
ANTITRUST LAWS: ITS HISTORICAL PERSPECTIVE AND EMERGENCE IN INDIA AND USA

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ABSTRACT

Anti-trust laws which are also known as “Competition law” plays an vital role in shaping the business conduct , influences economic policy of a nation, produces both opportunities and hindrances for people business and government across the world. Anti trust laws are a body of statutes which help to formulate and strengthen the markets with more competitive spirit by preventing anti-competitive business practices, and misuse of monopoly. Moreover, Competition law regimes everywhere face similar problems and issues. It aims is to promote economic efficiency. However, for equitable competition there are three folds - “allocative efficiency, productive efficiency and dynamic efficiency.” Hence, the above mentioned folds have been adopted by the countries as the fundamental principles for effective regulation and implementation of the antitrust laws. It prohibits price fixing, anticompetitive mergers, and practices designed to achieve or maintain a monopoly position. In USA, such practices are prohibited or held as illegal with the implementation of the Sherman Act and Clayton Act whereas in India, Competition law is regulated by the Competition Act, 2002 with aim to combat anti-competitive practices. This research paper aims to provide a deeper insight regarding the evolution of the Antitrust laws in the countries like India and USA and implementation of this laws since 19th century and the changes that have been brought till the date. The research paper also aims to analyse the role and functions of antitrust laws.

Keywords: Antitrust laws, Monopoly, Anti-Competitive Agreements, Sherman Act, anticompetitive agreements

INTRODUCTION

The term 'Anti-Trust' has its origin from the Sherman Anti-trust Law, passed in the United States in 1890. In some countries, including the United States, "antitrust" is another word for competition law. It is also known as "Antitrust laws" which is specially charged with protecting competition from the restraints so that it can have a direct and powerful impact on lives anywhere. Its main purpose "is to control and enhance market competition by outlawing unfair corporate practices and the abuse of monopolies". In addition to this, it has been seen that competition legislation applies both domestically and globally. Domestic institutions make decisions that directly affect economic life, but ideas, institutions, and experiences from around the world frequently influence those decisions. Each influences the other, therefore comprehending those influences is frequently required to understand competition law decisions anywhere. It is crucial to understand how competition law works in a certain domestic regime, but it is also critical to detect foreign impacts on its operation.

The three fundamental components of legislation in the history of antitrust regulation are the Clayton Act, the Federal Trade Commission Act, and the Sherman Act. DOJ and FTC are in charge of ensuring that antitrust laws are followed. In industries including banking, railroads, airlines, and telecommunications, the DOJ has exclusive antitrust jurisdiction and the authority to impose criminal penalties. In contrast, the FTC primarily targets areas of the economy where consumer spending is strong.

Moreover, Anti-trust laws introduces the concept of antitrust policies which are made by the government "to regulates the monopolistic behaviour in order to promote free and fair trade practices and to develop the healthy competition so that consumer could have certain benefits from it and increase the economic growth rate".

"The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organization of production. As such, competition is a central driver for productivity growth in

the economy, and hence the UK's international competitiveness.”¹

COMPETITION LAW IN INDIA

India had its own Competition Act since 1969 and it has been more than 40 years now. Earlier, Monopolies and Restrictive Trade Practices Act was enacted, this legislation “predicated on command and control economic notions, outlawed economic power concentration in a few hands that was harmful for the public good.”² It also ban monopolies and Restrictive commercial practices. Following the period liberalisation of 1991, it became obligatory to develop a framework for competition legislation that was both compatible with international norms and more flexible to local economic conditions. Thus, Competition law is a comprehensive law that was established by the Parliament in the year 2002 and protects the interest of their consumers.

Evolution of the Competition Act, 2002

The period of pre-independence was marked by various difficulties and India was continuously struggling to become self-reliant country. When India become an independent country and decided to adopt the “Second Fiver Plan” which is also known as “Mahalanobis Plan” and it also increases the pace of industrialisation. Hence, the plan establish large number of industries in order to form a socialistic society. Due to large number of industries in the economy, the government felt an urge to regulate the monopolistic practices and hence, led to formation of “Monopolies Inquiry Commission (1965)” whose role was to examine the conditions of a monopolistic market and to provide certain measures regarding the same. Thus, Parliament of India passed an act .i.e. Monopolies and Restrictive Trade Practices Act, 1969 (MRTP ACT) that prevent monopolistic behaviour. However, act wasn't definite and has certain loopholes .

Thus, Indian government was looking for an effective act which would be competent enough to deal with the requirements of an anti-market and was looking forward to have an best investigation machinery that would look after all the anti-trust activities in the market .In result , under the chairmanship of the Mr.S.V.S Raghavan , the Raghavan Committee was established on 22nd May 2000 by the Central government which aims “to achieve a fair market competition

¹ Himanshu Handa, Evolution of Competition law in India, 5. IJSLR, 53, 53-54(2010), <https://www.ukca.in/wp-content/uploads/2019/08/EVOLUTION-OF-COMPETITION-LAW-IN-INDIA.pdf>.

