



Anti-Monopoly Laws in India: a way to Create Fair Competition in Market

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Abstract

In India after 1990, when government followed LPG policy, there was urge to frame such policies and laws that helps in promoting fair competition which can help in promoting competition, which helped in the growth of economy. This paper attempts to reviews the different anti-monopoly laws in India and give suggestions for further improvement to promote competition and economic growth.

Key words: MRTP Act 1986, Competition Act

I. INTRODUCTION

Competition law – known as antitrust law in the United States and anti-monopoly law in China and Russia – aims to ensure market competition and consumer welfare by regulating anti-competitive conduct in domestic economies. Until the mid-20th century, there were less than ten competition regimes worldwide.¹ However, upon the end of the Second World War, countries across Asia, Europe and Latin America began implementing competition policies. By the 1980s, global implementation of competition regimes had become widespread, and this gained further impetus towards the mid-1990s with the advent of the World Trade Organization. At present, there are over 125 competition regimes operating throughout the world,² including amongst them, the Indian and Pakistani competition regimes. Anti-trust law maintains and promotes market competition within the territorial boundaries of a country. International competition agencies protect international competition. It aims to protect the interest of the consumers.

1. OECD Competition Trends 2020' (OECD, 26 February 2020)
<<http://www.oecd.org/competition/oecd-competition-trends.htm>> accessed 4 October 2020.

2. Ibid.

II. BACKGROUND OF COMPETITION LAW IN INDIA

The first law to regulate competition in India was the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). There are three studies that played a part in the change of the MRTP Act. The first study was made by the committee which was chaired by R.K. Hazari, the committee studied the industrial licensing procedure under the Industrial (Development and Regulation) Act, 1951. The committee concluded that the working of the licensing system had resulted in disproportionation growth of some business houses in India. The second study was done by the committee chaired by Professor P.C. Mahalanobis, the main aim of the committee was to study the distribution and levels of income in the country. The committee submitted in its report that the top 10% of the population of India has access as much as 40% of income. The committee further noted that due to the industrial policy economy model practiced by the government, big business houses were emerging. The suggestion made by this committee was that there is great need to deal with economic power. The third study was conducted by Monopolies Inquiry Commission (MIC), which was appointed by the government in April 1964, under the chairmanship of K.C Das Gupta. It was instructed to enquire into extent and effect of concentration of power in private hands and prevalence of monopolistic and restrictive trade practice in important sector of the economic activity. The MIC stated that there was a concentration of economic power in terms of both industry and product in its report delivered in October 1965. In light of its conclusions, MIC created a measure to control how the economy functions in order to prevent the concentration of economic power. The measure also includes



provisions for monopoly control and the outlawing of monopolistic and restrictive business practises that are harmful to the public interest. The MRTP Act, which was created from a draught by the MIC and modified by a committee of the parliament, went into effect on June 1 of that year. The basic principles of the Indian constitution's state policy, which attempts to balance social justice with economic prosperity, served as the basis for the Act. The premise on which MRTP Act rests include unrestrained interaction of competition forces, maximum material progress through rational allocation of resources, availability of goods and services of quality at reasonable prices and finally, a just and fair deal to the consumers. An interesting feature of the statute is that it covers fields of production and distribution of both goods and services. According to the behavioural theory, the behaviour of businesses, undertakings, and organisations that engage in trade practises that are harmful to the public interest is assessed in light of whether the practises in question represent any monopoly, restriction, or unfair trade practise. According to the reformist concept, the MRTP Act's provisions stipulate that if the Commission determines after an investigation that a business has engaged in either monopoly or an unfair trading practise, it may advise and require that company to stop or not repeat the trade activity in question. The MRTP Act also allows for the acceptance of an organization's statement that it has taken measures to ensure the absence of that adverse information trade practise. The veneer of the MRTP Act is essentially based on a directive or reformist approach. There is no deterrence by punishment.

i. The Monopolies and Restrictive Trade Practices Act (MRTP Act) was passed by Parliament of India on 18th December 1969 and got president's assent on December 27, 1969, but it came into force from June 1, 1970.

