INTERNATIONAL JOURNAL OF RESEARCH IN COMMERCE, ECONOMICS AND MANAGEMENT

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- Hunker, H.L. and A.J. Wright (1963), "Factors of Industrial Location in Ohio," Ohio State University.

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SOCIAL RESPONSIBILITY OF ENTERPRISES IN A GLOBALISED INDIAN ECONOMY - AN ANALYSIS

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ABSTRACT

The paper discusses briefly the scenario that necessitated the evolution of Competition Law in India and the lacunas in the Monopolies and Restrictive Trade Practices (MRTP) Act. Further, the paper examines the various modalities available in the Competition Act for restricting or prohibiting anti-competitive agreements entered into between enterprises. Finally, the drawbacks existing in the enactment are brought to light followed by suggestions to plug the same.

KEYWORDS

Enterprises, Social Responsibility, India.

INTRODUCTION

In this paper the term 'Enterprise' is dealt with to mean 'A company organized for commercial purposes'[1]

In the present day modern society, people predominantly prefer to do business in the form enterprises for the varied advantages such as legal recognition of independent corporate existence, perpetual succession, limited liability, easy transferability of securities, public monetary contribution and creation of floating charge on debenture issues, which are benefits uniquely available only to business enterprises in the corporate sector.

Since 1991 the Government of India has adopted a liberalized economic policy with the aim of increasing the foreign exchange flow into India and towards this end it encouraged Multi National companies (MNC) & foreign institutional investment in India. This changed scenario created by espousing of Liberalisation, Privatisation & Globalisation constrained Indian companies to, all of a sudden, compete with huge enterprises and they weren't on the same footing with the latter corporate, in terms of exposure in the global arena, availability of funds, man power, experience, among other factors. Further this necessitated India to carry out its obligations under World Trade Organization (WTO), General Agreement on Trade & Services (GATS), Trade Related Aspects of Intellectual Property Rights (TRIPS) etc.

The MRTP Act, 1969 was framed primarily to prevent concentration of economic power as amongst companies incorporated & transacting business in India. It was not suited to deal with the aspects of maintain & promoting competition in the commercial sector, which would act as a safeguard in protecting Indian companies from being overridden by MNCs. Further some of the provisions in the said Act were deleted since they posed an obstruction to encouraging private investment from foreign territories as they required prior approval of Central Government in varies matters regarding foreign investment which would significantly decelerate entry of foreign enterprises into India amounting to discouragement. Thus, MRTP Act could not meet the situation created by the incursion of MNCs into the Indian market, in maintaining a balanced operational field for both Indian & foreign enterprises.

Global experience indicates that private monopolies can be detrimental to national economy. Free & healthy competition is mandatory for achieving a vigorous economy.

To perform this mission, the Central Government appointed, in 1999 a Committee (The Raghavan Committee) to survey the Indian economic scene & suggest suitable recommendations for formulating a competition policy. The Committee suggested a new legislation in this regard, for the following reasons.

- The term 'Competition' has been used sparsely in the MRTP Act (only in 2 places);
- Definitions of important terms relating to competition weren't stated in the MRTP Act-dominance, cartel, collusion, boycott, refusal to deal, bid rigging, predatory pricing etc. Without definitions in the Act, it would not be possible to effectively prove such behaviour & penalize the perpetrators. This is likely to; in turn lead to contradictory judicial interpretations.
- The term 'Cartel' which is a major tool used to reduce & finally eliminate competition, not mentioned in the MRTP Act.
- Existing Law inadequate to deal with implementation of the WTO agreements.
- No provisions to deal with merger of enterprises as found in the Competition Laws of other countries. at par with other modern competition Laws.
- Similar provisions relating to unfair trade practices found in both Consumer Protection Act, 1986 & MRTP Act, 1969.

Thus, the Competition Act, was enacted in the year 2002.

On the one hand there needed to be created a balanced atmosphere wherein all companies dealing with identical goods/services will have a fair opportunity to compete in the market. On the other hand, it is mandatory to safeguard consumers' benefit and ensure that they are not adversely affected by the phenomenal growth of the corporate sector due to influx of MNCs resulting in mammoth companies entering into agreements to stifle and ultimately eliminate (local) competition and ultimately monopolizing the market to the detriment of the consumers. Further, unrestricted private monopolies may amount to impairment of the National economy.

