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Emergence and Applicability of Competition Act, 2002 in India's New Competitive Regime: An Overview

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Abstract:

In the quest of globalization, India has countered positively by opening up its economy, removing controls and resorting to liberalization. Thus, to achieve the objective of maximum economic efficiency, the liberal trade policy must be complimented through a sound competition policy by preventing anti-competitive business practices and unnecessary government intervention. The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007, removing the former MRTP Act,1969, follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates entering into combinations (consisting of mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India. In view of this, this article tries to highlight the issues and challenges contained in the Indian Competition Act, 2002 in ensuring competitive business environment. A good competition policy, along with a sound competition law, should help in fostering competition, economic efficiency, consumer welfare and freedom of trade, which should equip the Governments in meeting the challenges of globalization by increasing competition in local and national markets.

Key words: Competition, Act, India, MRTP.

1. Introduction:

In the quest of globalization, India has countered positively by opening up its economy, removing controls and resorting to liberalization. The expected consequence of this is that Indian market should be forced to face stiff competition from within the country and outside (Viswanathan, 2003). Trade and competition are closely associated in that both trade laws and competition laws have the universal objective of achieving economic efficiency, by improving the business environment for more efficient resource allocation. Thus, to achieve the objective of maximum economic efficiency, the liberal trade policy must be complimented through a sound competition policy by preventing anti-competitive business practices and unnecessary government intervention.

Presently, the whole world is facing the throat- cut competition and to keep in pace with it, every nation is trying to pull their economy up. The globalization and urbanization is also playing a good role in the same. To have a fair and healthy competition, India government has set up a judicial body which is known as the 'competition commission of India' as the nation's competition regulator and a Competition Appellate Tribunal to hear appeals in competition matters.

To take care of the needs of trading, industry and business association, the central government decided to enact a law on competition.The then Finance Minister, P.Chidambaram (2003) highlighted the need for having a well-built legal system and said " A world class legal system is absolutely necessary to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system

of dispensing justice in commercial matters".In India, there was an act regarding the competition in the market named MRTP Act [Monopolistic & Restrictive Trade Practice Act] but as the time changed, this act was not able to prevent the needed defense for the society and market, and thus new act named The Competition Act was enacted in 2002.It is said that the competition act is, "an act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition in the market, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in the markets, in India, and for matters connected there with or incidental thereto." Therefore, India has begun to bring into force the provisions of its Competition Act, 2002 replacing the previous 1969 Monopolies and Restrictive Trade Practices Act. The new regime is loosely reflective of EC and UK competition law, set against the backdrop of an historically state-dominated economy.

The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007, follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates entering into combinations (consisting of mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

Therefore, the Act covers the usual three areas of anticompetitive agreements, abuses of a dominant position and 'combinations' (i.e. mergers and acquisitions above specified asset or turnover thresholds). The Act explicitly applies to firms or persons located abroad whose practices have an anticompetitive effect in India. It also applies to Indian state-controlled enterprises and activities.

In view of the above discussion, this article tries to highlight the issues and challenges contained in the Indian Competition Act, 2002 in ensuring competitive business environment.

2. Brief review of Indian Competition Act, 2002:

In October 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May 2000 [the report will be referred to hereinafter as High Level Committee (2000)]. The draft competition law was drafted and presented to the Government in November 2000. After some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002.

2.1. Objectives:

Competition Act, 2002 is passed keeping to foster economic development of the country vis-à-vis to establish a commission, protect the interest of the consumers and ensure freedom of trade in markets in India.with following objective:

i. To prohibit the agreements or practices that restricts free trading and also the competition between two business entities.

ii. To ban the abusive situation of the market monopoly.

iii. To provide the opportunity to the entrepreneur for the competition in the market.

iv. To have the international support and enforcement network across the world.

v. To prevent from anti-competition practices and to promote a fair and healthy competition in the market.

