Introduction to Competition Law & Policy and Competition Act 2002

by

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Structure of Talk

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Structure of Talk

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History of Competition Law (Complaw)

**U.S.A.**
- Modern Complaw generally traced to US Sherman Act, 1890.
- Response to ‘trusts’ formation by enterprises and growing power of big business.
- Sherman Act prohibited ‘agreements in restraint of trade’ and ‘monopolization or attempts or conspiracies to monopolize’.
- Clayton Act, 1914- merger control, tying, price discrimination, exclusive dealing.
- Federal Trade Commission Act, 1914
- Celler Kefauver Act 1950 – further control over mergers.
History of Complaw (Contd.)

UK
- Monoplies & Restrictive Practices (Inquiry and Control) Act 1948
- Fair Trading Act 1973
- Restrictive Trade Practices Act 1976
- Resale Prices Act 1976
- Competition Act 1980
History of Complaw (Contd.)

**UK (Current laws)**

- Competition Act 1998
  - Chap I like Art 81
  - Chap II like Art 82
  - Further power to OFT-information, investigation, penalties.

- Enterprise Act 2002
  - OFT in place of DGFT
History of Complaw (Contd.)

- CC given powers over mergers & market investigations
- CAT created
- Secretary of State powers on mergers removed
- Cartel - criminal offence
- Disbarment of directors
- Third parties given right to seek relief
History of Complaw (Contd.)

**European Union**

- Treaty of Rome: Art. 85, 86 (renumbered 81,82) cover anticompetitive agreements, abuse of dominant position.
- State aid, Art. 87.
- State owned enterprises, Art. 86
- Enforcement through European Commission; decentralized in 2003 giving greater role to NCAs.
History of Competition Law (Contd)

Other Countries/Jurisdictions
- Several States of USA since 19th century.
- Canada 1889; but not effectively enforced for decades
- Japan 1947
- Germany, 1947, 1958; merger control, 1974
Objectives of Competition Law

- Maintain and protect competitive process.
- Maintain, protect, freedom of trade Art.19 of Indian Constitution).
- Protection of SMEs.
- Restrain adverse effects of Government intervention.
- In EU, maintain common market.
Economics of Competition Law

- It is an economic law; economic understanding necessary for appreciation of the law.
- Economics provides:
  - conceptual basis
  - analytical tools.
- What is competition?
  - ‘a situation in which firms or sellers independently strive for buyer’s patronage in order to achieve a particular business objective, e.g. profit, sales or market share’ (EU, WB-OECD Framework)
‘a striving for the custom and business of people in the market place’ (Richard Whish)
‘a process of rivalry between firms--- seeking to win customers’ business over time.’ (UK-CC)

Benefits of perfect competition:
- Allocative efficiency
- Productive efficiency
- Dynamic efficiency (innovation); Schumpeter: ‘gales of creative destruction’
  “Invisible hand of competition”
Maximize consumer welfare
Consumer has wider choice, better availability at affordable prices.
At other end is monopoly:
  - Excessive pricing (lower output)
  - Allocative inefficiency (deadweight loss)
  - Productive inefficiency (X-inefficiency); easy life, wasteful expenses.
Weakness of perfect competition theory:
- Neither perfect competition nor perfect monopoly exist.

Assumptions of perfect competition:
- Homogeneous products.
- Large number of sellers & buyers
- No entry or exit barriers.
- Perfect information
- Free flow of resources
Other concepts have grown:
- Effective competition (EU, UK-OFTEL, UTILITIES ACT)
- Workable competition (Clark)
- Contestable market (Free entry/exit, hit & run)

However perfect competition remains a useful reference frame.
Economics of Competition Law (contd.)

Weakness of perfect competition theory (contd.)

- Natural monopolies (Economies of scale/scope)
  e.g. transmission lines, Pipelines.
- Network industries e.g. telecom, PC operating systems.

- Influence of schools of thought
  - Harvard, 1950s-60s S→C→P, interventionist
  - Chicago, 1970s-80s. Focus on efficiency.
  - Freiburg (ordo-liberal)
  - Schumpeter. Creative destruction.
**Economics of Competition Law** (contd.)

- Examples of economic tools:
  - Relevant market: product, geographic
  - Elasticity of demand, supply. Cross elasticity
  - SSNIP test; cellophane fallacy
  - Market share
  - Entry barriers, sunk costs

  Structure- HHI, CR, Market Shares Economics of Scale/Scope; MES Marginal cost; cost of production
Competition Law, Regulation and Professions

- Regulation necessary in certain sectors
  - Natural monopolies
  - Network industries
- Regulation is usually ‘in-market’ and ex-ante; Competition Law is ‘off-market’ and ex-post (except mergers).
- Regulation mimics market: competition law allows play of market forces.
- Competition perspective: regulation should be competition driven, progressively light (sunset clause)
- Mutual consultation/cooperation essential
Competition Law, Regulation and Professions (contd.)

- Professions include: CAs, CSs, C&WAs, Medical, Legal, Architecture etc.
- Most professions have statutory self regulatory regimes.
- Regulation necessary; usually covers entry requirements, continuing education and training, exclusive rights to perform certain services.
- Problems arising when regulation extends to other areas e.g. preventing price competition, controlling forms of business structure, restricting advertising.
Competition Law, Regulation and Professions (contd.)

