legislation like Patents Act 1970 or the Trade Marks Act 1999.

Act 2002. It can issue directions to discontinue or not to re-enter through cease & desist orders in case it finds abuse of dominance and can subsequently grant interim relief during enquiry. It can impose penalty on producers, distributors, suppliers of up to three times of average profits or up to ten percent of average turnover for each year of continuance of agreement, whichever is higher, in case of cartel like behaviour or impose penalty which shall be not more than ten percent of the average of the turnover for the last years, for other violations. CCI can also impose penalty on felonious directors and functionaries who are delegated with requisite powers. Moreover, the CCI can declare anti-competitive agreements void. It further possesses the authority to divide dominant enterprise or groups and modify or totally block combinations.

The Competition (Amendment) Act, 2007 was passed by the Parliament in September 2007 and received Presidential assent on 24th September 2007. The amendment brought noteworthy changes in the then existing regulatory infrastructure established under the Competition Act. The major changes brought in by this amendment include the designation of the CCI. It was initially proposed to function as a judicial body, but could now act as an expert body in an advisory capacity, to prevent and regulate anti-competitive practices.

The Competition (Amendment) Act, 2012: The major amendments approved by the Cabinet related to changing the definition of “turnover”, “Group”, reducing the overall time limit of finalization of combinations from 210 days to 180 days and insertion of a new Section 5A enabling the Central Government to lay down, in consultation with the Competition Commission of India, different thresholds for any class or classes of enterprises for the purpose of examining acquisitions, mergers and amalgamations by the Commission.

The Act was further amended in 2009 and the Competition (Amendment) Act 2009 received the assent of the president of India on December 22, 2009. The major changes brought in by this amendment included the transfer of all the pending cases under MRTTC and cases under Monopolies Act to the Competition Appellate Tribunal. Moreover, Monopolistic and restrictive trade practices was transferred to the CCI whereas Unfair trade practices was transferred to the National Commission under the Consumer (Protection) Act 1986.

Summary

Competition law and policy in India is emerging as a means to enhance economic development and competition as well as protection of consumers in India. The Competition Act, 2002 was put together with the intent to address the shortcomings in the Monopolies and Restrictive Trade Practices Act, 1969 in the light of the changed economic circumstances in the country. The Competition Act aims to prevent discrimination and nourish competition in the Indian market so as to ensure free and fair trade by all the players in the market. Different decisions from the Competition Commission and the Courts have considerably changed the jurisprudence on this subject within a very short span of time and it is important for the students of competition law to constantly monitor the cases coming up in this area.