2.2. Guiding principles:

The Competition Commission of India is being guided by the following principles in its approach to its work:

i.. To be in sync with markets; have good understanding of market forces.

ii. To minimize cost of compliance by enterprises, and cost of enforcement by Commission.

iii. To maintain confidentiality of business information; to maintain transparency in Commission's own operations.

iv. To be a professional body, equipped with requisite skills.

v. To maintain a consultative approach.

2.3. Functions:

i. CCI shall prohibit anti-competitive agreements and abuse of dominance, and regulate combinations (merger or amalgamation or acquisition) through a process of enquiry.

ii. It shall give opinion on competition issues on a reference received from an authority established under any law (statutory authority)/Central Government.

iii. CCI is also mandated to undertake competition advocacy, create public awareness and impart training on competition issues.

2.4. Enforcement:

The enforcement provisions in the Competition Act relate to prohibition of anti-competitive agreements and abuse of dominant position, and also prevention of anti-competitive combinations.

Section (3): Anti competitive agreements

Section (4) Abuse of dominant power

Section (5): Combination

Section (6): Regulation of combinations

2.5. Notifications:

Though the act was passed in India in 2003, it could not be enforced. Competition Act is being notified in phases. The commission came into being on 28 February 2009 with appointment of the Chairman and Members of the Competition Commission of India vide notification dated 27-march-2009. Vide Notification dated 28th August 2009, Monopolies and Restrictive Trade Practices Act, 1969 ("the MRTP Act") stands repealed and is replaced by the Competition Act, 2002, with effect from September 1, 2009. Anti competitive agreements (section 3) and Abuse of dominant power (Section 4) has already came into force on 20-5-09 vide notification dated 15-5-09. However Regulations with respect to combinations are still awaited to be notified.

2.6. Repeal of MRTP Act, 1969:

i. GOI vide Notification dated 28th August 2009, repealed the Monopolies and Restrictive Trade Practices Act, 1969 and the MRTP Act is replaced by the Competition Act, 2002, with effect from September 1, 2009. However as per amendment act, 2007 MRTP was to act as per provisions of repealed act. For 2 years from effective date of repeal with the condition that it will not hear any new case. On 14-October 2009 The President of India promulgated the competition (Amendment) Ordinance, 2009 and enforced the same with immediate effect. With this amendment MRTP Commission became defunct.

2.7. Transfer of cases from MRTP:

The following transitional provisions would apply as provided in Section 66 of the Competition Act, 2002:-

1. Transfer of pending cases:

a) Monopolistic or restrictive trade practice cases: All pending cases pertaining to monopolistic or restrictive trade practices, including cases having an element of unfair trade practice, shall stand transferred

to the Competition Appellate Tribunal, which shall adjudicate such cases in accordance with the provisions of the repealed MRTP Act.

b) Unfair trade practice cases: All pending cases relating solely to unfair trade practices shall stand transferred to the National Commission as constituted under the Consumer Protection Act, 1986, which may in turn transfer such cases to a State Commission constituted under the said Act under circumstances it deems appropriate. These cases will be dealt with by them in accordance with the provisions of the Consumer Protection Act.

c) Cases relating to giving false or misleading facts disparaging the goods, services or trade of another person under the MRTP Act: All such pending cases shall be transferred to the Competition Appellate Tribunal which will be dealt in accordance with the provisions of repealed MRTP Act.

2. Investigations/proceedings undertaken by the Director General under the MRTP Act:

a) Monopolistic/ restrictive trade practices will be transferred to the Competition Commission of India (CCI), who may conduct such investigations/ proceedings in any manner it deems appropriate.

b) Unfair trade practices will be transferred to the National Commission under the Consumer Protection) Act 1986.

c) Cases giving false or misleading facts disparaging the goods, services or trade of another person will be transferred to the CCI.