- Competition Advocacy/case law leading to reforms:
  - Entry restrictions
  - Fee control
  - Advertising prohibition
  - Forms of organizations
  - OECD paper: entry requirements should not be disproportionately high, should not limit number of new entries, restrictions on prices and division of markets be removed, truthful advertising be permitted.
Competition Law & IPRs

- IPRs: patents, copyrights, trade marks, GIs, etc:
  - reward innovation,
  - incentive-wise competitors to innovate.
  - bring innovations into public arena.
- However IPR creates a monopoly.
- Competition authorities not averse to IPR itself but to the manner of its exercise.
- Examples: grant back, refusal to deal, royalty payment after patent expiry, using tie-in to gain access to another market, patent pooling
Competition Law & IPRs (Contd.)

- Competition concerns more relevant in developing countries due to: capacity for innovation limited, more IPRs in control of foreign companies, possibility of over broad patents, public interest issues like disease control, environment protection, farmer welfare.
Two elements required to sustain competition:
- Competition Policy
- Competition Law

Competition Policy: Set of Government measures which enhance competition, give primacy to market forces, facilitate entry and exit, reduce administrative controls, and minimize regulations (Dhall)

Competition Law: statute to prohibit and penalize anti-competitive practices and regulate potentially anti-competitive measures (Dhall)

Both elements mutually complementary.
Policies affecting competition:
- Trade (quantitative controls, tariffs)
- Industrial (licensing, locational, FDI)
- Public Sector (preferences, reservations)
- SME (preferences, reservations)
- Government procurement (preferences, reservations)
- Privatization/disinvestment
- Fiscal policy (taxes, incentives)
Competition Law and Competition Policy (Contd.)

Policies affecting competition (contd.)

- Subsidies/State Aid
- Labour
- Regulatory policies
- State restrictions/barriers (transport permits, tax barriers)

- Conflict with ‘industrial policy’
  - Protection to local industries.
  - Anti-dumping measures.
  - Promoting national champions; (Michael Porter’s observations)
National Competition Policy

*Principles advocated by Competition Commission for Policies:*

- Effective Competition Law
- Competitive neutrality
- Rule bound, transparent, non-discriminatory procedures.
- Institutional separation between policy making, operations, regulation.
- Competition driven regulation
Principles advocated by Competition Commission for Policies (Contd):

- Third party access to essential facilities
- Deviation from principles only to meet desirable, social, national objectives.
- Applicable across all sectors of economy.
- Hitherto reforms have been sector by sector; no uniformity.
Need for NCP:

- Risk of inconsistency between sectoral policies.
- Some policies/legislative initiatives adversely affecting competitive forces.
- Broad-based, over arching NCP will promote coherence and establish uniform competition principles.
National Competition Policy (Contd.)

Examples of NCP:
- Australia
- Botswana
- UK
- Denmark
- Turkey
Competition Advocacy

Advocacy with Government: examples:
- Postal Amendment Bill
- Warehousing Bill
- Shipping
- Road Transport

Advocacy with Regulators: examples:
- RBI
- TRAI
Advocacy with industry; public awareness:

- Chambers: CII, FICCI, ASSOCHAM, Others
- Trade Associations: Tyres, Cement, Shipping
- Professions: CAs, CSs, CWAs, Bar
Competition Law - International Dimension

Multilateral organizations:
- UNCTAD, OECD, ICN, WTO

Bilateral Agreements: Legislation/Regional:
- BTAs, CECAs, RTAs
- Need for including competition in India’s BTAs/CECAs; Graded level of cooperation
History of Competition Law in India

- High Level of Economic Concentration in 64/100 industries:
  - Prevalence of MTPs e.g. price discrimination, predatory pricing, RPM, exclusive dealing.
  - Prevalence of RTPs e.g. price fixing, cartelization, boycott.
History of Competition Law in India (Contd.)

- High Power Expert Committee (Sachar Committee) to enquiry inter alia improvements/changes in MRTP Act. Recommended strengthening of MRTPC.
- Amendments to MRTP Act 1984:
  - UTPs included
  - Concept of deemed illegality in RTPs.
  - MTP and M&A provisions not changed.
History of Competition Law in India (Contd.)

- Economic Reforms 1991, changes in MRTP:
  - Provisions requiring MRTP enterprises to obtain approval for expansion, new undertaking, etc. removed.
  - PSUs brought under ambit
  - Interim injunction possible without notice affected parties
Competition Act 2002

- Enacted in January 2003
- Certain Sections, including those related to establishment and competition advocacy brought into force.
- Enforcement provisions not brought into force.
- Writ petition filed
- Hon’ble Supreme Court passed judgment in 2005.
- Government undertook process of amendment. Amendment Bill introduced in March 2006.
Competition Act 2002 (contd.)

- During above period Commission functioning with one Member/acting Chairman plus small compliment of staff.
- Work done by Commission during this period:
  - Competition advocacy
  - Professional groundwork
  - Capacity building
Competition Act 2002 (contd.)

**Substantive provisions:**
- Prohibition of abuse of dominance
- Regulation of combinations
- Prohibition of anti-competitive agreements
- Competition advocacy and public awareness.
Suggested Readings

- Report of the High Level Committee (Raghavan Committee)
- The Competition Act, 2002 as amended (along with Statement of Objects & Reasons) and the notifications issued by the Central Government.
- Competition Commission of India Website: www.competitioncommission.gov.in
- OECD, Competition Policy and Law Division. Website: http://www.oecd.org/competition
- International Competition Network. Website: www.internationalcompetitionnetwork.org
Suggested Readings (Contd.)

- WTO Competition Policy. Website: http://www.wto.org/
- Jones & Sufrin (2004): “Introduction to Competition Law”