Competition Act 2002 – A critical analysis

-- Prof KV Rao and Mrs B Radha***

Ensuring economic justice has been the main plank of the government since independence. With the same objective in mind, the Government enacted Monopolies and Restrictive Trade Practices Act, 1969. But this small piece of legislation attracted sharp criticism on account of its "ineffectiveness" in achieving the objectives stated in the Act. The Act was perceived to have failed in curbing concentration of economic power or in regulating the diverse monopolistic, restrictive and unfair trade practices.

However, with the onset of globalisation, it was realized that it would be better to promote competition and not concentration. A high-level committee was constituted in October 1999 under the chairmanship of SVS Raghavan to go into the aspects of competition policy and a related Law. The committee submitted its report in May 2000. Its recommendations formed the basis of a draft Bill, which was presented in the Parliament. The Bill got Presidential assent in January 2003, after two-and-a-half years.

Objective of Competition Act, 2002

The Preamble of the Act declares the intention of the Government to press in service the provisions of the Act for the achievement of the following objectives:

i. *To prevent anti-competition practices;*
ii. *To promote and sustain competition in markets;*

"The Competition Act, 2002 seeks to promote and sustain competition in markets, protect the interests of consumers, to ensure freedom of trade for all participants in markets in India and to thwart anti-competition practices. The new Act takes into account the modern issues of globalisation and WTO besides the shortcomings of the now repealed MRTP Act 1969. But the success of the Act depends on the identification and determination of anti-competitive agreements."

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iii. *To protect the interests of consumers; and*
iv. *To ensure freedom of trade for all participants in the markets in India.*

On the whole, the legislation seeks to clear all the hurdles in promoting competition among business units of domestic and foreign origin. In this new Act, there is no mention of 'concentration' but whether such 'concentration' leads to employing anti-competitive practices.

Major areas in focus

The Act focuses on the following four major areas:

1. Prohibition of anti-competitive agreements;
2. Prohibition against abuse of dominant position;
3. Regulation of combinations;
4. Advocacy of competition policy

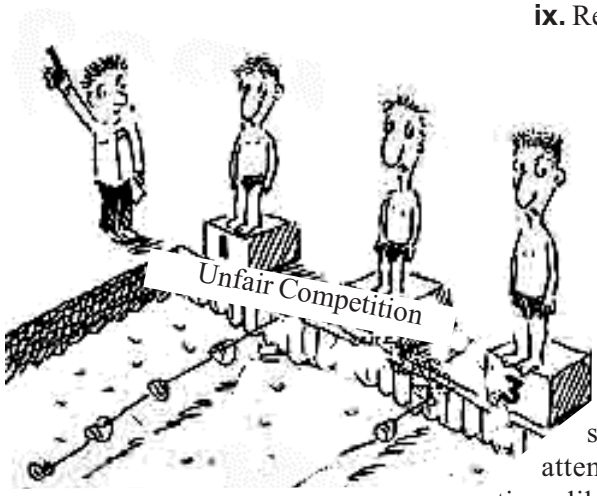
Anti-competitive agreements

According to Section 3 of the Act, no enterprise or association of enterprises shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

The key aspect in the implementation of the provision of this section is the identification of situation involving adverse effect on competition. The Act has identified the following types of arrangements/agreements that are likely to cause adverse effect on competition:

i. Determining sale price or purchase price directly or indirectly
ii. Limiting or controlling production, supply, markets, technical development or investment
iii. Sharing markets or sources of supply by territory, type, size or in any other manner
iv. Bid rigging or collusive bidding
v. Tie-in arrangement
vi. Exclusive supply agreement
vii. Exclusive distribution agreement

The new Act attempts to delimit practices like cartels, bid rigging, exclusive supply and distribution agreements. Due to lack of procession in the clauses of the MRTP Act, one had to depend on the interpretations of the MRTP commission or courts. This anomaly was sought to be corrected through the Competition Act.



iii. Refusal to deal
ix. Resale price maintenance

As a matter of fact, many of the above agreements are those that were covered under Section 33 of the MRTP Act, 1969.

Nevertheless, the present Act seeks to furnish a pointed interpretation to the words used in earlier clauses. More so, the new Act is also attempting to delimit practices like cartels, bid rigging, exclusive supply and distribution agreements. Due to lack of procession in the clauses of the MRTP Act, one had to depend on the interpretations of the MRTP Commission or courts. This anomaly was sought to be corrected through the Competition Act.

Further, there has been a sea change in the trade environment after the advent of the WTO. A new set of trade issues has come to the fore for every developing economy, resulting in new type of restrictive trade agreements. WTO issues like TRIPS, TRIMS, state monopolies, anti-dumping measures, sanitary and phytosanitary measures, technical barriers to trade, etc. need to be addressed in the new Act. As such, the new Act attempted to take this changing environment into account and formulate a new policy.