2.8. Remedies in Competition Act:

Section 27 of the Act provides various remedies for restoring competition and penalizing the offenders in case of contravention of this law. They are –

- passing 'cease and desist order'
- providing agreements having appreciable adverse effect on competition to be void
- imposing penalty upto 10% of the turnover or 3 times of cartelized profit, whichever is higher
- awarding compensation or damages as per Section 34
- directing modifications to agreements
- in case of combinations, they can be approved with or without modification or even be refused approval
- in case of dominant enterprise, order can recommend division as provided in Section 28 of the Act

2.9. Amending Act & Ordinance:

2. The competition(Amendment) Act , 2007

3. The Competition(Amendment) Ordinance, 2009

3. Need for substitution of MRTP Act,1969 by Competition Act,2002:

In 1991, comprehensive economic reforms were undertaken and consequently the march from Command-and-Control economy to an economy based more on free market principles instigated its pace. As is true of many countries, economic liberalization has taken root in India and the need for an effective competition regime has also been recognized.

After India became a party to the WTO agreement, a perceptible change was noticed in India's foreign trade policy which had been earlier highly restrictive.

Recognizing the important linkages between trade and economic growth, the Government of India, in the early 90's took step to integrate the Indian economy with the global economy. Thus, finally enhancing its thrust on globalization and opened up its economy removing controls and resorting to liberalization.

Consequently, India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the

country. Finding the ambit of MRTP Act inadequate for fostering competition in the market and eliminating anti-competitive practices in the national and international trade, the Government of India in October 1999 appointed a high level committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law consonant with international developments. Acting on the report of the committee, the Government enacted the new Competition Act, 2002 which has replaced the earlier MRTP Act, 1969.

Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Pegging on the Directive Principles, the first Indian competition law was enacted in 1969 and was christened the Monopolies And Restrictive Trade Practices, 1969 (MRTP Act). Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing.

i. That the ownership and control of material resources of the community are so distributed as best to sub serve the common good; and
ii. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The objective of Monopolies and restrictive Trade Practices,1969 which came into force on June,1,1970 was to ensure that the operation of the economic system did not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for the matter connected therewith and incidental thereto(MRTP Act,1969).

After the economic reforms of the early 1990s, the Monopolies & Restrictive Trade Practices Act, 1969 (the MRTP Act) was considered to have become obsolete, as India had embraced a market driven economy while entering globalization. Hence there was a need to shift focus from curbing monopolies to promoting competition, leading to enacting the Competition Act, 2002 (the Competition Act). The *raison d'etre* of the Competition Act was to create an environment conducive to competition and was brought into force in stages.

Since 1970,MRTP Act had been amended and revised several times to equip the changing circumstances. Nevertheless, after the economic reforms initiated in 1991,it has been observed that MRTP Act,1969 had become obsolete in certain respects in the light of international economic development relating more particularly to competition laws and there was need to shift focus from curbing monopolies to promoting competition. The Raghavan Committee discusses the issues and concluded that MRTP Act was beyond repair and could not serve the purpose of new competitive environment .A new law (Indian Competition Act) may be enacted, the former MRTP Act may be repealed and the MRTP Commission wound up.The provisions regarding unfair trade practice(UTP) need not figure in the Indian Competition Act since they are covered by Consumer Protection Act,1986.The pending cases in the MRTP Commission may be transferred to the concerned consumers' court under the Consumer Protection Act,1986.The pending MTP(Monopolies and trade practices) and RTP(Restrictive Trade Practices) cases in the MRTP Commission may be taken up for adjudication by the Competition Commission of India(CCI) from the stages they were in (Raghavan,2000).

In view of the policy shift from curbing monopolies to promoting competition, there was a need to repeal the Monopolies and Restrictive Trade Practices Act. Hence, the Competition Law aims at doing away with the rigidly structured MRTP Act. The Competition Law proposed is flexible and behaviour oriented.

