EMERGENCE & DEVELOPMENT OF COMPETITION LAW

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Abstract

The history of modern competition law is generally traced to the United States where the Sherman Act was enacted in 1890 out of the growing concern about the formation of trusts by American companies wherein owners of stocks held in competing companies transferred those stocks to trusts which then controlled the activities of those competitors with the view to coordinate their activities in regard to pricing, output or other areas and thereby to dominate the market. There has been a growing concern, both at an international and domestic level, more particularly among developing nations, about the need to develop a comprehensive legal framework to deal with the anti-competitive practices in order to promote an orderly market growth. Discussions on the "Interaction between Trade and Competition Policy" have been catalysed recently. The year 1991 has an important landmark of economic history where India faced severe economic crisis triggered by serious Balance of Payments situation. This crisis bought some fundamental changes in the economic policy and stabilise economic reform. The New Economic Policy 1991 which brought Liberalisation, Privatisation and Globalisation widened the space of economic market and reduced the role of government sector in business. The Government of India constituted a High Level Committee on competition law and policy held by Mr. SVS Raghavan (popularly known as Raghavan Committee) and advised for new and effective competition law and policy to cope up with international economic developments and to recommend a legislative framework.

Keywords*: Competition law, economic development, legislative framework*

INTRODUCTION

In economics, competition is the rivalry among sellers trying to achieve such goals as increasing profits, market share, and sales volume by varying the elements of the marketing mix: price, product, distribution and promotion. Merriam-Webster defines competition in business as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms."[1] In his 1776 *The Wealth of Nations*, Adam Smith described it as the exercise of allocating productive resources to their most highly valued uses and encouraging efficiency, an explanation that quickly found support among liberal economists opposing the monopolistic practices of mercantilism, the dominant economic philosophy of the time.[2] Competition, according to the theory, causes commercial firms to develop new products, services and technologies, which would give consumers greater selection and better products. The greater selection typically causes lower price for the products, compared to prices in a monopoly (single dominant firm in market) or oligopoly (a few dominating firms in economy) market. Competition may also lead to wasted (duplicated) effort and an increase in costs and prices in some circumstances.

Competition does not necessarily have to be between companies. For example, business writers sometimes refer to "internal competition". This is competition within companies. The idea was first introduced by Alfred Sloan at General Motors in the 1920s. Sloan deliberately created areas of overlaps between divisions of the company so they would be competing with each other. For example, the Chevy division would compete with the Pontiac division for some market segments. Also in 1931, Proctor and Gamble initiated a deliberate system of internal brand versus brand rivalry. Each brand manager was given responsibility for the success or failure of the brand and was compensated accordingly.

It should be noted that business and economic competition in most countries is often limited or restricted. Competition is often subject to legal restrictions. This is where competition law has its inception. For example, competition may be legally prohibited as in the case with a government monopoly or a government-granted monopoly. Tariffs or other protectionist measures may also be instituted by the government in order to prevent or reduce competition. Depending on the respective economic policy, the pure competition is to a greater or lesser

1 Available at: https://www.merriam-webster.com

2 Lanny Ebenstein, 2015; Chicagonomics: The Evolution of Chicago Free Market Economics, Macmillan, pp. 13-17,107

extent regulated by competition law or policy. Competition between countries is quite subtle to detect, but it is quite evident in the World Economy, where the countries like US, Japan, China, the European Union and the 4 Asian Tigers (Hong Kong, Singapore, South Korea, and Taiwan) each try to outdo each other in the quest for economic supremacy in the global market, harkening to the concept of Kiasuism.[3]

The history of modern competition law is generally traced to the United States where the Sherman Act was enacted in 1890 out of the growing concern about the formation of trusts by American companies wherein owners of stocks held in competing companies transferred those stocks to trusts which then controlled the activities of those competitors with the view to coordinate their activities in regard to pricing, output or other areas and thereby to dominate the market. Such trusts were formed, for example, in oil, sugar, whisky and metals. The Sherman Act, 1890 prohibited contracts, combinations or conspiracies in restraint of trade, and also prohibited monopolization or attempts or conspiracies to monopolize.[4] Thus, the Sherman Act 1890 was the first codified law which recognised common law principles of competition law. With the progress of time, the competition law has attained new dimensions with the enactment of subsequent laws, like the Clayton Act 1914, the Federal Trade Commission Act, 1914 and the Robinson-Patman Act 1936. The United Kingdom on the other hand introduced the considerably less stringent Restrictive Practices Act 1956 but later on enacted more elaborate legislations like the Competition Act, 1998 and the Enterprise Act 2002 were introduced.[5]

