



**NATIONAL LAW SCHOOL
OF INDIA UNIVERSITY
BENGALURU**

**Faculty Development Programme on
COMPETITION LAW**

9th – 11th December, 2015

Indian Institute of Corporate Affairs
IMT—Manesar

under

*“Capacity Building Initiative in the Competition Area
under Trade Development Program in India”*



**DELEGATION OF
EUROPEAN UNION
TO INDIA**

Rationale for Competition Law and Economic Regulation

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Competition Act 2002

- The Competition Act, 2002 (ref. to as Act) is a Law meant to regulate market and enforce competitions
- What is Competition
 - that elusive force which creates the ambience of anticipation of some one or some other business going ahead.
- Why Competition
 - it helps to reduce costs, motivate innovations and ensure efficiency. In India the acceptance of benefits of competition to consumers is recent traceable to the outcomes of higher growth baskets, wider consumer choice and expansion of the basket of goods and services
 - Competition needs to be nurtured and markets regulated for benefits to accrue
 - Trade liberalization is one of the most effective ways to introduce competition
- Why an Act and why a Market Regulator
 - Markets tend to get distorted
 - Players in the market are often not for competition
- Basic underlying perception is that markets often require regulation to ensure their effective functioning towards which there are certain basic ground rules of competition and in the language of a regulator is that of 'level playing field'.
- To make markets work effectively is the role of the regulator – an independent body set up under a statute

Distinctions: Acts, Policy and Regulation

- Why a new Act as there is an existing Act the Monopolies and Restrictive Trade Practices Act 1969 (MRTP) for regulating the market
- Distinction between competition policy and competition law
- Policy is a statement of government intention
 - Advocates for a separate policy opine that other government policies such as trade policy, monetary policy, fiscal policy, industrial policy are inadequate
 - A counter view is that liberalization policies towards market orientation was based on either changes/modifications to above policies or removal
 - Law is a legal binding to bring competition and regulate markets that are amenable to competition
- Distinction between market regulator and sector regulators - on market structures amenable to competition and on natural monopolies
 - Natural monopolies are regulated by separate regulators
 - Or by the market regulator itself

Background to the Act

- Post independence markets were regulated – but regulated through the mechanism of ‘control and command’ termed the “Licence Raj”
- India adopted a mixed economy framework (public and private enterprises) where:
 - Capacity control and licensing constituted the major planks of our industrial policy
 - Many areas of production were reserved for the public sector or for small-scale enterprises.
 - Trade barriers with emphasis on import-substitution and reliance on capital goods production
- Tight leash on what , where and how the private sector could function
- Market structures that emerged in most industries were largely an outcome of government policy, not a consequence of free competitive firm interactions.
 - The multitude of controls led to fragmented capacity and muted competition.
 - Concentration of economic power
- The year 1991 marked the crucial turning point when a clear and comprehensive shift was made in the policy stance towards economic liberalisation
 - the new industrial policy placed reliance on market forces.
 - The so-called “license raj” ended; the protective tariff barriers were brought down.
- Economic liberalization shifted the divide between private and public in favour of a greater role for the private sector
 - through removal of entry barriers erected by the mechanism of licensing.
 - Markets as the mechanism for resource allocation replaced licensing.
 - Guided by the objective of improving efficiency, the new policy recognised the need for subjecting Indian industry to the forces of competition.

M RTP- Background

- MR TP enacted after several enquiries on increasing concentration of economic power
- Monopolies Inquiry Committee (MIC) 1964 constituted to:
 - Ascertain factors responsible for concentration of economic power
 - Ascertain their social and economic consequences
 - Suggest suitable legislation to protect public interest
- MR TP enacted in 1969 after modifications to the Bill drafted by MIC
- With MR TP the Foreign Exchange Regulation Act,1973
- MR TP Act was in consequence of directive principles of the State – Articles 38 and 39
 - Article 38 - State to secure a social order for the promotion of the welfare of the state;
 - Article 39 – Certain principles of policy to be followed by the State (which includes
 - That ownership and control of the material resources of the community are so distributed as best to subserve the common good
 - That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

Features of MRTP

- Objectives of MRTP
 - Prevention of concentration of economic power – by control of monopolies defined in terms of a threshold
 - Prohibition of monopolistic trade practices; restrictive trade practices; unfair trade practice
- Amendment to MRTP (1984)
 - Protection of consumers on misleading advertisements
 - Creation of a Director General of Investigation
 - Inclusion of new definition such as 'dominant undertaking'; interconnected undertakings
- MRTP essentially structuralist set in the framework of government regulation and policies
 - by 1991 MRTP limited to trade practices
 - Only powers of cease and desist
- Not in tune with economic liberalization, competition and market orientation

