Competition Law–Indian Experience

With the globalisation and progressive integration of the world economy, there is increasing flow of trade, finance, ideas and information across the world. The World Bank, World Trade Organisation (WTO) and Organization of Economic Co-operation and Development (OECD) have long back realised the importance of competition law for efficient functioning of the free-market economy. Presently over 100 countries have legal and regulatory framework for competition, anti-trust activities, and merger & acquisition in the corporate sector. This article discusses the concepts of competition policy and law and their implications on international trade in the light of the experience of advanced countries and India, and offers a few suggestions.

"Competition is a very rich concept containing within it a number of ideas and may be valued for many reasons as serving economic, social and political goals". - Australian Trade Practices Tribunal.

Naresh Kumar

(The author is an Advocate. He can be reached at nareshadvocate08@yahoo.com.)

Concept

Fair competition is one of the key pillars of an efficient market economy for optimisation of production and distribution. Competition stimulates innovation and productivity, ensures optimum allocation of resources and enables better satisfaction

of consumer preferences. Competitiveness refers to an enterprise's ability to compete–in respect to prices, quality, management, and innovation. In a competitive market, consumers are protected against mal-practices of trade and industry. They are also ensured availability of 'goods' and 'services' in abundance of acceptable quality at affordable price. Moreover, in a fair business climate, investors face relatively low entry and exit barriers and are protected against the risk of expropriation and abuse. Competition leads to an overall enhancement of efficiency and productivity of factors of production and thereby higher level of socio-economic welfare.

Competition Policy

'Competition Policy' promotes equity among producers and reduces rent seeking behaviour on their part. According to the World Bank, *"Competition policy refers to government measures that directly affect the behaviour of enterprises and the structure of industry."* An appropriate competition policy includes both:

(a) policies that enhance competition in local and national markets, such as liberalised trade policy, relaxed foreign investment and ownership requirements, and economic deregulation, and

(b) anti-trust or anti-monopoly law designed to prevent anti-competitive business practices by firms and unnecessary government intervention in the market place.

Competition Law

With the globalisation and progressive integration of the world economy, there is increasing flow of trade, finance, ideas and information across the world. The competition law is one of the most important legislations to promote and ensure efficient functioning of free-market economies. Though there is no multilateral agreement on trade and competition in the WTO, but the principles of non-discrimination, transparency, most-favoured-nation and national treatment are an integral part of the liberalised trading system under the WTO regime.

The regulatory framework lays down the principles of fair conduct of business actively and checking:

(i) horizontal agreements between firms to fix prices, engage in bid-rigging, restrict output and/or market shares, allocate geographic markets and or customers; and

(ii) abuse of market positions by large dominant firms and vertical restraints between suppliers and distributors such as resale price maintenance, exclusive dealing and geographical market restrictions.

Competition and International Trade

Trade and competition policy share some of the common objectives and values. Both contribute towards making markets more competitive and improving the allocation of resources and promoting efficiency and consumer welfare. However, in practice, the goals and objectives of international trade and competition policy may diverge. The WTO Working Group on the Interaction between Trade and Competition Policy while discussing the role of competition policy in ensuring effective market access and the role of trade liberalisation in facilitating removal of governmental measures that facilitate anti-competitive behaviour of enterprises stated: *"Trade policy was basically concerned with the government action, whereas competition policy focused on the behaviour of enterprises. Trade policy is traditionally focused on measures at the border, whereas competition policy regulates competitive conditions and behavior of enterprises within the country"*.

Exposure to international markets plays a central role in promoting competition in domestic markets. Imports directly introduce international competition pressures to domestic markets. This pressure is also introduced indirectly, through exports, since domestic firms have to compete in the global markets. It is an established fact that trade liberalisation increases competition and, consequently, efficiency and productivity growth.

International Regulatory Framework

The history of the United States of America (USA) anti-trust regime can be traced to the Sherman Act, 1890. The antitrust laws are concerned with defining the fundamentals of the competitive order and preventing market distortions. The European Union (EU), Canada and Australia also have well developed competition regimes. More and more countries had to introduce regulatory framework after failing to control anti-competitive practices through other provisions of their laws. Experience

In the US, high prices charged by a monopolist are not considered anti-competitive per se and the issue is left for the courts to decide. The European Union, however, condemns excessive pricing as an 'exploitative abuse'. In India, 'excessive pricing' by itself is not listed as an anti-competitive violation under the Competition Act, 2002.

proves that it is easier to deal with combinations and mergers at the initial stages, rather than to post-facto control of market power or collusions to avoid social and economic cost by ordering a de-merger. The regulatory authority looks both at the plans and intentions of a company in approving combinations. It is ensured that the acquisition move is not a pre-emptive move to kill future competition. In Australia, the government has powers under the Foreign Acquisition and Takeovers Act to block proposals which are deemed contrary to national interest.