Aims & Objectives of MRTP Act

On the basis of recommendation of Dutt Committee, MRTP Act was enacted in 1969 to ensure that concentration of economic power in hands of few rich. The act was there to prohibit monopolistic and restrictive trade practices.

The main objectives of this act were:

- To ensure that the operation of the economic system does not result in the concentration of economic power in hands of few rich.
- To provide for the control of monopolies, and

- To prohibit monopolistic and restrictive trade practices

According to this law MRTP Act was not applicable to

- Government Company and undertaking owned by Government.
- Company established by a Central or State Act.
- Trade Unions
- Companies which have been taken over by the central Government.
- Companies owned by registered Cooperative Societies.
- Any financial institution.

Definition of Monopolistic Trade Practice

The act defines the Monopolistic Trade Practice as "Such practice indicates misuse of one's power to abuse the market in terms of production and sales of goods and services.

- Firms involved in monopolistic trade practice tries to eliminate competition from the market.
- Then they take advantage of their monopoly and charge unreasonably high prices.
- They also deteriorate the product quality, limit technical development, prevent competition and adopt unfair trade practices.

Definition of Unfair Trade Practice

The act defines Unfair Trade Practice as

- False representation and misleading advertisement of goods and services.
- Falsely representing second-hand goods as new.
- Misleading representation regarding usefulness, need, quality, standard, style etc of goods and services.
- False claims or representation regarding price of goods and services.
- Giving false facts regarding sponsorship, affiliation etc. of goods and services.
- Giving false guarantee or warranty on goods and services without adequate tests.

Definition of Restrictive Trade Practice

The act defines Restrictive Trade Practice as such practices that, the traders, in order to maximize their profits and to gain power in the market, often indulge. These activities **tend to block the flow of capital into production**. These traders also bring in such conditions of delivery which affect the flow of supplies leading to unjustified costs.



MRTP Company

The firms with assets of Rs. 25 Crore or more were put under the obligation of taking permission from the government of India and they were called MRTP companies. This upper limit of Rs. 25 Crore was known as MRTP limit. It was later relaxed to Rs. 50 crore in 1980, Rs. 100 Crore in 1985 and in 1991 this limit was removed. Now only companies having more than 25% market share were called Monopolies.

Monopolies and Restrictive Trade Practices Commission

Monopolies and Restrictive Trade Practices Commission (MRTPC) was set up under section 5 of the Monopolies and Restrictive Trade Practices Act, 1969. The MRTPC is an organ of Department of Company Affairs, Ministry of Company Affairs, Government of India.

- MRTPC was a quasi-judicial body.
- Major function of the MRTP Commission is to enquire into and take appropriate action in respect of unfair trade practices and restrictive trade practices.
- In regard to monopolistic trade practices the Commission is empowered to inquire into such practices
- Upon a reference made to it by the Central Government
- Upon its own knowledge or information and submit its findings to Central Government for further action.

Competition Act

The MRTP Act, 1969 was outdated because the main focus of the Act was to curb monopolies and not promote competition in India. Importantly, the Act aimed to protect the consumer from exploitation. The Act that was in existence, however, simply lost its purpose and made things harder for business owners rather than simpler for consumers. As a result, the government established the Raghavan Committee to make recommendations for an appropriate legal framework, and as a result, the Competition Act, 2002, was created. It's interesting to note that even though the Act was passed in 2002 and received the President's assent in 2003, it was amended in 2007 but it was not implemented until 2009. This was done because the government wanted to ensure that this Act didn't have any significant flaws like the previous one. Because of this, even though the Competition Act had been established, the old MRTP Act continued to govern all actions for seven years were still

functioning under the old MRTP Act. Once the Competition Act was amended in 2007 the government was confident to repeal the old Act and bring in the new one.

The Act regulates three Anti-competitive practices namely

- i. Anti-competitive agreements,
- ii. Abuse of Dominant Position and
- iii. Mergers & Acquisitions (Combinations).