The New Market Act – Competition Act 2002

- Competition law a paradigm shift to embrace the needs and challenges of the new economic order.
- The *structuralist* Monopolies and Restrictive Trade Practices (MRTP) Act gave way to the *conduct oriented or behavioural* new competition law,
- The Competition Act 2002 which was enacted in 2003, amended in 2007, where under the Competition Commission of India (CCI) has been set up.
- As in most international competition laws, the Indian Act seeks to:
 - prohibit anti-competitive agreements, including cartels (S.3);
 - prevent abuse of dominant position (S.4); and
 - regulate mergers and acquisition above the specified threshold (S.5 and 6)
- The Act goes beyond the MRTP. It embraces trade policy to overarching competition policy in line with the orientation of WTO (1969) of Foreign Direct Investment; Intellectual Property Rights
- As of now separate Acts for:
 - Consumer Protection Act ,1986 – redressal process for individual consumers
 - Sectoral Regulators – starting with telecom and later electricity

Preamble of the Competition Act v MRTTP

Preamble to the Competition Act,

“*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, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto*”

Preamble to the MRTTP Act states:

“*An Act to provide that the concentration of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connection therewith or incidental thereto.*”

- The Act places
 - Focus on economic objectives,
 - defines the role of the Commission as an economic instrument, where dispensation of justice is primarily to promote and sustain competition in markets
 - whilst also protecting the interests of consumers.
- More emphasis on the interests of the “common man” than on competitors or the competitive process. Therefore, the onus on the Commission, to protect consumer interest is very heavy.

Constitution/Preamble of other Countries

- **USA** "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."
- **European Union Competition Law of EU** set in the framework of TEU. Article 3(3) of the TEU provides: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, **a highly competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment ..." (emphasis added).
- Article 3(1) of the TFEU further provides: "The Union shall have exclusive competence in the following areas: (a) customs union (b) **the establishing of the competition rules necessary for the functioning of the internal market...**"
- **Individual European countries - Germany** in the Act Against Restraints of Competition is considered as the 'constitution of the free market economy'
- **The Preamble to the (South African) Competition Act of 1998** sets out a number of public policy goals, including competition, and provides:
 - "The people of South Africa recognize:
 - That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.
 - That the economy must be open to greater ownership by a greater number of South Africans.
 - That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.
 - That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.

Essential Features of the Competition Act

- Competition is not defined in the new Act while market power and its abuse leave a vast area for interpretation by the Commission.
- The Act is not rigid “*per se*” - Section 4 sets out a *per se* prohibition of an abuse of dominance.
- An effect-based and rule of reason emphasized- **Economic Law**
 - there are multiple ways to devise rules or criteria for the evaluation of unilateral behavior of firms.
 - A presumption-based approach widens the scope of Type I error (false positives).
 - The simplicity of *per se* rules may provide a certain degree of legal certainty, it may deter desirable conduct and adversely affect consumer welfare.
- A false positive occurs where a competition authority incorrectly holds pro-competitive behavior as abusive - may result in “chilling competition.”
- The key challenge stems from the fact that the theories of harm of foreclosure and/or restrictions of competition are often not robust or, even if they are, empirical validation or quantification gets severely constrained due to a host of factors.
- Following the black letter of the law may not fully meet the ends of ensuring competitive markets.
- A more nuanced, layered economic analysis at the Commission level may reveal that consumer benefits may not really be as apparent as suggested in the first instance
- Precipitous analysis may risk distorting competition and market functioning emphasizing the need for economic analysis and economic evidence
- Special features of the Act:
 - Right of redressal on competition issue lies with the Commission and not the courts
 - The Act is Agnostic – individual right to file a case not a right to liability
 - Advocacy is mandated – advice to government
 - Right to levy penalties and issue remedial measures (structuralist and behavioral) – the latter must follow the former in cases of Abuse of Dominance
 - Competitive neutrality

Elements of Competition Act

There are three elements:

- Section 3 : Prohibiting anti-competitive agreements - Agreements that cause or are likely to cause appreciable adverse effects on competition within India are anti-competitive agreements
- Section 4: Prohibiting abuse of dominant position – dominance defined in terms of position of strength in a relevant market which enables it to:
 - Operate independently of the competitive force prevailing in the relevant market
 - Affect its competitors or consumers or the relevant market in its favor
- Section 5&6: Regulating combinations – which cause or likely to cause AAEC on competition – ex ante
- There is a fourth element : competition advocacy.