In the US, high prices charged by a monopolist are not considered anti-competitive *per se* and the issue is left for the courts to decide. The European Union, however, condemns excessive pricing as an 'exploitative abuse'. In India, 'excessive pricing' by itself is not listed as an anti-competitive violation under the Competition Act, 2002.

The typical cases of combinations include:

(a) The Federal Trade Commission (FTC) took action in the merger between Institute Merieux of France and Connaught of Canada, although neither party maintained production facilities in the US. Merieux, the sole supplier of rabies vaccines in the US, had acquired Connaught, which was still developing a rabies vaccine and was thus a potential competitor. The FTC was concerned that Merieux's monopoly would remain unchallenged, and, therefore, forced Merieux to lease Connaught's rabies vaccine manufacturing business to another firm.

(b) The FTC stopped the merger of office supply retail chains Staples and Office Depot because of the resulting high market share and likelihood of increased prices.

(c) The European Commission (EC) blocked the merger of Lonrho and Gencor because the two firms would have accounted for 70% of the world platinum supply, whereas the other suppliers were fragmented.

(d) The EC stopped the acquisition of Portugal's gas company GDP by its electricity company EDP and Italian energy company ENT because EDP and GDP had dominant positions pre-merger in electricity and gas markets. This vertical merger could have led to "input foreclosure" for rivals by increasing their cost of gas, the raw material for producing electricity.

Cartels

Cartels are the most pernicious form of anti competitive business practices because such understandings and arrangements are not reduced in writing. It, therefore, becomes difficult for the authorities to investigate and gather evidence of price fixation for effective prosecution of the offenders.

Cartels are likely to be more harmful in developing economies where the rate of detection and quick judicial punishments may not match with those in the developed world. Mexico and Colombia are classical examples where the ill-famed drug cartel mafia is known to be constantly engaged in a state of 'drug war'. The 'gangland' type executions by Mexican gangs have reportedly increased dramatically since 2001 and in 2007 an estimated 2,500 executions took place. In Argentina, in July 2005, five Cement companies were prosecuted for a cartel that lasted for 18 years from 1981 to 1999. The cartel members were fined $107 million, the largest antitrust fine in the nation's history.

- Siem Reap in Cambodia is a very popular tourist town, which houses the famous Angkor Vat temples. There are three means of transportation from Phnom Penh to Siem Reap–boat, road and air. The competition between boat companies has been intense and the prices came down from US$ 10 to US$ 5. The boaters discussed among themselves and resolved that they will charge US$ 10 from Khmer nationals and US$ 20-25 from foreigners. They further agreed that they would not compete with each other and would share their departure schedules. There was no written agreement but the common understanding constituted the cartel agreement.

- The International Vitamins Cartel in which all leading manufacturers of vitamins located in Belgium, Canada, France, Germany, Japan, the Netherlands, Switzerland and the United States, including Hoffmannla Roche Ag and BASF of Germany, Rhonepoulenc of France operated for over 10 years from 1989 to 1999 and covered all major vitamins consumed the world over. The overcharge on vitamins imports by 90 economies during the years 1990 to 1999 was estimated to be $2,709.87
- The EC too has made great strides in fighting cartels. Between 2000 and 2005 the Commission adopted 38 infringement decisions targeting both European and worldwide cartels, and imposed total fines of €4.4 billion.

INDIAN EXPERIENCE

Background:

The Constitution of India in the 'Directive Principles of State Policy' provides "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment [Article 39 (c)]." Accordingly, the Monopolistic and Restrictive Trade Practices Act 1969 (MRTP Act) was enacted. The MRTP Act dealt with control of monopolies, prohibition of monopolistic and restrictive trade practices. The provision relating to unfair trade practices was inserted in 1984. The MRTP Act specifically dealt with issue relating to mergers and acquisition, which required prior approval from Central Government (Section 23), but the provisions relating to concentration of economic power were deleted in 1991.

Competition Act, 2002:

The Government of India enacted the Competition Act, 2002 (Act) on 13th January 2003 to give a boost to the process of globalisation and liberalisation and efficient functioning of free market economy. The Act prevents practices having adverse effect on competition, to promote and sustain competition in markets and protects the interests of consumers and ensures freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental therewith.

The Act prevents practices having adverse effect on competition, to promote and sustain competition in markets and protects the interests of consumers and ensures freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental therewith.

Simply stated, the Act mainly deals with three areas–(a) prohibition of anti-competitive agreements; (b) prohibition of abuse of dominant position; and (c) regulation of combinations including acquisitions, mergers and amalgamations which exceed the threshold limits specified in the Act in terms of assets of turnover. The four limbs of the law are inter-related.