The main criteria used for the regulation of anti-competitive practices are that such practices should not cause an appreciable adverse effect on competition within India. Section 3 of the Act explains as to what agreements are anti-competitive in nature and it classifies such agreements into two categories namely **Horizontal agreements** and **vertical agreements**. It states that all the anticompetitive agreements which can cause an appreciable adverse effect on competition in India shall be void subject to certain exceptions as provided under section 3(5).

Section 4 deals with issues of abuse of dominant position, it gives a list of acts which may amount to abuse of dominant position. Further section 5 and 6 explains aspects of combinations and also prescribe certain norms to regulate combinations.

Key Concepts and Significant features of Competition Act, 2002

For the detailed understanding of the Act it is important to get an insight of several important concepts and features of the Act. These are explained hereunder:

Important Definitions under the Act

The Act provides for several key definitions which are necessary to be understood in order to understand the functioning of the Act. These are:

a. **Cartel:** The Act defines 'Cartel' as an association of producers, sellers, distributors, traders or service providers who by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of or trade in goods or provision of services. Cartel has been put in the category of those anti-competitive agreements through which the manufacturers, sellers, producers of homogenous commodities agree to control the production, supply prices etc. of goods so as to get desired profits and control over the market. Amity International Journal of Juridical Sciences.

b. **Enterprise:** As per Section 2(h) of the Act, 'enterprise' means and includes a person³ or a department of Government, who or which is or has been engaged in following activities:

- (i) Production, storage, supply, distribution, acquisition or control of articles or goods;



- (ii) Provisions of services of any kind;
- (iii) Investing or acquiring of business, holding or dealing in shares or other securities of any other body corporate either directly or through a subsidiary.

However, a department of Government carrying activity relating to sovereign functions of the government which includes activities relating to atomic energy, currency, defence and space shall not be termed as an 'enterprise' for the purpose of the Act.

c. **Person:** Section 2(l) of the Act provides an inclusive definition of 'person'. It states that a 'person' includes following:

- (i) An individual, Hindu undivided family, company or a firm;
- (ii) An association of persons whether incorporated or not in India or outside India;
- (iii) Any corporation established by Central or State government or a Government Company as defined under Companies Act.
- (iv) Anybody corporate incorporated by or under the laws of a country outside India
- (v) Any Cooperative Society, local authority or an artificial juridical person.

d. **Relevant Market:** The definition of the term 'relevant market' is dependent on two terms namely 'relevant geographic market' and 'relevant product market' as section 2(r) of the Act lays down that for determination of relevant market. Commission has to refer either 'relevant geographic market' or 'relevant product market' or both.

³ Person' has been defined under section 2(l) of the Act

(i) Relevant geographic market implies a market in an area where homogeneous conditions prevail for various aspects of trade and commerce. Such conditions are distinct from markets in neighbouring areas⁴

e. **Relevant Product Market** refers to a market where the products and services are of such a nature that those can be interchanged or substituted by other products and services available in that market⁵.

Key Concepts of the Act The Competition Act, 2002 deals with mainly following concepts:

- (I) Anti-Competitive Agreements
- (II) Abuse of Dominant Position
- (III) Mergers and Acquisitions

These are explained hereunder.

(I) **Anti-Competitive Agreements**

Anti-Competitive agreements are those agreements among the persons involved in a business transaction which have the tendency to

harm the Competition in a particular market or which results in undue benefit to one person or group over the loss of others. Such anti-competitive agreements are prohibited under the Competition Act, 2002. The term 'agreement' as defined under section 2(b) of the Act provides that the agreement does not necessarily have to be in the form of a formal document executed by the parties. It may or may not be in writing. Clearly, the definition so provided is inclusive in nature and not exhaustive and is a wide one.

The main reason for adopting a wide connotation for the term 'agreement' in Competition law is because the persons so involved in anti-competitive activities may not enter into formal written agreements so as to keep it a secret affair. For example, Cartels are usually shrouded in secrecy. Section 3 of the Act prohibits any agreement with respect to production, supply, distribution storage, acquisition or control of goods or provision of services which causes or is likely to cause appreciable adverse effect on competition within India.⁶ Further section 3(2) provides that any agreement in disobeying of this provision shall be void. On the basis of the provisions of Section 3 of the Act, anti-competitive agreements are divided into two categories namely horizontal agreements and vertical agreements.

