

DEVELOPMENT AND PROGRESS OF COMPETITION LAW IN INDIA

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ABSTRACT

The globalized and liberalized Indian economy is witnessing cut-throat competition. To provide institutional support to healthy and fair competition, there is a requirement of better regulatory and adjudicatory mechanism. To this effect, India has enacted the new competition law which shall replace the earlier law. This is a shift from curbing monopolies to encouraging competition. The design of the new law carves out a very important role for the Competition Commission of India (CCI). The task has been divided in three phases. This article sets out to explain the intricate relationship of competition law and judiciary in India by examining the experience CCI had so far. The article then goes on to examine the role of lawyers. The article then considers the time frame for the implementation of the three phases and provides realistic suggestions to have a successful setting of competition regime in India.

KEYWORDS

Competition Advocacy, Competition Commission, India, Judiciary, Lawyers, MRTP Act

INTRODUCTION

In the pursuit of globalization, India has responded by opening up its economy, removing controls and resorting to liberalization. The natural corollary of this is that the Indian market should be geared to face competition from within the country, and outside (Viswanathan, 2003). To take care of the needs of the trading, industry and business associations, the Central Government decided to enact a law on competition. Finance Minister, Chidambaram (2003) highlighted the need to have a strong legal system and said —A world class legal system is absolutely essential 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.“ With this zeal the Government went ahead and enacted the Competition Act, 2002.

THE EARLIER LAW AND THE NEED FOR CHANGE

The Monopolies and Restrictive Trade Practices came into force on June 1, 1970 as the Monopolies and Restrictive Trade Practices Act, 1969. The Statement of Objects and Reasons mentioned that the Act was to provide 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 matters connected therewith and incidental thereto (MRTP Act, 1969).

Since 1970, the Act had been amended several times to suit to the changing circumstances. However, in late 1990s, it was felt that the MRTP Act had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there was a need to shift focus from curbing monopolies to promoting competition. The Raghavan Committee discussed the issues and concluded that the MRTP Act was beyond repair and could not serve the purpose of the new competitive environment. A new law (Indian Competition Act) may be enacted, the MRTP Act may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices (UTP) need not figure in the Indian Competition Act as they were covered by the Consumer Protection Act, 1986. The pending cases in the MRTP Commission may be transferred to the concerned Consumer Courts under the Consumer Protection Act, 1986. The pending MTP (Monopolies and Restrictive 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).

The Competition Act, 2002 (the Act) received assent of the President of India on January 13, 2003 and was published in the Gazette of India dated January 14, 2003.

THE INDIAN EXPERIENCE SO FAR

Indian experience with the competition regime so far has vindicated it. The setting up of the competition regime in India has so far proved to be a much more difficult task than envisaged.

There are a number of reasons which may be equally true in any developing economy. Besides all those reasons, India is facing the unique challenge from Judiciary

When on October 14, 2003, the Central Government appointed Mr. Dipak Chatterji as Chairperson of the CCI for a period of five years from the date on which he entered upon his office, or till he attained the age of sixty-seven years, whichever is earlier, no one knew that even after one and a half years, the CCI would not have a chairperson (Gazette, 2003). A petition was filed in the Supreme Court challenging the appointment of Chatterji as the chairperson. The grounds of challenge, inter alia, being that Chatterji a senior bureaucrat cannot sit in judgment over retired High Court and Supreme Court judges. The Supreme Court admitted the petition and issued notice to the Central Government to file its reply. The Central Government argued that the CCI was more of a regulatory body that requires expertise in the field and such expertise cannot be supplied by members of judiciary. It was also contended that the CCI was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers. This argument did not find favour with the judiciary. It is important to note that the Constitution of India provides for independence of judiciary. Due to this independence and wide powers under Articles 226 and 32 of the Constitution of India, the High Courts and the Supreme Court respectively are able to exhibit such judicial activism which is unheard of in other countries. The Supreme Court took a firm stand of not accepting the Central Government's argument.