AN OVERVIEW OF THE COMPETITION POLICY OF VARIOUS COUNTRIES: EU AND US COMPETITION POLICIES: SIMILAR OBJECTIVES, DIFFERENT APPROACHES

Both the US and EU have well developed competition policies that aim to prevent and penalize anti-competitive behaviour. Although they share similar aims, there are a number of significant differences. The EU has an administrative system for antitrust enforcement, in which companies are penalized with fines. In contrast, US antitrust enforcement is based on criminal law, with financial and custodial penalties against individuals. Private enforcement plays a greater role in the US system, where victims of anti-competitive behaviour are awarded damages treble the amount of the actual damage suffered.

[3] Vernacular Chinese phrase whose English equivalent would be 'Over-Competitiveness'

[4] Vinod Dhall, Overview: Key concepts in Competition Law in Competition Law Today: Concepts, issues and the law in practice (Vinod Dhall, Edn. 2007)

[5] *Competition Commission of India* v. *Steel Authority of India* (2010) 10 SCC 744

Modern competition policy in the US started with the adoption of the Sherman Antitrust Act by the US Congress in 1890. It prohibits contracts and business alliances that restrain interstate commerce and trade. In 1911, the US Supreme Court applied the law to break up the Standard Oil Trust into independent companies. Merger control was introduced by the Clayton Act in 1914. This law also prohibits practices such as price discrimination. In the same year the federal Trade Commission was established to enforce the competition rules. In Europe, competition policy gained momentum after World War II with the break-up of trusts that played a role in war time production. The Paris Treaty establishing the European Coal and Steel Community (1952) contained provisions regarding cartels, concentrations (mergers) and abuse of dominant position by firms. Competition policy among the member states also formed around this time, for example with the foundation of the German Federal Cartel Office in 1958. The Treaty of Rome laid the foundations of European Community competition policy. It aims at ensuring that competition in the internal market is not obstructed by the anti-competitive behavior of companies or national authorities. The Treaty contains provisions for anti-competitive agreements (Article 85) and abuse of dominant position (Article 86) as well as state aid (Article 90). The European Commission was given the authority to enforce competition rules.

Merger control in the EU is more centralized than the US. In order to ensure fair competition in the internal market, EU competition policy has strict rules on state aid, whereas US legislations has no provisions in this area. EC and US competition authorities cooperate on cases which affect both generations. The question of state aid was raised in the EU-US negotiations for a Transatlantic Trade and Investment Partnership. While the European Parliament is only consulted on matters of competition policy, the US Congress plays a more active role. High-profile merger cases in the US are subject to scrutiny from Congress, including Congressional hearings.[6]

COMPETITION LAWS IN ASEAN: A SOUTH-EAST ASIAN PERSPECTIVE

The ASEAN or the Association of South East Asian countries is an economic group which consist of 10 member nations – Brunel, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam. Most of these countries are developing nations with constantly evolving markets. The last decade has witnessed the introduction of competition law

[6] Available at: http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf

legislation in several nations of the ASEAN. The introduction of a nationwide competition policy and law by 2015 was a prerequisite for the member states in the fulfilment of the goals of the 2007 ASEAN Economic Blueprint, to incubate a culture of fair business competition for enhanced regional economic performance.[7]

There has been a growing concern, both at an international and domestic level, more particularly among developing nations, about the need to develop a comprehensive legal framework to deal with the anti-competitive practices in order to promote an orderly market growth. Discussions on the "Interaction between Trade and Competition Policy" have been catalyzed recently. This happened due to the setting up of a Working Group on Trade and Competition under the aegis of the World Trade Organisation following the Singapore Ministerial and the possibility of negotiations following the Doha Ministerial Declaration. This can also be felt in the South Asian region, which is probably of greater intensity than many parts of the world.[8]

The ASEAN countries are diverse in terms of their economic development as well as their institutional and commercial policy environments. Nevertheless most of the ASEAN economies have liberalized and deregulated their economies in order for their economies to be attractive to foreign investment. Despite the variations in the economic, political and legal climate ASEAN nations have welcomed the introduction of competition laws in an attempt to promote cross border cooperation and openness in their economies.