² Dr.S.C.Tripathi, Competition law 4 (Central law Publications ,107,Darbhangha Castle, Prayagraj 107, 2nd ed.,2019)

with the view to frame competition law and its policy with the object to curb monopolistic markets across India” .³ Later on , committee recommendations to repeal the MRTP Act and suggest that in the era of post-liberalisation there is a need to pass legislation that would increase competition and gives choices to the consumers. Hence, Competition Act, 2002 was passed and came into effect on 13th January 2003. Further, it has been amended in year 2007 and then 2009 .CCI is a statutory body which is established in 2009 It contains nine chapters and sixty six sections .The primary goal is to prevent practices having adverse effect on competition , to promote and sustain competition in markets , to protect interests of consumers and to ensure freedom of trade.⁴ It gave all industrialists and businessmen the right to free trade, but with reasonable restrictions. The act not only focused on the regulatory part but has also adopted the concept of ‘Competition Advocacy’(was not a part of MRTP Act) which promote competition, create awareness etc. as a social duty of the Commission.⁵ Provisions regarding Competition Advocacy is discussed under the Section-49 of the Act .The Comp. Act,2002 is governed by the Competition Commission of India (CCI).It is empowered with various powers like investigative, regulatory, adjudicatory etc. under the act .

Distinction between MRTP ACT, 1969 and COMPETITION ACT, 2002.

The distinction between the MRTP Act and Competition Act can be made on the basis of its grounds, power, approach, offences, issues etc.

1.MRTP Act, is the first and foremost competition law made in India , came into force on 1st June 1970 and it deals rules relating to unfair trade practice. Competition Act , 2002 is a successor of MRTP Act , 1969 which was enacted to promote competition in the economy.

2.MRTP Commission pass an order on Restrictive trade practice “ prejudicial to the public interest whereas Competition Act focuses on the concept “ appreciable adverse effect on competition “ by taking all market forces. ⁶

3.MRTP Act is reformatory in nature, whereas Competition Act is punitive.⁷

4.The MRTP act does not specify any penalty for 14 offenses which is listed by the act (against

³ Dr.S.C.Tripathi ,Supra note 2 at 8.

⁴ Id .at 13.

⁵ Dr.S.C.Tripathi ,Supra note 2 at 24.

⁶ Dr.S.C.Tripathi ,Supra note 2 at 11

⁷ Dr.S.C.Tripathi supra note 2 at 11

the principle of natural justice) but Competition Act recognise 4 offences (against the principle of natural justice) and states their penalty also

5. Monopolies and Restrictive Trade Practices (MRTP), registration of agreement is compulsory whereas Competition Act is silent on the registration of agreement.

6. MRTP commission has the power to pass only 'Cease 'and 'Desist' orders whereas the Competition can declare an order to prohibit and penalise those activities which abuses competition.⁸

Hence , MRTP Act was rigid in nature whereas Competition Act is flexible in nature.

Vipul A.shah v. All India Film Employee Confederation⁹

In this case , Vipul A.shah alleges before the Commission that certain provisions of MOU dated October 01, 2010 signed between Federation of Western India Cine Employees and Producers Associations, Indian Motion Picture Producers Association, Film and Television Producers Guild of India and Indian Film and Television Producers Council relating fixation wages, overtime wages etc. were anti- competitive. Moreover, the investigation done by the DG held that the provisions of the MOU were against the Section-3 of the Competition Act . Hence, the Commission passed the order of ceased and desist against the above mentioned association on October 31, 2017 but no monetary penalty was imposed on them.

COMPETITION ACT mainly regulations three kind of agreements :-

Anti-competitive agreements :-

It deals with Section -3 ,Competition Act which states that any agreement of production, supply, distribution, acquisition etc. which cause an appreciable adverse effect (AAEC) would be considered as "void agreements". The mentioned act regulate two kinds of agreements: (a) horizontal agreements (Sec-3(3) of the act). This agreements are considered to cause an AAEC mostly as compared to vertical agreements. Production and supply of control , market

⁸ Dr.S.C.Tripathi, Supra note 2 at 11

⁹ Case no. 19/2014

allocation, fixing prices, Bid – rigging , cartel etc. these are some of the examples which cause AAEC or illegal per-se.

(b) vertical agreements (Sec-3(4) of the act) Illustration:- agreement between manufacturer and supplier. It follows the rule of reason. Types of vertical agreements:-

- Tie in arrangement
- Exclusive supply agreements
- Exclusive distribution agreements
- Refusal to deal
- Re -sale price maintenance.