(a) **Horizontal Agreement:** These are the agreements which generally occur between two or more entities or enterprises that stand at par with each other in terms of production, supply distribution etc. in the same market. For example, an agreement between manufactures of a particular commodity of not selling a particular product below agreed price or for not to supply a product to a particular market would be deemed as horizontal anti-competitive agreements. Competition Act, 2002 prohibits following types of horizontal agreements namely: (i) Agreements regarding fixing of purchase or selling prices of a product either directly or indirectly.⁷

(ii) Agreements with regard to limit, control production, supply, investment, provision of services of particular products and for a particular quantity.⁸

(iii) Agreement regarding sharing of market

⁴Section 2(s)

⁵Section 2(t)

⁶Section 3(1)

⁷Section 3(3)(a)

⁸Section 3(3)(b)



(iv) Bid Rigging Agreements. Explanation to Section 3(3)(d) defines 'bid rigging' as an agreement between parties engaged in identical business, which has the effect of eliminating or reducing the competition for bids or adversely affecting or manipulating the process for bidding

(v) Agreements in the form of Cartels. Cartels are created by anti-competitive horizontal agreements among business enterprises. They pose a great threat to competition and ultimately tend to destroy the free trade. In fact cartels are secret agreements between business firms with the sole objective of fixing prices or sharing markets between them.⁹

(b) Vertical Agreements: According to Section 3(4) of the Act 'vertical agreements' are those agreements which take place among enterprises or persons at different stages or levels of production in respect of production, supply, distribution, storage, sale or price of goods etc. For example, any agreement between manufacturer and wholesaler which can adversely affect competition in the market will be termed as a vertical anti-competitive agreement. Competition Act, 2002 envisages various types of Vertical agreements. These are:

(i) **Tie-in-Arrangement:** This arrangement includes any agreement that requires the purchaser of the goods to purchase some other goods along with the required goods as a condition mandate.¹⁰ Such kind of agreements is usually entered into by the sellers so as to increase their sales and earn more profit. A tie-in arrangement will become illegal when an enterprise uses its market power that it has on a particular product and by taking advantage does not sell or lease that product to the customer until and unless he agrees to buy another product that the enterprise wants him to buy.

(ii) **Exclusive Supply Agreement**¹¹: Such agreements impose restrictions on purchaser of the goods of not to acquire or deal in goods other than those of the seller or any other person. Such agreements are usually entered into by using dominant position in the market. For example buyer of a particular commodity enters into an agreement with the manufacturer of not making the same product for any other buyer. However, such agreements should not be confused with arrangement between the buyers and sellers/manufacturers with regard to specifications, quality, size etc. which is legal and not anticompetitive in nature.

(iii) **Exclusive Distribution Agreement**¹²: Such agreement usually imposes conditions that limit, restrict or withhold the output or supply of any goods. Sometimes, restrictions with regard to allocation of any area or market for disposal or sale

of goods are also covered under this part. Such arrangement may violate the competition law if their effect substantially lessens or tends to create a monopoly in any line of commerce.

(iv) Refusal to Deal¹³: Agreements which, by any method, restrict, or are likely to restrict the persons or class of persons to whom goods are sold or from whom goods are bought are prohibited under the Act as such agreements have anti-competitive tendencies.

(v) Resale Price Maintenance¹⁴: Resale price maintenance includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may

⁹ Rajkumar S. Adukia, 'An overview of provisions relating to Competition laws & Consumer Protection Laws in India' Retrieved from <http://www.caaa.in> on 29/04/2016

¹⁰ Section 3(4)(a)

¹¹ Section 3(4)(b)

¹² Section 3(4)(c)

¹³ Section 3(4)(d)

¹⁴ Section 3(4)(e)

be charged. In other words, resale price maintenance refers to any attempt by an upstream supplier to control or maintain the minimum price at which the product is resold by its customer. This prevents the resellers from competing too fiercely and thereby drives down its profits. Insisting that a product be resold at a specific margin, or limiting the discounts that a reseller may offer, in essence restricts the reseller's ability to set a price and is accordingly prohibited.