Another factor responsible for the introduction of competition law in ASEAN include the bilateral and regional trade agreements signed that are consistent with the WTO policies which attempt to limit anti-competitive practices. Competition law is also viewed as a means to reduce administrative and regulatory barriers and introduce regulatory predictability, which increase competitiveness in economies and promote economic growth.

Some of the actins the Asian Member States have agreed to be:

1. Endeavour to introduce a competition policy in all ASEAN member countries by 2015;

2. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;

3. Encourage capacity building programs/activities for ASEAN Member countries in

[7] Available at: http://www.lexology.com/library/detail.aspx?g=6c532563-816b-4507-ade6-bfbd13a3f4ab
[8] Available at: http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/2000PaperonSAsiaCL.pdf

developing national competition policy;

4. Develop a regional guideline on competition policy by 2010,based on country experiences best international practices with the view of creating fair competition environment.[9]

Only five member countries have generic competition law legislation:

- Malaysia: The Competition Act 2010 (Malaysian Competition Act) was passed by the Malaysian Parliament in April 2010 and came into force in January 2012. It prohibits anti-competitive activities and abuses of dominance. It however does not govern mergers and acquisitions.

- Thailand: The Trade Competition Act 1999 (Thai Competition Act) is the principle legislation that governs anti-competitive agreement, abuse of dominance, mergers and other unfair trade practices in Thailand. This Act co-exists with several other sectoral laws that regulate competition in certain industries.

- Vietnam: The Law of Competition (Vietnam Competition Act) is the main legislation that governs competition law. The two main regulators in charge are the Vietnam Competition Administration Department (VCAD) which falls under the Ministry of Industry and Trade and the Vietnam Competition Council (VCC).

- Indonesia: Law No. 5 of 1999 on the Prohibition of Monopoly and Unfair Business Competition Practices (Indonesian Competition Act) was introduced in March 1999 and came into force in 2000. The national competition agency known as *Komisi Pengawas Persaingan Usaha (KPPU)* regulates competition law in Indonesia.

- Singapore: The Singapore Competition Act regulates competition law in Singapore. The Competition Commission of Singapore (CSS) is the main regulator in Singapore and has released 13 sets of guidelines which provide useful explanations as to how the CSS interprets, administers and enforces the Singapore Competition Act.[10]

The natural progression for the ASEAN countries is to create a cohesive ASEAN market and work towards transformation into a single market that is highly competitive and fully integrated

[9] Available at: https://www.lexology.com/library/detail.aspx?g=6c532563-816b-4507-ade6-bfbd13a3f4ab
[10] *Ibid*

with the global community.[11] Even if there is no unanimity among the nations on the issue of a multilateral competition regime, especially at the WTO, the issue of competition policy is getting increasing importance in all regional trade arrangements, not only in the EU but also other regional arrangements like CARICOM, MERCOSUR, COMESA, SADC and even ASEAN. A similar initiative however was not taken up by SAARC maybe because the association is not making any progress at present.[12]

EMERGENCE OF COMPETITION LAW IN INDIA

The architects of Independent India were deeply influenced by socialism and the same is reflected in the manner in which India followed the Soviet style industrialization and required extensive state intervention along with import substitution.[13]

In recent years India's competitiveness has improved particularly in goods market efficiency, innovation, business etc. World Bank defines "competition" as a situation in the market in which the firms and sellers independently strive for buyer's patronage in order to achieve a particular business objective for example profit, shares or market shares.[14] Competition law is also known as antitrust or trade practices law in some countries is rules and regulations on how a company should operate and compete in the market without harming consumers. The purpose of this law is to promote fair competition and safeguard to consumers.