After the Act came into the public sphere, a question often cited is whether it is not still the old law in substance although not in form. The Act is a new wine in a new bottle. The differences between the old law (namely the MRTP Act, 1969) and the new law (the Competition Act, 2002) may be best depicted in the form of a table presented below:

Table:1: Difference between MRTP Act,1969 and Competition Act,2002

Points of distinction	**MRTP Act, 1969**	**Competition Act, 2002**
1.	Based on pre-reform scenario	Based on post-reform scenario
2.	Frown upon dominance	Frown upon abuse of dominance
3.	Very little administrative and financial autonomy for the competition commission	Relatively more autonomy for the competition commission
4.	Registration of agreements compulsory	No requirement of registration of agreements
5.	14 *per se* offences negotiating the principles of natural justice	4 *per se* offences and rests are subjected to rule of reason
6.	Based on size as a factor	Based on structure as a factor
7.	Complex in arrangement and language	Simple in arrangement and language and easily comprehensible
8.	MRTP commission appointed by Government	Competition Commission selected by a collegium(Search Committee)
9.	No combinations regulation	Combinations regulated beyond a high threshold limits
10.	Competition offences are implicit and not defined	Competition offences are explicit and defined
11.	No competition advocacy role for the Competition Commission	Competition Commission has competition advocacy role
12.	Unfair trade practices will cover	Unfair trade practices omitted(Consumer Protection Act,1986 to deal with this)
13.	Reactive and rigid	Proactive and flexible
14.	No penalties for offences	Penalties for offences
15.	Does not vest MRTP Commission to inquire into cartels of foreign origin in a direct manner	Competition law seeks to regulate them

4. Salient Features of New Competition Act, 2002:

The Competition Act has been designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objects are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade of other participants in the market, all against the backdrop of the economic development of the country. However, the Competition Act is surprisingly compact, composed of only 66 sections. The legislation is procedure-intensive, and is structured in an uncomplicated manner. The *raison d'etre* of the Competition Act is to create an environment conducive to competition. The various salient feature of the Act are as follows:

(i) *The Industries (Development and Regulation) Act, 1951: It* may no longer be necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and national heritage protection considerations, etc.

(ii) *The Industrial Disputes Act, 1947:* This act and the connected statutes need to be amended to provide

for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.

(iii)*The Board for Industrial Finance & Restructuring (BIFR)*: BIFR formulated under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 should be abolished.

(iv) World Trade Organistions (WTO): There should be necessary provision and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. Particularly, agreements relating to foreign investment, intellectual property rights, subsidies, countervailing duties, anti-dumping measures, sanitary and psytosanitary measures, technical barriers to trade and Government procurement need to be reckoned in the Competition Policy/Law with a view to dealing with anti-competition practices. The competition law should be made extra territorial.

(v)*MRTPAct:* It is suggested that:

* The MRTP Act 1969 may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices need not figure in the Indian Competition Act as they are presently covered by the ConsumerProtectionAct,1986.
* The pending UTP cases in the MRTP Commission may be transferred to the concerned consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP Cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.

5. Components Of Competition Act, 2002:

The Competition Act, 2002 has essentially four compartments:
Anti- Competition Agreements
Abuse of Dominance
Combinations Regulation
Competition Advocacy

Section (3): Anti-Competitive Agreements:

Agreements which cause or are likely to cause appreciable adverse effect on competition in markets in India are anti-competitive and are void. While some anti-competitive agreements are presumed to cause appreciable adverse effect on competition, others are to be proved so by rule of reason.

Therefore, section 3(1) of the Act prohibits any agreement 'which causes or is likely to cause an appreciable adverse effect on competition within India'. Section 3(2) holds such agreements to be void. According to section 3(3), hard-core cartel agreements (price-fixing, output restriction, market sharing and bid-rigging) are rebuttably presumed to have an appreciable adverse effect on competition (an AAEC).