The attempt of the high-level committee needs to be appreciated for its far-sighted vision and for enhancing the scope of the Act. But the success of the

According to Section 4 of the Act, no enterprise shall abuse its dominant position. The power to decide on dominant position is vested in the hands of the Commission. The Section 4 of the Competition Act has defined the term dominant position

Act depends on the identification and determination of anti-competitive agreements. Ipso facto, an agreement of the above nature shall not become void per se, unless it is proved that such an agreement has an adverse effect on competition.

As a measure of guiding the work of the Competition Commission, the Act has identified certain situations that are likely to cause adverse effect on competition. They are:

(a) Creation of barriers to new entrants in the market;

(b) Foreclosure of competition by hindering entry into the market

(c) Driving existing competitors out of the market;

(d) Accrual of benefits to consumers;

(e) Improvements in production or distribution of goods or provision of services; and

(f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Abuse of 'Dominant Position'

According to Section 4 of the Act, no enterprise shall abuse its dominant position. An abuse of dominant position is said to occur, when an enterprise:

(a) Directly or indirectly imposes unfair or discriminatory purchase of selling prices on condition, including predatory prices;

(b) Limits production, markets or technical development to the prejudice of consumers;

(c) Indulges in action resulting in denial of market access;

(d) Makes the conclusion of contracts subject to acceptance by other parties;

(e) Uses dominance in one market to move into or protect other markets.

For the purpose of determining whether an enterprise enjoys dominant position or other wise, one or more of the following factors may be taken into account:

(a) Market share

(b) Size and resources of the enterprise

(c) Size and importance of the competitors

(d) Economic power of the enterprise

(e) Technical advantages enjoyed by firm

(f) Dependence on consumers

(g) Monopoly status

(h) Entry barriers

(i) Countervailing buying power

(j) Market structure and size

(k) Any other factor which the commission considers to be relevant.

It is evident from the above that the Act is attempting to describe the meaning of dominant position. In its explanation to Section 4, the Act has defined the term to mean a position of strength enjoyed by an enterprise in the relevant market in India, enabling it to: (i) operate independently of competitive forces prevailing in the market; or (ii) effect its competitors or consumers of the relevant market in its favour.

The power to decide on dominant position is vested in the hands of the Commission, having regard to the factors listed above.

The dominance is required to be decided case by case and the rules are subjective in nature. Instead, the Act should have defined dominance in terms of a percentage of market share. In fact this was the methodology of the old MRTP Act. There are two aspects of this issue. First is the 'determination of dominance' and the second is the 'determination of the abuse of dominance'.

Though the first could be effectively determined, the case may be lost on the second ground. The authors of the Law should have followed the Microsoft case very closely and shaped their thinking on this aspect.

Regulation Combinations

Section 5 of the Act stipulates that any person who proposes to enter into an agreement or combination shall give a notice to the Commission in the prescribed form within seven days of occurrence of any of the following:

(a) The board of directors of respective companies accepting a proposal of merger ;

(b) The conclusion of negotiations of an agreement for an acquisition or acquiring control;

(c) The execution of a joint venture agreement or shareholder agreement or technology agreement.

However, the Commission will not enquire into all types of combinations. It has fixed certain norms for the acquirer company and the one being acquired in terms of assets and turnover. It means that the Commission intends to enquire into only those cases that result in substantial control of the assets or turnover.

Another important aspect of regulation is that a combination shall become void only when it causes or is likely to cause an appreciable adverse effect on competition. After receipt of the notice for combination, the commission will conduct an investigation to decide whether the combination in question leads to adverse effect or not.

The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, direct the parties to the said combination to publish details of the combination within 10 working days of such direction, in such a manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objection, if any, before the Commission within 15 working days from the date on which the details of the combination were published.

The Competition Com-mission has fixed certain norms for the acquirer company and the one being acquired in terms of assets and turnover. It means that the Commission intends to enquire into only those cases that result in substantial control of the assets or turnover.

The Commission may, within 15 working days from the expiry of the period specified in Sub-Section 3, call for such additional or other information as it may deem fit from the parties to the said combination. The additional or other information called for by the Commission shall be furnished by the parties referred to in Sub-Section (4) within 15 working days from the expiry of the period. After receipt of all information and within a period of 45 working days from the expiry of the period specified in Sub-Section 5, the Commission shall proceed to deal with the case in accordance with the provisions contained in Section 31.

Section 31 speaks of the scope of orders of the Commission on certain combinations. Where the Commission is of the opinion that any combination does not, or is not likely to have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under Sub-Section (2) of Section (6). Where the Commission is of the opinion that the combination has, or is likely to have an appreciable adverse effect on competition, it shall direct that the combination shall not take effect. Where the Commission is of the opinion that the combination has, or is likely to have, appreciable adverse effect on the competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.

There is takeover code prescribed by SEBI, in order to prevent hostile takeovers. Consistency or inconsistency of these provisions with the provisions of the Competition Act is required to be established soon.

The parties who accept the modification proposed by the Commission shall carry out such modification within the period specified by the Commission. If the parties to the combination, who have accepted the modification, fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act. If the parties to the combination do not accept the modification proposed by the Commission, such parties may, within 30 working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission under that Sub-Section.