The principal objective is to maintain and protect the competitive process since competition promotes efficiency including dynamic efficiency, increases consumer welfare and contributes to the progress of the economy as a whole.[2]

The paper endeavours to examine, with the aid of relevant case Law, the possible adverse effects anti-competitive agreements to manifest the ever growing tendency of enterprises to control and gradually monopolise the relevant markets, how cartels are formed to achieve this and statutory provisions incorporated in the Competition Act in India, to curb and prevent enforcement of anti-competitive agreements and in so doing create a level balanced field of operation for all competing enterprises.

CARTELS

Where two or more enterprises enter into an agreement with the aim of reducing or eliminating competition in the relevant market, they are usually termed as cartels. Section 2(c) of the Competition Act, 2002 as amended by Competition (Amendment) Act, 2007 is very expansive in including any association of producers, distributors, sellers, traders, service providers who, by agreement amongst themselves, limit, control or attempt to control, production, distribution, sale, price of, trade in goods or provision of services.

Cartel is a presumed to be an anti-competitive agreement.

In the following case Laws it has been held that the association or agreement formed results in a cartel.

[1] http://dictionary.reference.com/browse/enterprise (accessed on 14.3.2011)

[2] Competiton Law Today Concepts, Issues & The Law In Practice -edited by Vinod Dhall-pg.3. (accessed on 14.3.2011)

Madras Jewellers & Diamond Merchants' Association, Re –Trade Association asking its members not to sell below the rates announced by it, with a threat of expulsion in the event of non-compliance, was held to be a cartel.[3]

In DGIR v. Modi Alkali[4], it has been observed that the three essential ingredients of cartel are-(i)Parity of prices; (ii)Ag by way of concerted action suggesting conspiracy; (iii)To gain monopoly, restrict or eliminate competition'.

Cartelisation imposes unjustified cost on consumers. Price fixing is illegal per se, therefore, further enquiry on the issue of intent or the anti-competition effect is not required-as held in *Sumitomo Corpn In, Re[5].*

However, not always will an agreement between enterprises be struck down as anti-competitive in nature. For instance, in *Haridas Exports v. All India Float Glass Mfgrs Association*, it was held that protecting inefficient industry is not 'public interest' & in such cases 'cartel' is permissible. Also, by way of Obiter Dicta, it was stated that the MRTP Commission cannot pass an injunction for imports at predatory prices, if the cartel is selling goods to India at lower prices & still making profit, it will not be in the interest of general body of consumers in India to prevent import of such goods. The era of protectionalism is now coming to an end.[6]

HORIZONTAL & VERTICAL RESTRAINTS

Anti-competitive agreements maybe broadly classified into two groups, viz., horizontal restraints which are cartels & vertical restraints.

Vertical Restraints: Any agreement amongst enterprises/persons-at different stages or levels of-the production chain in diff markets-in respect of production, supply, distribution, storage, sale, price of, trade in-goods/services-shall be an agreement in contravention of S.3(1)-If such agreement causes or is likely to cause an appreciable adverse effect on competition in India (i.e., by applying the rule of reason)-S.3(4).

Thus, where the parties to the agreement are in different stages or levels of the production chain, this practice is called a vertical restraint.

In *Wisconsin Electric Co v. Dumore Co (Ohio)[7],* it has been observed that, 'The equitable Doctrine of 'Unfair Competition' is not confined to cases of actual market competition between similar products of different parties, but extends to all cases in which 1 party fraudulently seeks to sell his goods as those of another.'

PRO-COMPETITIVE BENEFITS OF VERTICAL RESTRAINTS

Occasionally, a vertical restraint maybe allowed when proved to be pro-competitive sans causing adversely affective the competitive process. In fact, the restraints may be necessary in certain scenarios, to ensure that the post-sales support to the retailers provided by the manufacturers.

PRESUMED ANTI-COMPETITIVENESS

Any agreement which has any of the under-mentioned effect shall be presumed to be anti-competitive practice.

a) Directly/indirectly determines purchase/sale prices;
b) Limits/controls-production/supply/markets/tech development /investment or provision of services;
c) Shares the market or sources of production/services by way of-allocation of geographical area of market/types of goods/ services/# of customers in the market/any other similar way;
d) Directly/indirectly results in bid rigging or collusive bidding

The onus of proving that the agreement is not anti-competitive, i.e., will not have any appreciable adverse effect on competition in India, falls on the defendant.