The Competition Act 2002 mainly deals with three areas – (a) prohibition of anti-competitive agreements; (b) prohibition of abuse of dominant position; and (c) regulation of combinations including acquisitions, mergers and amalgamations which exceed the threshold limits specified in the Act in terms of assets of turnover. The four limbs of the law are inter-related.

The important concepts used in the Act (Section 2) as under:

'acquisition' means directly or indirectly, acquiring or agreeing to acquire shares, voting rights or assets of any enterprise; or control over management or control over assets of any enterprise.

'agreement' includes any arrangement or understanding or action in concert;

"consumer" includes one who buys "goods" or avails of "services" for consideration notwithstanding whether such purchase of 'goods' or availing of 'services' is for one's own consumption or for resale or commercial purposes.

'goods' includes goods manufactured, processed, mined or imported into the country.

'person' includes an individual, firm, company, corporate incorporated by or under the laws of a country outside India.

"enterprise", *inter-alia*, includes private sector undertakings, public sector undertakings, government departments engaged in production, storage, supply, distribution, acquisition or control of articles, goods or services of any kind for consideration, but does not include government body performing sovereign functions.

'service' means services of any description which is made available to potential users including the

provision of services in connection with business of any industrial or commercial matters.

Anti-competitive agreement:
The Act prohibits all anti competitive agreement, which are void (Section 3). Anti competitive agreements are those agreements which have appreciable adverse effect on competition within India (AAEC) and which limit production or supply or allocate markets, agreement to fix price, collusive bidding, tie in arrangement, exclusive supply/ distribution arrangement and refusal to deal with any party.

Though the term AAEC has not been directly defined in the Act, but any agreement between any persons or associations engaged in identical or similar trade of goods or provisions of services which directly or indirectly determine purchase or sale prices, limits, control production, supply, markets, technical development, investments or provision of services, share the market, source of production or by way of allocation of geographical areas of market, goods or results in bid rigging, collusive bidding shall be presumed to have an appreciable adverse effect on competition.

Abuse of dominant position:
The Act prohibits abuse of dominant position (Section 4). Dominant position is abused by imposing unfair conditions with regard to pricing, distribution, supply *etc.* which makes other competitors to unable to enter the market. The object is to prevent and check that no enterprises or group shall abuse its dominant position. There shall be abuse of dominant position if enterprises or group imposes unfair or discriminatory conditions for purchase or sale of goods or services.

Regulation of Combinations:
The Act deals with combinations including mergers, amalgamation and acquisition of enterprise or control by one or more persons or group (Section 5). There is prescribed threshold limit in terms of assets or turnover of the entity which will come into existence after acquisition/merger and amalgamation.

The anti-competitive effect of mergers arises from increased risk of collusion amongst reduced number of players or from creation of excessive market power or even near monopoly conditions. The advantages of checking anti-competitive effect include (i) increased consumer welfare, higher levels of efficiency and greater innovation; (ii) checking collusive enterprises escaping punishment by simply resorting to the merger route thereby defeating the purpose of the law; and (iii) preventing collusion by restructuring industry.

The Act prohibits certain combinations having adverse effect on competition (Section 6). It provides that no person or enterprise shall enter into a combination which causes or likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void. The maximum of 210 days is prescribed for the clearance of combinations. Further, any person or enterprise who proposes to enter into a combination is required to give notice to the CCI disclosing the details of the proposed combination within 30 days of approval of proposal or execution of agreement.

Regulation of Cartels:
'Cartel' includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of service.' Cartel agreements are presumed to have adverse appreciable effect on competition in markets of India.

The three essential ingredients of cartel are:
(i) An agreement which includes arrangement or understanding;
(ii) Agreement is amongst producers, sellers, distributors, traders or service providers *i.e.*, parties engaged in identical or similar trade of goods or provision of service; and
(iii) Agreement aims to limit, control or attempt to control the production, distribution, and sale or price of, or, trade in goods or provision of services.

The adverse effect of cartels by overcharging is primarily on consumers. Normally the median cartels overcharge 17-19% for domestic cartels and 30-33% for international cartels. Studies have found that cartels raise prices 200% or more above the unit cost of production and distribution.

Competition Commission of India

The CCI of India, a quasi-judicial authority, was establishment for implementing the Act by preventing anti-competitive practices and ensuring fair competitive market in India. The CCI is to consist of a Chairperson and not less than two and not more than 10 other members to be appointed by the Government of India.

The duties, powers and functions of the CCI include keeping a check on the anti-competitive practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers, and ensure freedom of trade.

In India the CCI has adequate powers of investigation and awarding deterrent penalty to the extent of three times the profit on each of the members of the cartel agreement during the entire period of cartelisation or 10% of the turnover of each member of the cartel during the entire period of cartelisation, whichever is higher.

