INTRODUCTION - CONCEPT OF ANTI-COMPETITIVE PRACTICES

Development of Competition Law in India

Before considering the other issues of the Competition Act, 2002(hereinafter referred to as the **"Act"**), it may be useful to understand the economic milieu which led India to enact this Act which aims specifically at dealing with issues relating to the protection of the process of competition. A number of factors impelled this step, the major ones being the obligations on India by the World Trade Organization **(WTO)** agreements, viz. the General Agreement on Trade and Services **(GATS)**, Trade related aspects of Intellectual Property Rights **(TRIPS)**, etc., the entry of large multi-national companies in India, consequent on India's measures liberalizing trade. Most significantly Indian Industry began to realize that without legislation specifically aimed at protecting the significantly competitive process, they would be at a disadvantage in the changed business environment. The Government also considered that the Monopolies and Restrictive Trade Practices Act (for short "**MRTP Act**") which was India's first anti-competitive legislation enacted in 1969 to contain the concentration of economic power and was not the right mechanism suited to deal with the issues relating to the preservation and protection of competition, especially in the new business environment. The Central Government appointed in 1999 a high-level committee known as the "**Raghavan Committee**", to study the Indian economic scene and to make appropriate recommendations for a competition policy that would meet the needs of the country and provide the basis for legislation.[1]

Major Recommendations of the Raghavan Committee

1. The MRTP Act should be repealed and an Act called the Indian Competition Act should be enacted that would regulate anti-competitive practices or agreements, abuse of dominance and combinations, which would include mergers;

2. There should be a progressive reduction and ultimate elimination of reservation of products for the small scale industries and handloom sector;

3. The economic reforms of liberalization, deregulation and privatization should be further progressed and the government should divest its shares and assets in the state monopolies and public enterprises and privatize them in all sectors other than those sub serving defence and security needs;

4. The proposed legislation should cover all the industries in public and private sector and professional services.

The New Competition Law- Repealing the MRTP Act

The Act replaced the MRTP Act.TheStatement of Objects and Reasons annexed to the Competition Bill 2001, states the reasons for enacting the newlaw in the following words: *"In the pursuit of globalization, India has responded by*

[1] T. Ramappa, Competition law in India – Policy, Issues and Developments, Third Edition 2014, Pg. 7

opening up its economy, removing controls, and resorting to liberalization. The MRTP act has become obsolete in certain respects and there is a need to shift our focus from curbing monopolies to promoting competition."[2]

Thus, the repeal was on the ground that the MRTP Act was not suited to deal with issues of competition that may be expected to arise in the new liberal business environment.

The Competition Act, 2002.

The Act came into existence in January 2003 and the Competition Commission of India (for short **"CCI"**) was established in October 2003. The object of the Act as has been clearly laid down in the preamble is to provide for the establishment of a Commission keeping in view of the economic development of the country, "*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".* Thus, the preamble seeks to attain the following objectives:

- Prevent practices having adverse effect on competition.
- Promote and sustain competition in the markets.
- Protect the interests of consumers.
- Ensure freedom of trade carried on by other participants in markets, in India.

The Competition (Amendment) Act, 2007

The Competition (Amendment) Act, 2007 was approved by the Parliament in September 2007 and received Presidential assent on 24th September 2007. The amendment brought significant changes in the then existing regulatory infrastructure established under the Competition Act. A few of the major changes are set out below:

- The Commission to be an expert body which will function as a market regulator for preventing anti-competitive practices in the country and would also has advisory role and advocacy functions.

- The Commission to function as collegiums and its decisions would be based on simple majority. Omits power of the Commission to award compensation to parties against proven anti-competitive practices indulged in by enterprises.

- Allows continuation of the MRTP Commission till two years after the constitution of the Commission for trying pending cases under the MRTP Act and to dissolve the same thereafter.

- Notification of all "combinations" i.e. Mergers, Acquisitions and Amalgamations to the Commission made compulsory.

[2] Competition Bill, 2001: Statement of Objects and Reasons

- Establishment of a Competition Appellate Tribunal with a three member Quasi-judicial body to be headed by a retired or serving judge of the Supreme Court or Chief Justice of High Court to hear and dispose appeals against any direction issued or decision made or order passed by the Commission.

The Act as amended by the Competition (Amendment) Act, 2007, follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and M&A), which causes or is likely to cause an appreciable adverse effect on competition within India.[3]

Meaning of Anti-Competitive Practices

According to an OECD/World Bank Glossary[4],anti-competitive practices refers to a wide range of business practices that a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing foods and services at a lower cost or higher quality. Similarly, it can be said that anti-competitive agreements are agreements between firms or enterprises that restrict or prevent or otherwise unfavourably affect competition, and that may help increase the market position or share of the parties and may also be to the disadvantage of the consumer as the products and services may be available at a higher cost than are available in a competitive market and also may be of a lower quality.

The essence of competition entails attempts by firm(s) to gain advantage over rivals. However, the boundary of acceptable business practices may be crossed if firms contrive to artificially limit competition by not building so much on their advantages but on exploiting their market position to the disadvantage or detriment of competitors, customers and suppliers such that higher prices, reduced output, less consumer choice, loss of economic efficiency and misallocation of resources (or combinations thereof) are likely to result.

Which types of business practices are likely to be construed as being anti-competitive and, if that, as violating competition law, will vary by jurisdiction and on a case by case basis. Certain practices may be viewed as per se illegal while others may be subject to rule of reason.

The Act as laid down in its preamble has been framed on the philosophy of modern competition law to come in line with current policies of Government of India with growing national and international trends with regard to competition. It aims at fostering competition and promoting Indian markets against anti-competitive practices by enterprises. Competition laws in India like in any other jurisdiction prohibits all agreements which restrict freedom of trade and cause consumer harm by way of limiting production and distribution of goods and services and fixing prices higher than normal. While the objective of the Act, as stated in its preamble, is undoubtedly laudable and needless to say that this dynamic statute can and will touch and change the way Corporate India functions on a day to day basis, what is important is that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible and timing issues need to be addressed.

[3] *www.cci.gov.in/index.php?option=com_content&task=view&id=12*

[4] World Bank/OECD: "Glossary of Industrial Organization on Economics and Competition Law" available at ***http://cci.gov.in/images/media/ResearchReports/Pratima31jan2012.pdf***