But, where a Joint-venture agreements would increase efficiency in production, supply, distribution, storage, acquisition or control of goods/services, it will not be labelled as anti-competitive as it would not only be of advantage to enterprises as it will lead to systematic operations but also will benefit consumers.

RULE OF REASON & PER SE RULE

The two rules that are applied in ascertaining whether an agreement between enterprises is anti-competitive resulting in suppression of competition are rule of reason and per se rule. In the former the facts and circumstances of each case is analyzed in deciding the effect of the agreement, if permitted to be performed.

The rule of reason-explained by U.S. Supreme Court in *Board Of Trade Of City Of Chicago v. U.S.[8]* –"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates & perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[9]

This principle has been accepted by the SC of India also and applied in *Tata Engineering (TELCO) v. Registrar Of Restrictive Trade Agreement[10].*

The per se rule is applied literally. In U.S. in the early periods in the administration of Sherman Act, 1980-there was a blanket ban of all contracts if in the form of Trust, in restraint of trade/commerce. The reasoning being they were regarded as 'per se' bad.

Therefore it was regarded as unnecessary, to determine whether the agreement or clauses there in, limit or restrict competition, because it has been in the past, well established that the nature of such agreements was to cause anti-competitive effects & can be assumed to be prima facie, anti-competitive, sans going into the intricacies of the matter.

The concept of 'Per se rule' has been explained thus in *Northern Pac. R Co v. U.S.[11]* –"There are certain agreements or practices which because of their pernicious effect on competition & lack of any redeeming virtue are conclusively presumed to be unreasonable & therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

In India-these 2 rules are applied dichotomously in the Competition Act, 2002:

a) Section 3(3)(a) to (d) – Following clauses in ags presumed to have an appreciable adverse effect on competition-

- (a)Directly or indirectly determines purchase/sale prices;
- (b)Limits or controls-production, supply, markets, technological development, investment and/or services;
- (c)Allocation of geographical area of market/type of goods/services or number of customers in the market or any similar way;
- (d)Directly or indirectly results in big-rigging or collusive bidding.

b) Section 3(4)(a) to (e) – will be examined by applying 'Rule of Reason'-in determining whether they cause or likely to cause an appreciable adverse effect on competition in India.

- (a)Tie-in-ag;
- (b)Exclusive supply ag;
- (c)Exclusive distribution ag;
- (d)Refusal to deal;
- (e)Resale price maintenance.

[3] (1994) 2 CTJ 198 (MRTPC)
[4] (2002) 51 CLA 12 (MRTPC)
[5] (2001)42 CLA 12 (MRTPC)
[6] AIR 2002 SC 2728
[7] 35 F.2d 555 (1929)
[8] 246 US 231 (1918)
[9] 'Competition Law In India-Policy, Issues and Developments' by T. Ramappa (2nd Edition) pg.75.
[10] (1997) 47 Comp. Cas. 520 (SC)
[11] 356 US 1

STATUTORY PROHIBITIONS AS PER COMPETITION ACT, 2002

Apart from presumptions of Law, the inclusion of certain clauses in agreements as between enterprises are likely to adversely affect competition. Some such instances are discussed hereunder.

RESTRICTIONS ON OUTPUT/SUPPLY: EXCLUSIVE DISTRIBUTION AGREEMENT: [S.3(4)-Expln (c)]:

Agreements that limit or control-production, supply, markets, technical development, investment or provision of services is a presumed anti-competitive agreement.

As stated in the MRTP Act it means, agreements which have the effect of restricting or with holding or limiting-output, supply of goods or allocating any market or area/s for the disposal of goods.

DGIR (Director General Of Investigation & Registration) v. Bayer (India) Ltd[12], a condition in agreement with distributor that he will not make supplies to chemists, Doctors & Government or private institutions even though he accepts the order. That the seller will sell directly to these customers without any commission to the distributor was held to be an anti-competitive agreement.