According to section 19(3) of the Act, the CCI shall: … while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:

a. creation of barriers to new entrants in the market;

b. driving existing competitors out of the market;

c. foreclosure of competition by hindering entry into the market;

d. accrual of benefits to consumers;

e. improvements in production or distribution of goods or provision of services;

f. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Criteria (d) to (f) are similar to the criteria in Article 81(3) EC. Importantly, however, the section 19(3) criteria are not subject to the limitations in Article 81(3) that the agreement must allow consumers a fair

share of the benefits, must not impose restrictions that are unnecessary to attaining those benefits and must not substantially eliminate competition. Moreover, as section 19(3) applies to the whole of section 3, including section 3(3), it gives rise to the theoretical possibility of justifying even a hard-core cartel. Unlike Article 81(3), the Act does not provide for a system of block exemptions.4

With respect to vertical agreements, section 3(4) states that any such agreements (explicitly including those involving tying, exclusive supply or distribution, refusal to deal, or resale price maintenance) infringe the section 3(1) prohibition if they cause or are likely to cause an AAEC. Again, the absence of a *per se* prohibition of resale price maintenance is noteworthy.

In addition to invalidity, infringement of the section 3(1) prohibition carries the possibility of fines of up to 10 per cent of average turnover over the last three years or, in cartel cases, up to three times profit or 10 per cent of turnover for each year of the cartel, whichever is higher. There is no criminal cartel offence in India for either individuals or companies.

The Act does envisage a cartel leniency policy, which was brought into force in August 2009 through separate implementing regulations.5 Full immunity from fines is available to the first party to approach the CCI with a 'vital disclosure' (meaning true and full disclosure) of information or evidence sufficient to enable the CCI either to form a *prima facie* opinion about the existence of the cartel, or to establish an infringement of section 3—in each case in circumstances in which the CCI did not already have sufficient evidence to make such a finding. The second and third applicants may receive leniency reductions of up to 50 per cent and 30 per cent respectively, where they provide evidence contributing 'significant added value' (in the sense of enhancing the CCI's ability to establish the existence of a cartel) to that already in the CCI's possession. Although the regulations envisage the possibility of making oral leniency applications, these must be followed by a written application, giving rise to concerns as to the potential disclosability of such applications in foreign (particularly US) damages actions.

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser - seller relationship. An obvious example that comes to mind is an agreement between enterprises dealing in the same product or products. Such horizontal agreements, which include membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are per se illegal. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect. Barring the aforesaid four types of agreements, all the others will be subject to the rule of reason test in the Act.

Section (4) Prohibition of abuse of dominant position:

The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to:

Operate independently of the competitive forces prevailing in the relevant market; or

Affect its competitors or consumers or the relevant market in its favour.

It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. In a perfectly competitive market no enterprise has control over the market, especially in the determination of price of the product. However, perfect market conditions are more of an economic

"ideal" than reality. Keeping this in view the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant.

In determining whether an enterprise enjoys a dominant position, the CCI is required by section 19(4) of the Act to have regard to 13 listed factors. Ten of these are standard economic criteria recognized in other competition law systems, but there are also three criteria relating to 'social obligations and social costs', 'relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position' and 'any other factor which the [CCI] may consider relevant for the inquiry'. The effect of these provisions may be to absolve an otherwise-dominant company from a finding of dominance—and therefore liability for abuse of that dominance—on social, political, or economic development grounds.

Most far-reaching is the provision under section 28 of the Act allowing the CCI to break up a dominant firm to ensure that it does not abuse its dominant position, without requiring proof that it has already done so. While this provision is likely to be used rarely in practice, it gives rise to legitimate concerns as to the ability of the CCI to penalize dominance *per se*, rather than only the abuse of that dominance**.**

The provisions relating to abuse of dominant position require determination of dominance in the relevant market. The relevant market consists of the relevant product market and the relevant geographic market. The factors for determination of the relevant market as well as dominance are provided in the Act itself. Once dominance has been established, the conduct of an enterprise, which falls within any one of the five abuses, is prohibited.