However , there are certain exceptions to these agreements and are not illegal per se as mentioned under sec--3(5), Competition Act.

Abuse of dominant position :-

Abuse of dominant position deals with Sec- 4 of the Competition Act. .The term ‘Abuse of Dominant Position’ was firstly coined under Art- 82 of the European Community treaty and then under Sec-4(1) of the Competition Act. Under the said act the term “dominant position” is defined as “a position of strength, enjoyed by an enterprise, in the relevant market in India which enables it to operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour”.¹⁰ The Act prohibits an enterprise, which enjoys a “dominant position” in a relevant market from abusing its position of dominance(Sec-19) of the Competition Act. CCI lists a number of elements that may considered while determining such dominance. These characteristics include market share, firm size and resources, rival size and relevance, market structure and size, and countervailing purchasing power. In addition to this , in case CCI want to conducting inquiry and to penalise any dominating organization or group ,CCI refers to the Sec-- 27, 35 and 28 of the Competition Act, 2002.

¹⁰ Dr.S.C.Tripathi , Supra note 2 at 60.

Combinations :-

From June 1, 2011, all high-value combinations (acquisitions, mergers, and amalgamations) must be reported to and approved by the CCI. The Indian merger control regime is governed by sections 5 and 6 of the Competition Act, as well as the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, as amended up to 4 April 2013 (Combination Regulations) issued under the Competition Act. Under Sec-6 of the act, threshold values are given based on the asset's size or number of sales. The threshold varies based on whether the combination consists of one or more enterprises, if the assets or revenue are developed exclusively in India or globally, and if the assets or income are created entirely in India. CCI (the Indian system's administrative body) has the authority to approve or deny mergers. For better regulation of combinations under Sec--6 must be read with Sec-29,30,31 of the act.

Recent Amendment under Competition Act

On April 3, 2023, the Indian Parliament passed the Competition (Amendment) Bill, 2023, which suggests certain revisions to the Competition Act, 2002. The Bill obtained assent from the Hon'ble President of India on April 11, 2023. The modifications are intended to enhance competition regulation, streamline processes, and promote a business-friendly atmosphere.

Key Highlights of Competition (Amendment) Bill, 2023**Establishing a threshold for Deal Value in mergers and acquisitions (Amending Sections 5 and 6 of the Competition Act):**

The Amendment Act stipulates that any acquisition, merger, or amalgamation valued at more than Rs. 2000 crores must be reported to the Competition Commission of India by any corporation with substantial business operations in the country. The Amendment Act, 2023 reduces the 210-day merger and acquisition review timeframe of the Competition Commission of India to 150 days.

Modifications in the concept of cartel and anti-competitive agreements

The Amendment Act, 2023, has expanded the definition of anti-competition agreements by substituting the term "Exclusive supply agreement" with "Exclusive dealing agreement." And

the definition of the cartel also is broadened i.e., those who do not directly participate in supply or production but participate indirectly at the horizontal levels such as trade associates or consultants or intermediaries.

Authority to nominate Director General for Competition Commission of India (Sec-16 of the act) :

It is important to note that, in accordance with the aforementioned Amendment Act 2023, the Competition Commission of India may designate a Director General to support it in carrying out an investigation or inquiry into any violations of the Competition Act. The Amendment Act, 2023 also gives the Director General additional investigative authority to carry out the investigation, including the ability to question any officer or agent of the party under investigation with prior permission from the Competition Commission of India. The Amendment Act, 2023 also gives the Competition Commission of India the authority to request expert opinions from experts.

Limitation on the number of complaints that CCI would consider:

In accordance with the Amendment ,no complaint or reference may be lodged with the Commission unless it is submitted within three years of the date of the cause of action.

Penalties based on “global turnover derived from all products and services” will be determined:

The CCI may levy fines on the worldwide turnover derived from goods and services in accordance with the Amendment Act, 2023. After looking into the agreements or misuse of a dominating position, the CCI may impose harsher penalties for the same.

As a result, section-5, 20 ,35 and 40 of the Competition (Amendment) Act ,2023 came into from 6 march 2024 as per the notification of the Ministry of Corporate Affairs.

COMPETITION LAW IN USA

In the last portion of the nineteenth century, there were two major shifts in the economy. The first was the industrial revolution, which increased the amount of cash needed by American companies. The emergence of large corporations with the ability to dominate entire industries

was the second. The lack of clarity in the main federal antitrust laws may be one reason why disagreements regarding antitrust laws continue to exist. The three basic provisions Section- 1 and 2 of the Sherman Act and Sec- 7 of the Clayton Act—are brief and ambiguous, essentially giving federal courts common law jurisdiction to formulate competition laws based on accepted economic theory that maintains the level of competition in order to provide consumers with lower prices and better products.