In January, the Central Government assured the Supreme Court that amendments would be made in the Competition Act to enable the Chairperson and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. The Supreme Court on January 20, 2005 disposed off the petition in view of the submission made by the Central Government (Supreme Court, 2005).

CHALLENGES AND THE TASK AHEAD

For the last more than a year, the CCI has been working without the Chairperson. There has been some arrangement by the Central Government in the form of personnel on deputation and some activities to give a semblance of a working commission. However, due to uncertain future of the CCI, earlier because of the petition pending in the Supreme Court and later due to the

expected amendment in the Competition Act, the existing CCI has not been able to do what was envisaged. There have been half-hearted efforts to spread competition advocacy. This is a challenging task to merge the issues of business, law and economics and present a curriculum which is acceptable to all. Many of the above activities are currently being undertaken. There is a need to have personnel solely for the work of CCI so that the system may get the benefit of their experience.

According to the time schedule, the second phase of adjudication should start anytime. But it does not appear to happen in the near future. One of the most important aspects of the adjudication process would be that the judicial and executive members work in tandem. It is easier said than done. The Supreme Court (2005) has said that there may be two bodies one with expertise that is advisory and regulatory and the other adjudicatory. There may be an appellate body to sit in appeal over the orders of the lower adjudicatory body. And, the jurisdiction of the Supreme Court under Article 136 shall always remain unquestioned. Setting up adjudicatory bodies requires capital as well as revenue expenditure. Except the Supreme Court and the High Courts, whose expenditure is charged on the Consolidated Fund of India, all other judicial bodies depend upon the government central or state. Recently, the Central Government refused to allocate funds for the 1,734 Fast Track Courts, established a couple of years back. The Supreme Court had to intervene and give a direction to the Central Government to grant funds to these courts. Still the future of these courts hangs in the balance (Times Of India, 2005).

It has been envisaged that in the third year, the CCI will commence regulation of certain combinations. This is just wishful thinking. Merger control requires very complex assessments and risks of mistaken decisions are high, specially when such assessments are made by insufficiently experienced competition authorities. There is a serious dearth of trained professionals in this field.

AWARENESS

To set up a competition regime, it is essential that awareness is spread and limited resources are used in the most effective manner. For this, the agenda has to be truly realistic. First of all, adequate time should be allocated for the first phase of activities of competition advocacy. One year is too short a period for this. It may be enough for developed countries, but for India, a lot

more time, may be two to three years, or even more, is required. During this time period there should be a concerted effort from the CCI, the government, bar associations, business communities and the educational institutions. The most important is the inclusion of competition curriculum in the business, law and economic schools. It is a process which shall take about two to three years time and the desirable results can only be obtained when the students are well prepared to take the challenge of putting into practice what they learnt in the class room.

ROLE OF LAWYERS

Lawyers are not the most likable section of the society and it is known that the lawyers' association is a very strong and powerful body. It has tremendous clout and also has a strong say in the policy formulation of the government. Due to this reason, entry of foreign law firms in India is fought tooth and nail by the bar associations across India. In such a scenario, it would be detrimental for the society to start the adjudication process in the CCI without creating awareness about it.

CONCLUSION

As planned now, the adjudication process starts just after one year of the entire business community and the lawyers are not ready for the new law. Going for the adjudication stage prematurely would lead to such matters going to the lawyers who have not been trained for the new competition regime. As the new regime requires a totally different mindset and attitude of more towards internationalism and resolution of disputes with a not-so-strict-legal perspective of the lawyer, who has been till now trained with the traditional tools, would not be fit to serve the purpose. The competition regime must be brought slowly and cautiously. Agreed, too much circumspection leads to inaction. But, justice hurried is justice buried. Not to go with the Shakespearean doctrine of killing all the lawyers, but training them before making the CCI to function is the sine qua non. Half baked lawyers will wreck havoc. There is no need to rush into the competition regime without full preparation. Until and unless awareness is made adequately, the CCI should not jump to the second phase. If it rushes into the second and then to the third phase without satisfactorily completing the first phase, it would be a classic case of

fools rush in where angels fear to tread. Make haste slowly.