If the Commission agrees with the amendment submitted by the parties, it shall, by order, approve the combination. If the Commission does not accept the amendment submitted, the parties shall be allowed a further period of 30 working days within which such parties shall accept the modification proposed by the Commission. If the parties fail to accept the modification proposed by the Commission within 30 working days or within a further period of 30 working days referred to in Sub-Section (8), the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.

What is more important in this context is that there is takeover code prescribed by SEBI, in order to prevent hostile takeovers. Consistency or inconsistency of these provisions with the provisions of the Competition Act is required to be established soon. Further, there were provisions in the old MRTP Act for upholding public interest in case of mergers under Section12A.

The intention of legislature was clear. If the merger or amalgamation was found to be detrimental to the public interest then such action cannot be permitted by the Commission. In one of the judgments, Justice R M Sahai stressed that the term 'Public Interest' should be interpreted in a very distinct manner, particularly when merger involves a foreign company. Learned Justice has underlined that the perspective of public interest should change, when merger is between two Indian companies and between Indian and foreign companies. It is not the interest of the shareholder or the employers only, but the interest of the society, which is to be examined. As per the new Act, combinations are required to be regulated or prohibited only if they are found to be having adverse effect on competition. There is no talk of 'Public Interest' here. Surely, the expression 'Public Interest' has larger meaning than 'adverse affect'. Anyway, this will be proved in due course.

Advocating 'Competition Policy'

The theoretical background for the present Competition Act can be seen from the changed philosophy of the Government. In the present era of liberalization, the Government is intending to play a proactive role than in regulating the institutions. Perhaps, it thought that the repealed MRTP Act is bent upon regulating the business growth and hence it wants to ensure free play of market forces. Competition, it believes, is the foundation of an efficiently working market system, with a total freedom to develop optimum size without any restriction.

The ultimate raison d'être of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods. A free press, worthy advertisements and even such modern institutions as the Internet could support a modern competitive society. Without them, competition cannot thrive in a kind of vacuum. Thus, Competition policy in this context becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of

concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare. Therefore, while competition policy is a desirable objective and a useful instrument for serving consumer interest and welfare, there is first a need to bring about a competitive environment.

A second reason, as already argued above, is to benefit from reciprocity from other countries, which have legislated against the abuse of competition through dumping and predatory pricing.

However, these arguments must be used with caution for, the immediate and short-term effect of dumping and predatory pricing is to lower the cost of goods. It is only the long-term effects that could be deleterious if it destroys alternative domestic productive capacity.

These long-term effects may never come about. It would be foolish to lose short-term benefits for illusory long-term gains. It may be wiser to counter the short-term impact by a strictly temporary countervailing duty until the conditions that bring about counter actions no longer prevail.

In so far as international dumping is concerned, we already have the necessary mechanism in WTO. A competition law is only of value against domestic abuse of competitive power. In any event, it is safe to say that domestic predatory practices are probably less easy to discover or counter. Normally they are controlled by the imposition of fines after due legal process. However, these investigations are expensive to unravel abuses and require trained personnel. It may be easier to allow competition to assert itself in due course rather than creating an 'elaborate machinery'.

Machinery for Implementation of Act

The other important section of the Act is the one relating to the Constitution of Competition Commission of India. Chapters-III and IV of the Act deal with the establishment, duties, powers and functions of the Commission.

As per the provisions of the Act, the Commission, which shall consist of a chairperson and not less than two and not more than 10 members, has the powers to enquire into the following issues:

(1) Anti-competitive Agreements
(2) Dominant position of the undertakings
(3) Certain types of combinations

Relating to the first two issues, the Commission upon receipt of a complaint or a reference from the Central Government or State Government or a statutory authority or on its own knowledge, shall direct the Director General to cause an investigation to be made into the matter. ■

The ultimate raison d'être of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society.

ANNOUNCEMENT

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A member of the Institute who wishes to undertake the Management accountancy/Corporate Management/Tax Management Course, is eligible to apply for the grant of Merit Scholarship for purchase of books under the Incentive Scheme. Scholarship will be granted to those who had cleared the Final examination of the Chartered Accountancy course in one sitting (both groups).

In all 10 scholarships of Rs. 2,500/- each are to be awarded in a financial year. Applications for consideration of the Committee may be sent so as to reach the Joint Secretary, Post Qualification, Courses Cell, The Institute of Chartered Accountants of India, Post Box: 7100, Indraprastha Marg, New Delhi-110 002 by September 30, 2004 furnishing the following information on plain paper:

1. Name of the Post Qualification Course **2.** Membership number and date of enrolment **3.** Present Occupation. **4.** Period of service or practice (as the case may be) **5.** Particulars of passing the Chartered accountants Final Examination (Please enclose a copy of the marksheet and awards, etc.) **6.** Particulars of passing Management Accountancy/Corporate Management/Tax Management (Part I) Examination (For those who have passed the aforesaid examination) and percentage of marks obtained (Please enclose a copy of the marksheet and awards, etc.)
7. Particulars of the organisation in which practical training had been undertaken or is proposed to be undertaken.