Section 4(1) of the Act prohibits abuses of a dominant market position. Section 4(2) lists several abusive practices: There shall be an abuse of dominance under subsection (1), if an enterprise

a. directly or indirectly, imposes unfair or discriminatory

i. condition in purchase or sale of goods or service; or

ii. price in purchase or sale (including predatory price) of goods or service; or

b. limits or restricts

i. production of goods or provision of services or market therefore; or

ii. technical or scientific development relating to goods or services to the prejudice of consumers; or

c. indulges in practice or practices resulting in denial of market access in any manner; or

d. makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

e. uses its dominant position in one relevant market to enter into, or protect, other relevant markets.

Practices (a), (b), and (d) bear considerable resemblance to the corresponding sections of Article 82 EC. There are, however, important differences. Unlike the prohibition on anticompetitive agreements, section 4 of the Act does not require proof of an AAEC, other than for behaviour falling within section 4(2)(c) or (e). This may give rise to divergence with EC and other competition laws. For example, Article 82(2)(c) EC explicitly requires that discriminatory prices give rise to an anticompetitive effect in the form of competitive disadvantage caused to other trading parties.7 Without such a requirement, section 4 of the Act risks condemning benign forms of price discrimination as *per se* abusive. On the other hand, section 4 includes an explicit 'meeting competition' defence for both discriminatory and predatory prices. This differs from the position under EC law, which has rejected such a defence for predatory pricing.8

Factors to determine dominant position:

Dominance has been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. However, a number of other factors play a role in determining the influence of an enterprise or a group of enterprises in the market. These include:

Market share,

The size and resources of the enterprise;

Size and importance of competitors;

Economic power of the enterprise;

Vertical integration;

Dependence of consumers on the enterprise;

Extent of entry and exit barriers in the market; countervailing buying power;

Market structure and size of the market;

Source of dominant position viz. whether obtained due to statute etc.;

Social costs and obligations and contribution of enterprise enjoying dominant position to economic development.

The Commission is also authorized to take into account any other factor which it may consider relevant for the determination of dominance.

Abuse of dominance:

Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner. The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Such practices shall constitute abuse only when adopted by an enterprise enjoying dominant position in the relevant market in India. Abuse of dominance is judged in terms of the specified types of acts committed by a dominant enterprise alone or in concert. Such acts are prohibited under the law. There is no need for any reference by the Commission to the adverse effect on competition (in Indian markets). Rather, any abuse of the type specified in the Act by a dominant firm shall stand prohibited.

Therefore, section 4 enjoins that no enterprise shall abuse its dominant position. Dominant position is the position of strength enjoyed by an enterprise in the relevant market which enables it to operate independently of competitive forces prevailing in the market or affects its competitors or consumers or the relevant market in its favour. Dominant position is abused when an enterprise imposes unfair or discriminatory conditions in purchase or sale of goods or services or in the price in purchase or sale of goods or services. Again, the philosophy of the Competition Act is reflected in this provision, where it is clarified that a situation of monopoly per se is not against public policy but, rather, the use of the monopoly status such that it operates to the detriment of potential and actual competitors.

At this point it is worth mentioning that the Act does not prohibit or restrict enterprises from coming into dominance. There is no control whatsoever to prevent enterprises from coming into or acquiring position of dominance. All that the Act prohibits is the abuse of that dominant position. The Act therefore targets the abuse of dominance and not dominance per se. This is indeed a welcome step, a step towards a truly global and liberal economy.

Sections (5 & 6): Combination & Regulation of combinations:

Combination includes merger, amalgamation and acquisition above the thresholds stated in the Act in terms of assets or turnover. Regulation of combinations is usually done *ex ante*, although the Commission has the power to investigate a combination even after it has taken effect. Combinations which cause or are likely to

cause appreciable adverse effect on competition have to be prevented. The provisions relating to regulation of combinations are given in sections 5 and 6 of the Act.

