

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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IMPACT OF COMPETITION ACT ON ILLEGAL BUSINESS PRACTICES IN INDIA

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ABSTRACT

Competition Act 2002 brought new era of economic control and judicial interpretation. It amended the judicial setup of the country and reshaped the channel of communication on international level for business control. The predecessor law MRTP Act 1969 was classical version with object to manage the society and the business environment. The effective remedy under the classical law was inquiry by MRTP Commission. It was welfare measure with legal face to inspire confidence in society that law keeps check and it protects. The change of legal regime was forced by national and international events of economic liberalization and globalization with the entry of internet and mobile boom and the paper aims to check the impact of competition law on illegal business practices. The paper highlights the changes brought in by new law and the effective control over the business environment due to change in legal regime. The challenges faced by new law and effect of amendments on business environment. The need of changes if any expected in future to manage the national economy are also part of research work.

KEYWORDS:

The keywords for the paper are:

Competition Act, 2002,

Impact

Quasi judicial setup

Illegal business practices

INTRODUCTION

In this modern globalized world, competition is an entity not unknown to anyone. Competition as we understand is a thought of our mind that creates a need and forces us to carry out struggle for achieving the objectives as per needs. Cambridge dictionary defines competition as “a situation in which someone is trying to win something or be more successful than someone else.” There is competition in business, with sole objective of achieving money and the money comes with perfection. Soon after independence, the Government brought statutory enactment in 1969 to control business monopoly. For common man, the statute was absurd because the statute was effective for big business houses and in 2002; the statute controlling the monopoly was replaced by another statute controlling competition. It is pertinent to note that the entire scenario changed from monopoly to competition. There was gap of about 30 years and formation of special commissions to undertake study for bringing the statutory enactment.

By this research paper we cannot declare the action of Government or the Commissions that brought the statutory enactments as valid or invalid but this study was undertaken to access the impact of Competition Act on illegal business practices in India. It was comparative study of past and present law carried out with an objective of understanding the role of ideology that brought about the legal provisions related to law of competition.

The Monopolies and Restrictive Trade Practices Act, 1969

The MRTP Act was not an accidental invention of our Parliament. It was based on thorough Research and based on Laws enacted around the world. The report of High Powered Expert Committee on Companies and MRTP Acts¹ clearly discussed about the adoption of anti-monopolistic laws around the world.

Federation of Canada	It came into existence in 1857	Anti-monopoly legislation enacted soon thereafter in 1889
Federation of Australia	It came into being in 1900	Industries Preservation Act of 1906,
United States of America	1890	Sherman Act
United Kingdom	1948	Anti-monopoly legislation starting with the Monopolies and Restrictive

¹ Para 1.16 Introduction

		Practices (Inquiry and Control) Act,' 1948
whole of Western Europe, Japan and Latin American countries		Anti-monopoly legislations
United Nations Conference on Trade and Development Fourth Session held in Nairobi	May, 1976	Measures to control monopoly and restrictive trade practices were recognised

The MRTP Act was enacted after lot of research and recommendations. The first study was chaired by Mr Hazari² who studied industrial licensing procedure under the Industries (Development and Regulation) Act 1951. The report submitted by committee concluded that the working of the licensing system has resulted in disproportionate growth of some of the big business houses in India. The second study was by Professor Mahalonobis in Oct 1960 wherein it was reported that big business houses were emerging because of planned economy model practiced by the Government. The third study was carried by Monopolies Inquiry Commission under the Chairmanship of Mr Das Gupta who submitted his report in October 1965.

The MRTP Act 1969 was enacted to control monopolies by business houses. The Act was not applicable to companies and undertakings owned by Government, financial institutions and registered cooperative societies³. The report of High Powered Expert Committee on Companies and MRTP Act have stated that⁴ *certain criticisms have also been voiced about the dilution of the role given to the Monopolies Commission. In many cases the difficulties have arisen out of the present wording of many of the sections.*

Section 10 of the Act provided for inquiry by the Commission into any restrictive trade practice. This inquiry was subject to complaint from any trade or consumer association having membership of not less than 25 persons or 25 or more consumers or upon reference made to it by Central or State Government or upon an application by Registrar or upon its own knowledge or information. The Section 11 provided restriction upon inquiry by mandating preliminary investigation and Section 12 conferred powers of civil court upon the Commission. The issue of patents was also considered under section 15 of the Act. Section 20 quantified the value for

² Hazari, 1965 in compilation of Dr S. Chakravarthy – Why India adopted a new competition Law.