(c) Permitted Agreements: Competition Act, 2002 provides for certain exceptions which meant for the protection of Intellectual Property Rights (IPRs). As per section 3(5) prohibition for anti-competitive agreements will not affect the right on any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights under the following legislations:

(i) The Copyright Act, 1957,

(ii) The Patents Act, 1970

(iii) The Trade and Merchandise Marks Act, 1958

(iv) The Geographical Indications of Goods (Registration and Protection) Act, 1999

(v) The Designs Act, 2000

(vi) The Semi-Conductor Integrated Circuits Layout-Design Act, 2000



Similarly, exemption against anti-competitive agreements is also provided in cases of export. Section 3(5)(ii) lays down those prohibitions of anti-competitive agreements shall not apply to the right of any person to export goods from India to the extent to which the agreement relates export of goods or services.

(II) Abuse of Dominant Position

. A person or an enterprise is deemed to be in dominant position when such entity is in a position of strength and such position enables that entity to operate independently of competitive forces prevailing in the relevant market or affects its competitors or consumers or the relevant market in its favour.¹⁵

“Dominant Position” has been aptly defined in the Act in as the “position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to

- (i) Operate independently of competitive forces prevailing in the relevant market; or
- (ii) Affect its competitors or consumers or the relevant market, in its favor”

For the purpose of Competition Act, 2002 the definition of ‘dominant position’ depends upon the definitions of relevant market, which are explained above. Thus, for an abuse of dominance finding, it is necessary to first find the enterprise in question occupied a position of dominance in terms of a particular product market and the demarcation of the geographic market for that product.

Section 4 of the Act provides for control of such abuse. It states that no enterprise or group abuse its dominant position. It also provides for instances as to what acts amounts to abuse of Dominant position. The acts which amount to ‘abuse of dominant position’ are enshrined below:

¹⁵Explanation (a) to Section 4

- (i) Direct or Indirect imposition of unfair or discriminatory condition in purchase or sale of goods or services or prices in purchase or sale (including predatory price) of goods and services.¹⁶

‘Predatory price’ means selling of goods at a price which is below the cost of production of goods or provisions of service in order to eliminate competitors or to reduce competition. The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 have been enacted for the determination of predatory pricing cost. According to Regulation 3(1), average variable cost will generally be taken as a proxy for marginal cost.

- (ii) Limiting or restricting the production of goods or services or putting restrictions on technical or scientific development relating to goods or services to the prejudice of consumers.
- (iii) Indulging in practices which result in denial of market access in any manner
- (iv) Using Dominant position in one relevant market to protect or to enter into another relevant market.

III. MERGERS AND ACQUISITIONS

Mergers and acquisitions is the third area of focus of Competition Law. The Competition Act regulates mainly three types of combinations namely.¹⁷

- (i) Acquisition of shares, voting rights or assets of another entity by a person or an enterprise.
- (ii) Acquiring control by a person over enterprise.
- (iii) Merger or amalgamation between or amongst enterprise.

Section 5 of the Act defines combination by providing certain threshold limits below which combinations would not be covered under the scanner of Competition Act. The main justification behind prescribing such limits can be the reason that combination between small enterprises or entities may not have appreciable adverse effect on competition in Indian markets.

The limits so provided under section 5 of the Act have been explained below:

- (a) In case of acquisition of share, voting rights or acquiring the control: The person acquiring the shares and the enterprise whose shares, assets or voting rights are being acquired jointly have:

(i) Assets in India: - More than 1000 crores
Turnover: - More than 3000 crores

(ii) Aggregate assets in India or Outside India: - More than 500 million dollars including at least 500 crores in India. Turnover: - More than 1500 million dollars including at least 1500 crores in India.

In case of acquisition by group, the joint assets and such acquiring group should be:

(i) Assets in India: - More than 4000 crores
Turnover: - More than 12000 crores

(ii) Aggregate assets in India and outside India: - more than 2 billion dollars, including at least 500 crores in India. Turnover: - More than 6 billion dollars, including at least 1500 hundred crores in India.