Section 6 of the Act provides that ‘no person or enterprise shall enter into a combination which causes or is likely to cause an [AAEC] within the relevant market in India and such a combination shall be void’. The introduction of a merger control regime has been the most controversial part of the Act in India, with Indian business interests maintaining that Indian companies need to have freedom to consolidate substantially in order to compete internationally. At the time of writing, the Indian government was continuing to consult with industry (on the basis of draft Combination Regulations on both procedural issues and the timing of the introduction of the regime.

The Act defines a ‘combination’ as an acquisition of shares, voting rights, assets, or control in which the combined assets or turnover of the parties exceed certain thresholds. Although separate thresholds are given for ‘group’ and ‘non-group’ combinations, the broad definition of the former category means that its thresholds will apply in almost every case. Those thresholds are combined assets of INR30,000 million (roughly €420 million) or combined turnover of INR120,000 million (roughly €1,700 million). Where either or both firms have assets or turnover outside of India, the thresholds are combined assets of US$2,000 million, including at least INR5,000 million (roughly €70 million) in India, or combined turnover of US$6,000 million, including at least INR15,000 million (roughly €210 million) in India. Although these thresholds could be met when only the enterprise being acquired has assets or turnover in India, the draft Combination Regulations provide that combinations where at least two parties to the combination do not have assets of INR 2,000 million (roughly €28 million) in India, or turnover of INR6,000 million (roughly €85 million) in India, will be deemed unlikely to give rise to an AAEC (although it is unclear whether or not such transactions would remain notifiable). Similar provisions apply to certain acquisitions of shares or assets for ordinary course investment purposes.

Notification of qualifying mergers is mandatory and no such merger can come into effect until the expiry of 210 days (a lengthy period by international standards) or CCI clearance, whichever is sooner. It is currently envisaged that this period will comprise a 30-day phase I inquiry for cases raising no or only minor issues; a 60-day phase I period for combinations raising more substantive issues, and the remainder of the 210 day period for detailed investigation of combinations which appear *prima facie* to give rise to an AAEC. Unusually, it is for the CCI rather than the parties to propose remedies in such cases (although the parties can respond to the CCI's proposal with a modified remedies package).

The assessment of whether or not a combination is likely to cause an AAEC involves consideration of a range of standard economic indicia listed in section 20(4) of the Act, which explicitly include both failing firm and efficiencies defences. As with the assessment of dominance in section 4 cases, however, the assessment of an AAEC in merger cases also includes reference to the ‘economic development’ criterion described above. It is unclear how often this provision will be relied on in practice to clear mergers that are likely to lead to an AAEC.

The Competition Act also is designed to regulate the operation and activities of combinations, a term, which contemplates acquisitions, mergers or amalgamations. Thus, the operation of the Competition Act is not confined to transactions strictly within the boundaries of India but also such transactions involving entities existing and/or established overseas.

Herein again lies the key to understanding the Competition Act. The intent of the legislation is not to prevent the existence of a monopoly across the board. There is a realization in policy-making circles that in certain industries, the nature of their operations and economies of scale indeed dictate the creation of a monopoly in order to be able to operate and remain viable and profitable. This is in significant contrast to the philosophy, which propelled the operation and application of the MRTP Act, the trigger for which was the existence or impending creation of a monopoly situation in a sector of industry.

The Act has made the pre-notification of combinations voluntary for the parties concerned. However, if the parties to the combination choose not to notify the CCI, as it is not mandatory to notify, they run the risk of

a post-combination action by the CCI, if it is discovered subsequently, that the combination has an appreciable adverse effect on competition. There is a rider that the CCI shall not initiate an inquiry into a combination after the expiry of one year from the date on which the combination has taken effect.

Competition Advocacy:

In line with the High Level Committee's recommendation, the Act extends the mandate of the Competition Commission of India beyond merely enforcing the law (High Level Committee, 2000). Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances. The Regulatory Authority under the Act, namely, Competition Commission of India (CCI), in terms of the advocacy provisions in the Act, is enabled to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the instance of the Central Government. The Central Government can make a reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. The Commission will therefore be assuming the role of competition advocate, acting pro-actively to bring about Government policies that lower barriers to entry, that promote deregulation and trade liberalization and that promote competition in the market place. Perhaps one of the most crucial components of the Competition Act is contained in a single section under the chapter entitled competition advocacy.