³ Section 3 MRTP Act 1969

⁴ Para 2.8

purpose of jurisdiction from 20 lakh to 1 crore.

From bare reading of the Act, it is clear that the intention of the legislature was to curtail control of business to its own advantage by any one entity but neither there was any specific definition nor there was any provision to control any such business operator. Even power of investigation were need based and not clearly defined. There was drastic change in Government policies, technology, International trading, Globalization of international market.

As per report published in Rostrum's Law Review, the Commission under MRTP Act, 1969⁵ handled many cases but it was established that majority of cases (about 21) were relating to price cartels. In addition, Commission settled around 64 cases before 1991 and passed cease and desist orders accordingly. However, after 1991 nearby 15 cases again related to price cartels and the majority of cases had been connected to the transportation where the truck organizations had been afraid in price-fixation and market share. The major reasons for failure of MRTP Act 1969 were:

- (A) Raghavan Report⁶ states that in MRTP Act there is no definition or even a mention of certain offending trade practices which are restrictive in character like:
- (i) Abuse of dominance
 - (ii) Cartel, collusion, and price fixing,
 - (iii) Bid Rigging
 - (iv) Boycott and refusal to deal
 - (v) Predatory pricing.
- (B) In para 7.2.3 of the Report, it was observed that "When the 1969 Act was drafted, the economic and trade milieu prevalent at that time constituted the premise for its various provisions. There has been subsequently a sea change in the milieu with considerable movement towards liberalisation, privatisation and globalisation. The law has to yield to the changed and changing scenario on the economic and trade front. This is yet another reason why a new Competition Law may be framed instead of making an effort to amend the existing MRTP Act. Many countries like the U.K., Canada, Australia and the European Community have, in line with this thinking, enacted new Competition Laws and repealed their earlier laws governing fair trading, etc."
- (C) In 1991 the License Raj was brought to an end by New Economic Policy. With the emergence of New Economic Policy and initiation of a Business Wave for

⁵Cartel Enforcement and Competition Law: A Case Study of India; Rostrum's Law Review | ISSN: 2321-3787
Jaswant Singh Saini, Narender Kumar Issue - RLR (2019) Volume V Issue II

⁶ Para 71.9 of Raghavan Report Relevance of the MRTP Act in Competitive Milieu

Globalisation, market took new turns. The Government felt the need of law that can comply with international scenario of business. The law of consumer interest was serving the needs but there were limitations. Though several amendments in the MRTP Act were proposed but it was realized by legislators that there is need of significant change in competition law.

- (D) It is worth noting that there were nine amendments⁷ to the MRTP Act by 2002 when it was finally repealed. The amendments of 1984 and 1991 had special significance due to changing political and economic scenario. Upto 1984, the MRTP Act contained no provisions for the protection of consumers against false or misleading advertisements and other similar Unfair trade Practices. The Sachar Committee recommended that a separate chapter be added to the MRTP Act covering the Unfair trade practices to apprise the society about the unfair trade so that both consumers on one side and business on the other side that include the manufacturers, suppliers, traders and others in the market, could conveniently identify practices that are prohibited. The provision for Unfair Trade Practices was introduced in 1984 in the MRTP Act.

On the recommendations of Sachar Committee Section 36A of the MRTP Act was introduced in 1984. This provided for protecting the interest of consumers and brought into its jurisdiction the private and public companies as well as Government Companies.

- (E) There was excessive control in the hands of Government. Upto 1991, license and approvals were required for various corporate activities. The control under MRTP Act was undefined and vague as the terms in the Act were not clearly defined. Section 2(o) included all type of violations but the definition was more of subjective nature and therefore any clear law was not available under given situation and thus different views were coming. The relevant provision is as below:

(o) "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, --

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or

⁷ 1974, 1980, 1982, 1983, 1984, 1985, 1986, 1988, and 1991

services in such manner as to impose on the consumers unjustified costs or restrictions."