Economic Tools – Economic Evidence

- Analytics of competition relies on economic theory of micro-economics and industrial organisation
- Problems of AoD and of Combinations are to take note of possible abuse in conditions of monopoly, oligopoly
- Price and quantity estimates are required for
 - Defining the relevant market
 - For quantifying unilateral effects
 - For estimating the strength of these effects
- Behavioural analysis and games of strategy using game theory techniques have come to the forefront
- The use of economic evidence in decisions by anti-trust or competition authorities has come a long way from simple economic analysis to ‘theoretical arguments’ as evidence earning the status of ‘revolution in the economics of competition’.
- The shift from ‘per se’ to ‘rule of reason’ and to a more economic approach is also testimony to the maturing of competition law and its enforcement.
- How far has the Commission proceeded – hesitancy on economic evidence more on legalese
- Less faith in the market and more in regulation – [How the Act Works](#)

Act and the Sections

Section 3 – Prohibition of Agreements

Section 3 – Anti-competitive Agreements

3 (1): No person or enterprise or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or likely to cause an appreciable adverse effect on competition

3(2):Such agreements are prohibited by law. Such agreements are VOID.

3(3): Agreements are defined very widely. Includes any arrangement or understanding or action in concert; formal and informal, written or oral ;not meant to be legally enforced; including cartels engaged in identical or similar trade of goods or provision of services. Agreements between enterprises or persons etc. (including cartels) (horizontal agreements)engaged in trade of identical or similar products **shall be presumed** to have 'Appreciable Adverse Effect on Competition' (AAEC) if they

- Directly or indirectly , determines purchase or sale prices;
- Limit or control production, supply, markets, technical development, investment or provision of services .
- Shares the market or source of production or provision of service by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- Directly or indirectly results in bid-rigging or collusive bidding

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures, if such agreement increases efficiency in production, supply distribution, storage, acquisition or control of goods or provisions of services

Vertical agreements

Section 3(4) are agreements between enterprises at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including –

- Tie-in arrangement;
- Exclusive supply agreement;
- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance

Shall be an agreement in contravention of sub-section (1) of Sec (3) if such agreements cause or is likely to cause an AAEC in India

Where vertical agreements are concerned:

- No presumption of AAEC
- Rule of Reason test
- Preponderance of probability
- Burden shifts to the Commission

Concerns agreements between manufacturer and retailers – barring retailers from selling franchised products in locations other than those specified in the agreements.

Vertical restraints reduce intra-brand competition but promote inter-brand competition by allowing efficiencies in the distribution of products – hence Rule of Reason approach

Explanation to Sec 3 (4) details out the different types of Agreements which have been state above

Section 3(5)IPRs

Sec 3(5) Nothing in this section shall restrict –

i) *the right of any person to restrain any infringement of, or to improve reasonable conditions as may be necessary for protecting any of his rights which have been or may be conferred upon under :*

Agreements involving 6 IPR laws that impose reasonable restrictions are out of purview of the general prohibition

- Copyright Act
- Patents Act
- Trade and Merchandise Marks Act
- Geographical Indications of Goods Registration and Protection Act
- Design Act
- Semi-conductor Integrated Circuits Layout Design Act

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply distribution or control of goods or provision of services for such report.

• Examples of possible unreasonable restrictions

- Patent pooling is a restrictive business practice
- When technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete
- Tie-in arrangement is yet another restrictive business practice and can cover:
 - ❖ Requirement to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers.
 - ❖ Payment of royalty after expiry of patent has expired or that royalties payable in respect of unpatented know-how
 - ❖ Restriction on competition in R&D or prohibits use of rival technology.
 - ❖ Price fixation.
 - ❖ Territorially or customers restrictions
 - ❖ Imposing a trade mark use requirement on the licensee is prejudicial to competition, as it could restrict a licensee's freedom to select a trade mark
 - ❖ Indemnification of the licensor to meet expenses and action in infringement proceedings

Determination of AAEC - Section 19 (3)

The Commission shall, while determining whether an agreement has an AAEC mainly with reference to Sec (3)(4) shall have due regard to all or any of the following factors, namely;

- creation of barriers to new entrants in the market;*
 - Driving existing competitors out of the market; foreclosure of competition by hindering entry into the market;*
 - Accrual of benefits to consumers;*
 - Improvements in production or distribution of goods or provision of services;*
 - Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services*
-
- [Section 3\(5\)IPRs](#)*

Section 4 – Prohibition of Abuse of Dominance (AoD)

Section 4 – Abuse of Dominant Position

Section 4

(1) No enterprise or group **shall** abuse its dominant position

(2) There shall be an abuse of dominant position under sub-section (1) if an enterprise or group-

- a) Directly or indirectly, imposes unfair or discriminatory
 - I. condition in purchase or sale of goods or services, or -
 - II. price in purchase or sale (including predatory price) of goods or services or

(Explanation clarifies shall not include such discriminatory conditions or prices which may be adopted to meet the competition)

- b) Limits or restricts;
 - i. production of goods or provision of services
 - ii. technical or scientific development relating to goods or services to the prejudice to the consumer
- 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 market

■ Explanation

- a) Dominant position means a 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.”