In DGIR v. Titan Industries[13], a clause in an agreement of Titan Industries with a franchisee that the latter will not deal in products of a similar nature for a period of 3 years within radius of 5 Kms from showroom, from the date of determination of agreement, was held to be a restrictive trade practice.

However, in DGIR v. Rajshree Cement[14], a clause that the dealer will concentrate on a particular area was permitted as permissible if there is no prohibition on him from effecting sales in other areas.

TIE-IN-SALE: (OR-FULL LINE FORCING): [S.3(4)-Expln (a)]:

Includes any agreement forcing a purchaser of goods to purchase some other goods or service along with the goods he wishes to purchase, thereby he is constrained to incur unnecessary expenditure. Also, this type of tie-in-sale results in reduced competition in the supply of the tied product.

The product or service required by the buyer is called tying product.

The product or service that is forced on the buyer is called the tied product/service.

In Re, R.P. Electronics[15] –Requiring a customer to sign up for a service contract while buying goods, in *Chanakya & Siddharta Gas Co, In Re*[16] –Making it mandatory for a customer to buy gas stove while giving gas connection, in *DGIR v. SBI* –The Bank asking person to open a fixed deposit with Bank while allotting him a locker, in *Amar Jeevan Public School, In Re*[17] –School making it compulsory to buy uniforms & books only from its own shop, in *United Radio & Television Co, In Re*[18] –Requiring a customer who is purchased a Television set to also buy voltage stabiliser from the seller-were all held to be anti-competitive agreements involving an element of tie-in.

However, in *TCI, In Re*[19] –it was stated that assertion by car manufacturer that, during the warranty period, air-conditioner can be fixed in the car only by authorised dealer to ensure that improper air-conditioner doesn't affect performance of car during warranty; Manufacturer stipulating that distributors shall maintain a minimum quantity of spare parts for machinery & equipment supplied by them in order to ensure prompt service; Carrier of goods charging an additional sum of money for goods to be transported at the carriers' risk, there being no compulsion on customers as they were free to send goods either at owner's risk or at carrier's risk. Hence, charging extra amount by transporter for taking goods at his risk is not tie-in sales.

EXCLUSIVE SUPPLY AGREEMENT: [S.3(4)-Expln (b)]:

Consists of an agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

RESALE PRICE MAINTENANCE [S.3(4)-Expln (e)]:

Includes any ag 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 be charged.

For instance in *Calcutta Goods Transport Association v. Truck Operators Union*[20] –Association of lorry owners fixing freight rates & not allowing members of association to charge price lower than that fixed by association is RTP.

It was observed in DGIR v. Infar (India) Ltd[21] that if the price mentioned is 'Maximum Retail Price' then it is inherent that the retailers are at liberty to sell the goods at prices below the MRP & hence unnecessary to expressly state this.

As regards Newspapers being the subject matter of the agreement they are exempt from this provision because it is crucial that they should reach speedily the public & permitting retailer to bargain the price would cause a delay, as pointed out in *Registrar v. Bennett Coleman & Co Ltd*.[22]

Nonetheless, if a manufacturer sells goods through his own retail outlets & sets the prices to be charged for his products in the showrooms, it is called direct price maintenance & this is allowed. This is adopted by huge enterprises such as Bata, Gwalior etc.

REFUSAL TO DEAL: [S.3(4)Expln (d)]:

Includes-any agreement which restricts/likely to restrict-by any method-the persons/classes of persons to whom goods are sold or from whom goods are bought.

AGREEMENT NOT ANTI-COMPETITIVE: [S.3(5)(i)]:

The under listed Enactments empower entities to impose restrictive covenants in any agreement they enter into with other enterprises, in order to protect their rights which are conferred upon them by the statutory provisions contained in the various Acts, by declaring that they are not anti-competitive in nature, thereby preventing any infringement of the same. The Legislations which armour the enterprises to include restrictive or prohibitive stipulations are

- ✓ The Copyright Act, 1957.
- ✓ The Patents Act, 1970.
- ✓ The Trade & Merchandise Marks Act, 1958 OR The Trade Marks Act, 1999.
- ✓ The Geographical Indications Of Goods (Registration & Protection) Act, 1999.
- ✓ The Designs Act, 2000.
- ✓ The Semi-conductor Integrated Circuits Layout-Design Act, 2000.