The CCI also has clear extra-territorial mandate to enquire into agreements, abuse of dominant position or combinations taking place outside India, if they have or are likely to have an appreciable adverse effect on competition in the relevant market in India (Section 32).

Any person, association of persons or consumers or trade, corporate body can approach the CCI. In addition, the Central Government, state government and other statutory authorities can also make reference to the Commission under the provisions of the Act.

Duties of the CCI:

The primary duty of the CCI is to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumer and ensure freedom of trade carried on by in Indian markets as indicated below:

- prohibiting anti competitive agreements, abuse of dominance position and regulate merger or amalgamation or acquisition after making an inquiry into the agreements and combinations, etc.;
- enquiring into violation of any provisions of the act, and in case of violation, imposing a penalty of not more than 10% of turnover of the enterprises ;
- directing an enterprise to discontinue anti-competitive agreement and abuse of dominant position including modifying the agreement;
- awarding compensation to the person affected by these practices;
- recommending to the Central Government for division of enterprises if found in a dominant position; and

In India, the Competition Commission of India has adequate powers of investigation and awarding deterrent penalty to the extent of three times the profit on each of the members of the cartel agreement during the entire period of cartelisation or 10% of the turnover of each member of the cartel during the entire period of cartelisation, whichever is higher.

Powers and Functions:

The CCI has power to enquire into any contravention of the Act by issuing directions to the Director General for investigating into cases relating to anti-competitive agreement, abuse of dominant position by an enterprise and combinations through a process of "enquiry". The Benches of the CCI may exercise the jurisdiction, powers and authority of the CCI. Every Bench shall consist of at least one judicial member.

The CCI may levy penalty on enterprises for failure to comply with its orders or directions and submission of false facts and statements.

The Government of India may also make a reference and seek opinion of the CCI on the possible effect on competition emanating from its policy, statute, rules, regulations framed, adopted or contemplated by it.

Suggestions

In Indian context, following suggestions deserve careful consideration for promoting competition:

1. There is need for continuous interaction between the government, chambers of trade, commerce and industry, and, competition authority to understand the complex issues involved and their ramifications for the developing countries.
2. The Government should periodically evaluate and assess the impact of state monopolies,

exclusive rights and regulatory policies on competition and international trade. In the light of the findings, the economic policy, competition policy and competition legal and regulatory framework should be harmonised.

3. The business and corporate world should assess the impact of the provisions of the competition law on business functioning, particularly for attracting foreign direct investment.
4. Promoting and keeping market competition requires positive intervention by the government, besides prohibiting anti-competitive practices. As such, there is a constant need to modify the legal and regulatory framework of competition in the light of the analysis of market structure, business practices and pricing mechanism.
5. Horizontal and vertical agreement, which are detrimental to competition, need to be strictly regulated by the competition law. Horizontal agreements relate to price, quantities, bids and market sharing, whereas vertical agreements like tie-in arrangements, exclusive distribution and refusal to deal are generally anti-competitive.
6. As a general proposition, the easy availability of capital has made sustained monopoly abuse difficult, the important task before the competition authorities is to promote and advance the cause of market regulated economy.
7. There is need for clarity on the relationship between the TRIPs and competition policy to achieve the objectives of the WTO, including promotion of international trade.
8. In developing countries companies are quite small compared to global MNCs. As such, competition authority in developing countries should focus more on encouraging competition rather than splitting companies.

Conclusion

The competition law for the last two centuries has a powerful influence on the society and business. There is consensus that competition is an essential element in the efficient working of markets. It encourages enterprise and efficiency and widens choice. It enables consumers to by the goods and services they want at the fair price. By encouraging efficiency in the industry, competition in the markets also contributes to international competitiveness. In the emerging scenario of globalisation and free enterprises, it has become necessary for the governments to safeguard their economic interests and regulate combinations

As a general proposition, the easy availability of capital has made sustained monopoly abuse difficult, the important task before the competition authorities is to promote and advance the cause of market regulated economy.

which result in market dominance and are against the public interest.

The objective of competition policy is to promote efficiency and maximise welfare. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate competition policy/law. The competition policy/law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competitive practices that may accompany or follow developments arising of the implementation of the WTO agreements pertaining to foreign investment, intellectual property rights, countervailing duties, antidumping measures, sanitary and phytosanitary measures. In addition, technical barrier to trade and government procurement need to be reckoned in the competition policy/law with a view to dealing with anti-competition practices.

In developing countries, the competition authority should not take for granted the intellectual property rights of a company under the patent law, but also scrutinise the implications of their patent rights on fair market price and the need for life saving drugs. The authority can, in public interest, judge the reasonableness of the price fixed and conditions imposed by the patent holders for marketing of patented drugs. The underlying object should be to allow reasonable profit and fair price of patented drugs, badly needed by poor patients of cancer, transplant and HIV/AID drugs. ■