- b) “predatory” price means the sale of goods or provision of services at a price which is below the cost, as maybe determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

Determination of dominant position

- There is no arithmetic figure - % of market share
- Rule of reason test – many factors to be considered by the Commission in determination of dominance
- Reference is to Sec 19 (4)
 - The Commission shall while inquiring whether an enterprise enjoys a dominant position or not under Sec (4) have due regard to all or any of the following factors, namely:-
 - a. Market share of the enterprise
 - b. Size and Resources of the Enterprise.
 - c. Size and importance of the competitors.
 - d. Economic power of the enterprise including commercial advantage.
 - e. Vertical integration of the enterprise or sale
 - f. Dependence of consumer
 - g. Monopoly and dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise.
 - h. Entry barriers including barriers such as regulatory barriers, financial risks, high capital cost of entry, marketing entry barriers, technical entry barriers, economies' scale, high cost of substitutable goods or services.
 - i. Countervailing buying power
 - j. Market structure and size of market
 - k. Social obligation and social cost
 - l. Relative advantage by way of the contribution to the economic development by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition.
 - m. Any other factor the Commission may consider relevant for the enquiry.

Relevant Product Market

- Dominance must be established in the relevant market - Determination of the relevant market first
- Relevant market has two aspects
 - Relevant product market
 - Relevant geographic market

- Relevant product market is the smallest set of close substitutes

“..a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”

Determine substitutability of products – Demand side substitutability - shift of demand to competing product on price rise (SNNIP Test)

Limitations of SNNIP Test

- Factors to be considered while determining relevant product market:
 - Physical characteristic of product
 - End-use of product
 - Price
 - Consumer preference – empirical evidence

Relevant geographic market

- Relevant geographic market can be defined as the area in which products are available at approximately the same price given transport costs and any increase in demand can be met from neighbouring areas profitably.
- Factors to be considered:
 - Shipment cost – very important
 - Regulatory trade barriers – octroi/sales tax
 - Local specification requirements – language display
 - National procurement policy – only local (state-level or national) suppliers permitted
 - Adequate distribution facilities – perishable products

Section 5&6 Combinations- Mergers & Acquisitions (M&A)

- Section 5 Combination covers (M&A)- Combinations are ex ante provisions as against ex poste assessment of dominance
 - ❑ Acquisition of shares/voting rights/assets
 - ❑ Merger
 - ❑ Amalgamation
 - ❑ Acquiring control over another enterprise in the same line of business
- Combination notification mandatory above defined threshold in terms of total assets of turnover plus domestic nexus
- Section 6 any combination which causes or is likely to cause appreciable adverse effect on competition is void
- Commission reference is to section 20 (4): *For the purpose of determining whether a combination would have the effect of or is likely to have an AAEC in the relevant market the Commission shall have due regard to all or any of the following market:-*
 - a. Actual and potential level of competition through imports*
 - b. Extent of barriers to entry*
 - c. Level of combination in the market*
 - d. Degree of countervailing power*
 - e. Likelihood that the combination would result in the parties to the combinations being able to significantly and sustainably increase prices or profit margin*
 - f. Extent of effective competition likely to sustain in a market*
 - g. Extent to which substitutes are available or likely to available*
 - h. Market share in the relevant market, of the persons or enterprises in a combination, individually and as a combination*
 - i. Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors*
 - j. Nature and extent of vertical integration*
 - k. Possibility of a failing business*
 - l. Nature and extent of innovation*
 - m. Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have AAEC.*
 - n. Whether the benefits of combinations out way the adverse impact of the combination*

Points to Ponder

- The Competition Act is still within the framework of the Constitution- Sovereign Socialist Secular Democratic Republic – Article 38 and 39
- Is there a tendency to combine policy with law
- Is the Act and hence Commission inclined towards a larger but undefined goal of consumer protection
- Apprehension of economics with the changing paradigm of platforms and networks that tend towards monopolization

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Thank You

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