The year 1991 has an important landmark of economic history where India faced severe economic crisis triggered by serious Balance of Payments situation. This crisis bought some fundamental changes in the economic policy and stabilise economic reform. The New Economic Policy 1991 which brought Liberalisation, Privatisation and Globalisation widened the space of economic market and reduced the role of government sector in business. The existing Monopolies and Restrictive Trade Practices Act, 1969 became obsolete. In India, the competition law was enacted in 1969 i.e. Monopolies and Restrictive Trade Practices Act, 1969. The MRTP Bill was introduced in the parliament in the year 1967. The MRTP ACT, 1967 came into force, with effect from, 1 June, 1970. The Monopolies and Restrictive Trade Practices Act, 1969 was enacted to provide for the control of monopolies and to prohibit monopolistic and restrictive trade practices.

[11] *Ibid*
[12] Available at: http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/2000PaperonSAsiaCL.pdf
[13] Abir Roy & Jayant Kumar, *Competition Law in India;* Eastern Law House. 1st Edn. p33
[14] World Bank, The World Bank annual report 1999, Washington DC; World Bank

The Government of India constituted a High Level Committee on competition law and policy held by Mr. SVS Raghavan (popularly known as Raghavan Committee) and advised for new and effective competition law and policy to cope up with international economic developments and to recommend a legislative framework. The Raghavan Committee pointed out the loopholes of MRTP Act, 1969. The MRTP Act would only be beneficial for curbing monopolies and it would not be effective for the fair competition in the market. The Raghavan Committee considered amending existing MRTP Act and enact a new competition law for international economic developments.

The Committee[15] submitted its report to the central government on the 22nd May, 2000, where it discussed in detail and make recommendations on both policy and law of competitions. Major Recommendations of the committee are as follows[16]:

1. Completion law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made. State monopolies, Government procurement and foreign companies should be subject to the competition laws.
2. The government enterprises as well as departments should be brought under the preview of competition law, the only exception being sovereign function of the government like defence.
3. The committee noted that the focus for most competition laws today in the world is on three areas:
    a) Agreement among Enterprises;
    b) Abuse of Dominance; and
    c) Mergers, or more generally, combination among enterprises.

The committee found the MRTP Act to be falling short of addressing competition and anti-competitive practices. It stated that the MRTP Act, in comparison with the competition laws of many countries, is in adequate for fostering competition in the market and trade and for reducing, if not eliminating, anti- competitive practice in the country's domestic and international trade. The committee found it expedient to have a new competition law which will focus on preventing anti-competitive practices that adversely affect welfare.[17] The Central Government introduced the competition Amendment Bill, 2001 to achieve the following:

[15] Report of the High Level Committee on Competition Law and Policy, 2000
[16] Krishna Keshav & Divya Verma, *Competition and Investment Laws in India*; Singhal Publication, p. 7-8
[17] *Ibid* at 9-10

1. To ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets.

2. Curbing negative aspect of competition through the medium of Competition Commission in India.

3. To provide for investigation by Director- General for the Commission

4. To confer power upon the CCI to levy penalty.

5. To create a fund to be called the competition Fund.

OBJECTIVES OF THE COMPETITION ACT, 2002

The basic objective of the act is to provide a law relating to competition among enterprises that will ensure that the process of competition is left free without stronger trading enterprises manipulating the market to their advantages and following from that, to the disadvantage of consumers.[18]

The objects of the act are stated in the preamble which reads as follows: "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 interest of consumers and to ensure freedom of trade carried by other participants in markets, in India, and for matters connected therewith and incidental thereto"

CONCLUSION

Competition law has grown at a phenomenal rate in recent year in response to the enormous changes in political thinking and economic behaviour that have taken place around the world.[19] Competition law is now applies to many economic activities that once were regarded as natural monopolies or the preserve of the state: telecommunications, energy, transport, broadcasting, postal services, sports, media etc.[20] Thus, competition law touches every sector of the economy.

[18] T. Ramappa, *Competition Law in India: Policy, issues, and Development*, 3rd Edn. p.1
[19] Richard Whish & David Bailey, *Competition Law*, Oxford University Press, 7th Edn, p.1
[20] *Ibid*