The Sherman Act , 1890

The Sherman Act was proposed by Ohio Sen. John Sherman and passed it in 1890. The aim of this act was to promote the economic fairness and to regulate interstate commerce. This Act contains 2 sections :-

Section-1 of the act prohibits the contracts in “Restraint of trade”. Certain kinds of agreements are prohibited in and of themselves under Sec-1 because they almost continuously impede competition. Price fixing, Market allocation, and certain horizontal boycotts are now included in the per se illegal. Thus, if any person who engages in any combination that is illegal shall be deemed guilty of offence. He shall be punished by fine not exceeding \$10,000,000 if a corporation or if any other person, \$350,000, or by imprisonment not exceeding 3 years or by both said punishment, in the discretion of the court.¹¹

Section-2 of the act deals with “Monopolization” While Sec-1 of the said act governs multilateral Restraints of trade, Sec- 2 prohibits unilateral Anticompetitive conduct by dominant firms—in a word, Monopolization.¹² If any person found guilty, he shall be punished by fine not exceeding \$10,000,000 if a corporation or if any other person, \$350,000, or by imprisonment not exceeding 3 years or by both said punishment, in the discretion of the court.¹³

But later on the Sherman act was replaced by the Clayton Act , 1914 which addressed specific practices that the Sherman Act didn't ban. Thus, in simple words Clayton act was enacted to have a strong approach in order to control the unlawful trade practices or monopolies.

¹¹ Dr.S.C.Tripathi, supra note 2 at 14

¹² Jay B.Sykes , Antitrust law : An introduction, CRS,1(2,2022) <https://sgp.fas.org/crs/misc/IF11234.pdf>

¹³ Id. at 16.

The Clayton Act,1914

The Clayton Act was passed by the Henry De Lamar Clayton of Alabama in 1914 to regulate massive corporations. Section-2 of the act handle unlawful price discrimination and predatory pricing .Section -3 deals with attempt to create monopoly. Section -7 handles merger and acquisitions. Later on , this act was amended by the Robinson Patman Act ,1936 (the act reinforced laws against price discrimination among customers) and the Celler Kefauver Act , 1950 (prohibited the transfer of equity assets).

The Federal Trade Commission

FTC,1914 is established as a “watchdog agency”. Section- 5 of the Federal Trade Commission Act (FTC ACT) forbade the use of “unfair methods of competition in commerce” in general. It claims that under the extensive authority granted to it by act they cant prohibit such types of behaviour that it considers detrimental to regular competitive interaction in our marketplaces.

Biggest example of antitrust law:-The U.S. Department of Justice has filed an antitrust suit against Google in October 2020 alleging that Google uses anti-competitive practices in online search and advertisement.¹⁴ (the suit is still pending as the trail will begin again in September 2024).

CONCLUSION

Competition law is a tool designed to protect the consumers from anti-competitive behaviour of the producers. It is also known as “Antitrust laws” in U.S.A. ,clearly states that Competition is an important principle of a free market system and enlists that the main goal of the competition law is to encourage efficiency and innovation. Moreover, it has been seen that Antitrust laws have a deeper history of evolution in both the countries i.e. India and U.S.A. In India , earlier under Article -39 of the Indian Constitution MRTP Act, 1969 was established and ruled for 33 years but after the liberalisation period (1991) the committee of S.V.S Raghavan recommended scraping of the MRTP and recommends to have a full fledge act due to obstacles faced in MRTP Act. As a result, Competition Act , 2002 was passed by the Indian Parliament. This act is flexible and behaviour oriented .CCI is the main body which follows

¹⁴ Investopedia, <https://www.investopedia.com/the-u-s-dept-of-justice-to-file-antitrust-suit-against-google-5083194>, (last visited March 25, 2024).

the principles of the act and regulates the competition in the market. Nowadays , it has seen that the act shifted its focus from consumer interest to the public and hence, became punitive in nature. Similarly on the other hand , the Antitrust laws in the U.S.A evolved during the 19th century and the Sherman Act was passed in 1890 to prevent monopolistic behaviour of the enterprises. Then, later on the above mentioned act was succeeded by the Clayton Act ,1914 which was established to have strong approach to control the unlawful trade practice but certain provisions of both the acts (i.e. the Sherman Act and the Clayton Act) are same as both deals with the same subject matter irrespective of their distinction.

In the end , the Antitrust law or Competition law have same objective i.e. to ensure the effective allocation of resources, ensures that costs of production are kept at a minimum and dynamic efficiency ¹⁵and both the countries antitrust law has the potential for the improvement . Various amendments are being made in the Antitrust law of both the countries in order to foster economic progress in both the nations.

¹⁵ Dr.S.C.Tripathi , Supra note 2 at 14.