Problems with the 2002 Act:

The 2002 Act addressed many of the shortcomings that were contained in the Competition (Amendment) Act, 1996. It has strengthened the Authority's search powers, in particular enabling it to seize original documents; to enter private homes as well as company premises; and to use reasonable force to gain entry if necessary. It has also introduced a number of presumptions regarding documents which should enable them to be introduced as evidence without need to establish proof of authorship. Increasing the penalties for individual executives in cartel cases indicates recognition that such practices cause serious harm to the community at large. It also means that individuals accused of engaging in such behaviour can be detained and questioned by the police for up to 12 hours. Nevertheless some problems remain.

The presumption in section 6(2) of the Competition Act, 2002, that 'hard-core' activities have the object of preventing, restricting or distorting competition represents a partial move towards the US position where 'hard-core' cartel activities are regarded as illegal *per se.*

There are certain arguments behind competitive Act,2002 that developing countries like India do not need this act.

First, it is sometimes argued that free trade by itself be sufficient to protect the competitive process (Williams,1994) which is referred to as "Threat of Import Arguments".

Secondly, some argue that because of the complexity of Competitive law analysis, combined with weak institutional endowment of most emerging economies, adoption of a competitive law regime might produce more harm than a good , as the risk of mistaken decisions might be very high. (Rodrigeuz and Coate ,1997).

Thirdly, argument is made by some observers that competition law would be a luxury for rich countries and that developing countries have other more pressing priorities. Jenny(1999) suggests that a number of developing countries are not convinced that the adoption of a competition law or policy,practice etc. is appropriate during the first phase of economic development.

Finally, some commentators point out that implementation of competition laws in developing economies should take into account the specific characteristics of these countries. Gal (2001) argues that small economies need a specifically tailored competition policy, because they face different welfare maximization issues than large ones. Competition law in these economies should focus exclusively on the promotion of economic efficiency, which should be given primacy over other goals sometimes promoted by competitive regime ,such as dispersion of economic power and the protection of small business.

Despite above mentioned lacunae, the powerful arguments suggests that adopting and implementing competitive law regimes should be beneficial to emerging economies and attention should be paid to the specific characteristics to these countries, such as high degree of concentration in some industries, their limited institutional endowment and so forth. There is a risk that setting up of competitive regimes might not be an easy process as they are sometimes shared by government officials and industry interests. In brief, competition regimes should be based on the local circumstances of each country and a realistic enforcement agenda should be developed for each country.

6. Conclusions:

The Competition Act has been designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objects are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade of other participants in the market, all against the backdrop of the economic development of the country. However, the Competition Act is surprisingly compact, composed of only 66 sections. The legislation is procedure-intensive, and is structured in an uncomplicated manner. In the changed scenario, India desires a brand new law for competition and a new regulatory authority, which under this policy is the `Competition Commission of India'. The law will serve the purpose only if it is made independently, runs independently and is less expensive. The message is strident yet clear that a well planned exhaustive competition compliance programme can be of great benefit to all enterprises irrespective of their size, area of operation, jurisdiction involved, nature of products supplied or services rendered and the same is essential for companies, its directors and the delegates, key corporate executives to avoid insuperable hardships of monetary fines, civil imprisonment, beside loss of hard-earned reputation when the Competition Authorities, the media and others reveal the misdeeds in public. In order to increase the clarity and workability of the new regime, it is highly desirable that the CCI publish detailed procedural and substantive guidelines as soon as its application of the Act has bedded down. A good competition policy, along with a sound competition law, should help in fostering competition, economic efficiency, consumer welfare and freedom of trade, which should equip the Governments in meeting the challenges of globalization by increasing competition in local and national markets.

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