RIGHT FOR EXCLUSIVE EXPORT

[12] RTPE 121 of 1988 decided on 29.7.1994 – (1995) 81 Taxman 178n(Mag) (MRTPC)
[13] (2001) 43 CLA 293 (MRTPC)
[14] (1995) 83 Comp. Cas. 712 (MRTPC)
[15] RTPE 73/86
[16] RTOE 11/1985
[17] Decided by MRTPC on 01.12.1992
[18] RTPE No.73/1987
[19] (1995) 19 CLA 26 (MRTPC)
[20] 1984 3 CLJ 265
[21] (1999) 35 CLA 250 (MRTPC)
[22] Taxman's Guide To Competition Law, pg.23

Section 3(5) (ii) protects 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 export.

CONCLUSION & SUGGESTIONS

India has come a long way since it decided to adopt a liberalized economy in 1991 & progressively equipped itself to deal with the influx of Multi National Enterprises and the major step in this attempt is the enactment of the Competition Act, 2002 along with the major amendments made to it in 2007. This Legislation has served effectively in reining in & eliminating the multifarious ways in which enterprises have often tried to minimize & ultimately monopolize the relevant markets.

Nonetheless, there are a few glaring lacunas in the Competition Act, 2002. Firstly, if an anti-competitive practice is adopted by an enterprise situated outside India & thus not subject to the jurisdiction of authorities within the geographical limits of India, how are they to be controlled if their activities adversely affect competition within India? The Competition Act wide Section 32 provides for inquiry into situations where-(i)an anti-competitive agreement falling u/s.3 of the Act has been entered into outside India, or any party to such agreement is outside India; (ii)Any party abusing the dominant position is outside India; (iii)A combination or (d)Any other practice arising out of such agreement or dominant position or combination is outside India, if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect in the relevant market. The primary flaw in this section is that it is silent as to what further action the Commission is to take once the inquiry is completed. Neither the types of Orders that the Commission may pass nor the means of enforcement of such Orders is stated in the Competition Act. The modes operandi in enforcing the decisions of the Competition Commission against enterprises placed outside the territory of India & that do not operate within India, have not been incorporated into the Act.

As of now there are no provisions, in the Competition Act, for dealing with issues relating to e-commerce Internet trading. As much of the entrepreneurial operations are done with the use of internet, it becomes quit-essential that provisions for regulating the same should be incorporated into the Competition Act.

Another quandary is in relation to the procedural aspects of Competition Act. Section 19(1) sets out the procedure for commencing inquiry into an anti-competitive agreement. It states that the Commission may inquire into any alleged contravention of the provisions contained in Section 3(1) suo motto, or on the receipt of a complaint from any person, consumer, or trade association or on a reference made by the central or a state government or a statutory authority. But, a common man, as a consumer or otherwise would not have the means of knowing about the terms of agreements entered into by enterprises with suppliers, sub-suppliers, agents, distributors, retailers etc at different places in India and their implications on competition. Anti-competitive agreements are pre-dominantly entered into by commercial enterprises, many of them are huge domestic and foreign enterprises involving a network of subsidiaries and their agreements wouldn't be available the public for perusal & will be accessible only to entities concerned with their execution. Sans perusing the agreements it would be unfeasible to detect whether any of the covenants set out in their agreements are in contravention to section 3(1) of the Competition Act, 2002 and without this knowledge it is impossible to initiate any action against such enterprises for eliminating their anti-competitive practices even though adequate measures may be provided in the Competition Act, 2002.

Adequate bilateral treaties such be entered into by India enabling it to reach even enterprises operating outside India but impacting business within the country by having an appreciable adverse effect of competition in India.

In order to enable the public, especially consumers be aware of the terms & conditions of the agreements that enterprises enter into, thus enabling them to know whether they are anti-competitive, major agreements as between manufacturers & retailers, distributors should be made to be published, by Statutory requirement, as in the case of Prospectus of companies inviting public monetary contributions, which has been made a mandatory pre-requisite as per Section 56 of the Companies Act, 1956. Suitable legislations should be made towards manifestation of this.

In conclusion it may be stated that the Competition Act, 2002 as amended in 2007, has equipped India in rising to global standards and streamlining enterprises in fulfilling their social responsibility in operating in a market where a healthy competitive spirit is maintained.

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