- (F) The MRTP Act provided for per se Rule instead of Rule of Reason: From various judgments passed by Hon'ble Supreme Court against the orders passed by MRTP Commission, it may be observed that MRTP Commission passed order presuming that the end result is violation of law under the Act though there was no evidence to substantiate the allegation leading to violation of the Act. In the case of **Tata Engineering and Locomotive Co., Ltd., Bombay v. The Registrar of the Restrictive Trade Agreement, New Delhi**⁸ Hon'ble Supreme Court recognized the Rule of Reason instead of per se rule.
- (G) Export oriented approach: MRTP Act had objectives without analytical approach to achieve them. Section 38 of the Act provided for fluctuation in exports and therefore if any project had high chance of exports, its applications were approved without considering the issue of competition or Monopoly.
- (H) Raghavan Report consider the issue of Consumer Courts and MRTP Act having common jurisdiction and it was recommended that the jurisdictions should have clear demarcation⁹.
- (I) Enforcement machinery: The machinery to enforce the provisions of Act were limited. The penalties were limited to cease and desist orders and the jail terms were rarely imposed.

THE COMPETITION ACT 2002

The Competition Act, 2002 came as master stroke of business legislation. It was having:

- (i) Past experience of MRTP Act 1969;
- (ii) Exposure to monopoly and the license raj of 1990s decade;
- (iii) Effect of globalization and internet boom;

The Competition Act ensured harmony and peace. There was no chance of scuffle between the business and the law. The Act leaves the final judgment in the hands of business enterprise by giving various options to settle before adjudication.

The special feature of Act is that the fact finding of issues is settled before the CCI and NCLAT and legal issues if any are settled by the Supreme Court of India if necessity arises. Competition Act clarified in advance that there cannot be restraint on competition. In

⁸ AIR 1977 SUPREME COURT 973

⁹ Para 7.2.4 of the Report.

business, everyone has equal rights. Anti-Competitive Agreements in any form are restricted. Cartel formed in non-formal manner if observed would be subject to penalties that may range from upto 10% of turnover of the violator. There will be fine upto Rs 1 lakh per day and total fine may go upto 10 Crores. The competition Act has not made the act on the part of business as an offence but non-compliance with legal provisions as penal.

There is no fix monetary fine since the fine is dependent upon the turnover, transaction limit and total turnover. Thus, the Competition Act created another body for law to take form. However, the law is dynamic and can be manipulated. It gets its teeth from society. The judgments passed by the Courts in India highlight the thought process of the business houses and the adjudication process under the legal system.

Relevance of Law for governing competition: The Raghavan Report provides that objective of competition policy is to promote efficiency and maximize welfare¹⁰. In this context the appropriate definition of welfare is the sum of consumers' surplus and producers' surplus and also includes any taxes collected by the Government. The competition law according to Raghavan Report is that the Government is collecting taxes and providing facilities out of the taxes to earn income and facilitating social welfare of the State. Mere running the Government is not sufficient in globalized environment. There may come competition from outside the country and the Government has to deal with it. The economic policy of the country would affect the business and the business would take steps to countervail the policy and to manage the effects of Government policies, law to govern competition is necessary.

IMPACT OF COMPETITION ACT:

The era of globalization was in progress in early 90s and it invited attention of countries around the world towards changing economic scenario wherein the world was proceeding to have strong hold over currency. The global focus was to earn gold as well as dollar. The world was using all available options to control the market. MRTP Act was operational but its effect was limited.

In 1991, the Government in India considered for changes in economic policies. The licensing system was brought to end. New liberal policies were introduced. On the issue of business control by the Government, MRTP Act 1969 was in action. There was no provision to control legal misuse by the business. The monopolies of business were being checked but the remedies

¹⁰ THE NEED FOR A COMPETITION POLICY Chapter 2, Raghavan Report Para 2.1.1

were limited. Few cases reported in published article¹¹ are:

- (i) *U.O.I & Others v. Hindustan Development Corporation and Others* 1994 AIR 988
- (ii) *Association of State R. Trans. Und. v. K. Mobiles Ltd. & Another* 1998 3 Comp L J 152 MRTPC
- (iii) *Builders Association of India v. Cement Manufacturers' Association and Others* 2002 CTJ 433 (MRTP)

PRE-EXISTING FORCES FOR CHANGE:

- (i) International Trade Cartels:

The Organization of the Petroleum Exporting Countries (OPEC) was well known international oil cartel, established in 1960. It had controls over petroleum policies, and was stabilizing the markets, managing prices by controlling production quotas among its 12 member nations.