¹⁶ Section 4(1)(a)

¹⁷ Section 5

- (b) In case of merger or amalgamation, the remaining enterprise after merger or the enterprise so created after amalgamation should have:



(i) Assets in India: More than 1000 crores Turnover:
- More than 3000 crores

(ii) Aggregate assets outside India: 500 million dollars, including at least 500 crores in India, or Turnover: - More than 1500 million dollars, including at least 1500 hundred crores in India. If the enterprise so created after amalgamation or remained after merger belongs to a group, then such group should have:

(i) Assets in India: - More than 4000 crores Turnover: - more than 12000 crores.

(ii) Aggregate assets in India and outside India: - 2 billion US dollars Turnover: - more than 6 billion US dollars, including at least 1500 crores in India.

Further, Section 6 of the Act deals with the provisions of regulations of Combinations. It provides for a compulsory notice of details of proposed combination to the Commission along with prescribed fees within 30 days of execution of any document of acquisition or approval of the proposal of amalgamation or merger by the board of Directors.¹⁸ The time period prescribed for the combination to take effect is 210 days after giving of notice to the commission or the date on which any order has been passed by the commission with regard to that notice, whichever is earlier.¹⁹

However, exception has been provided in favour of public financial institution, foreign institutional investors, bank or venture capital fund in case of any covenant of loan agreement or an investment agreement.²⁰

IV. CONCLUSION

It is to mention here that competition Act is definitely a better law as comparison to MRTP Act 2002. As this law not only helps the consumer for being exploited but also helps in promoting the fair competition in the country. This act does not prohibit competition rather it helps to increase the competition in the market which is basis of economic growth. It is not the era of restrictions rather competition, which is helping in boosting the economy. Competition Act is unquestionably a better law as compared to its forerunner's laws. MRTP Act 1986 was Repealed and competition Act came into force in 2009. Under this if firms are practising MTP (Monopolies Trade Practice Act) and Unfair Trade Practise Act, all such practices are prohibited under Competition Act 2002. Clear definition was given under this act and clear explanation was given of different terms and it was indicated properly what all are prohibited under this Act. This Act helps in prevention such practices which have adverse effect on competition and also helps in sustaining the competition in the market.

Besides this it also helps in protecting the interest of consumers. The Competition Act of 2002 was passed by the government as a measure to keep up with the rapidly evolving economic conditions and is consistent with the new economic paradigms of globalisation, privatisation, and liberalisation. It shows the country's readiness to transition from a planned economy to one with a free market, but with sufficient checks and controls. In addition to emphasising regulation, the Act also adopted the idea of "Competition Advocacy" to advance competition, raise awareness, etc. as a commission social responsibility. By imposing severe penalties on the parties involved in anti-competitive acts, the Commission occasionally makes its presence felt in the market.

¹⁸Section 6(2)

¹⁹Section 6(2A)

²⁰Section 6(4)

The consumer now benefits from healthy market competition and has the opportunity to choose the most affordable and advantageous choice available to him, which is the main advantage of such acts. To improve the effectiveness of India's competition regime, several factors still need to be taken into account by the government and the Commission. Being a late arrival, Indian competition law had the benefit of absorbing a few aspects of other nations' competition laws. Experts believe that the present Act might have included a number of significant issues of competition law that Indian law has overlooked. For instance, settlement and plea agreement provisions, which are present in other nations, speed up and improve the regulatory and adjudicative process. India chose not to adopt such a measure, which is one of the causes of delays in receiving a final decision. The ambiguity in the authority of commission is another issue that has recently arisen. Due to the Commission's failure to follow natural justice principles or other procedural mistakes, a number of cases heard by the Competition Appellate Tribunal have been reversed. Another issue that needs to be addressed by the government is the growing backlog of cases as a result of staff shortages. The Commission needs to reconsider the role that competition laws play in the overlap between intellectual property laws and competition rules, which is another area.²¹ To accomplish the desired goals for which the Competition Act was adopted, such matters must be seriously considered by the relevant authorities.



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