The International Air Transport Association¹² (IATA) was another well-known cartel founded in 1945 and being Airline Trade Association it controlled air tariff.

- (ii) Economic scenario of India

The economic system of India was on way to improvement and modernization. The permit raj was brought to an end in 1991 by new industrial policy. The Apex Court in India was also not much happy with the legal system under the MRTP Act.

At this stage, need was felt to bring changes to Monopoly and Restrictive Trade Practices Act, 1969. The issues like abuse of dominance, bid rigging, cartel, predatory pricing were not considered in the provisions of MRTP Act. Accordingly, committee headed by Sh S.V.S. Raghavan, a Retired Senior Central Government Officer was constituted in October 1999. The Committee brought forward the Competition Act, 2002 that received the accent of Hon'ble President of India on 13.01.2003.

Special Features of Competition Act 2002

The Act has crystallized structure and stands on its four pillars and these are:

- (i) Prohibition of anti-competitive agreements (Section 3),
- (ii) Abuse of dominant position (Section 4),

¹¹ Cartel Enforcement and Competition Law: A Case Study of India; Rostrum's Law Review | ISSN: 2321-3787
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¹² Wikipedia

- (iii) Regulation of combinations (mergers/acquisitions) (Section 5 and 6), and
- (iv) Competition advocacy (Section 49).

Another major feature of the Act was that CCI was empowered to frame its own procedure¹³ and was not bound by Code of Civil Procedure though the CCI was quasi-judicial body.

Secondly, it was specialized body for anti-competitive practices and the part of unfair trade practices was transferred to Consumer Forums under the Consumer Protection Act.

Thirdly, the CCI was empowered to follow liberal policies for adjudicatory mechanism while keeping in mind the power of parties before it.

Amendments to Competition Act:

The Act has seen various amendments like the Competition (Amendment) Act, 2007 wherein the status of Competition Commission of India was changed from advisory body to quasi-judicial body. Appellate Tribunal was also established as Competition Appellate Tribunal. This amendment was followed by Amendment in 2009 wherein issue regarding transfer of cases was refined. The Amendment of 2017 replaced the COMPAT with NCLAT for hearing appeals against CCI Orders. The latest amendments are by Competition (Amendment) Act 2023.

Challenge to legal provisions: The vires of Section 48 of the Act are under challenge before the Hon'ble Delhi High Court in WP(C) 13557 of 2019 titled as Tranter India Pvt. Ltd. and Others v. Competition Commission of India and Others. The petitioner is challenging the provision that makes the officers of the company liable for the contraventions committed by the Company.

Whereas the issues before the MRTP Commission were regarding investigation and inquiries and the Commission was having no framework for adjudication. The powers were limited to cease and desist and the adjudication by the Commission was without any statutory clarification leading to ambiguous decisions. The Competition Act has a basic legal mechanism. It represents India at international level¹⁴. It is quasi-judicial body headed by retired Civil Servants or experts having reputation. It is directly responsible to the Central Government¹⁵. It is specialized body dealing with spirit to encourage business competition. The objective of Competition Commission of India is lessor on legal and more on social welfare aspects¹⁶ of the country. The legal provisions are well defined regarding powers and options available under

¹³ Section 36 of the Act

¹⁴ Section 18 of the Act

¹⁵ Section 55 and 56 of the Act.

¹⁶ Section 3, 4, 5, 6, 19(3)(4).

given circumstances. Recently, Hon'ble Supreme Court has held that being dominant¹⁷ is not per-se illegal unless the position is exploited.

The Competition Commission of India is headed by Chairperson who is appointed on the basis of expertise in corporate affairs. The Commission maintains its website www.cci.gov.in wherein all the information regarding activities of the CCI are published and updated. The cases are filed by online mode using the website. The website plays important role in legal compliance by online mode.

The legal mechanism laid down clearly shows that the Competition Commission of India is foundation stone of the Competition Act and the Act has succeeded in achieving its objectives.



¹⁷ CCI vs Schott Glass India Pvt Ltd CIVIL APPEAL NO. 5843 OF 2014