Competition Law in India: Need to Go Slow and Steady

Anurag K Agarwal
akagarwal@iimahd.ernet.in
Tel: +91-79-2632 4916
Fax: +91-79-2630 6896

W.P. No. 2005-10-05
October 2005

INDIAN INSTITUTE OF MANAGEMENT
AHMEDABAD-380 015
INDIA

Competition Law in India: Need to Go Slow and Steady

Abstract

The globalized and liberalized Indian economy is witnessing cut-throat competition. To provide institutional support to healthy and fair competition, there is a requirement of better regulatory and adjudicatory mechanism. To this effect, India has enacted the new competition law which shall replace the earlier law. This is a shift from curbing monopolies to encouraging competition. The design of the new law carves out a very important role for the Competition Commission of India (CCI). The task has been divided in three phases. This article sets out to explain the intricate relationship of competition law and judiciary in India by examining the experience CCI had so far. The article then goes on to examine the role of lawyers. The article then considers the time frame for the implementation of the three phases and provides realistic suggestions to have a successful setting of competition regime in India.

Keywords

Competition Advocacy, Competition Commission, India, Judiciary, Lawyers, MRTP Act

Introduction

In the pursuit of globalization, India has responded by opening up its economy, removing controls and resorting to liberalization. The natural corollary of this is that the Indian market should be geared to face competition from within the country, and outside (Viswanathan, 2003). To take care of the needs of the trading, industry and business associations, the Central Government decided to enact a law on competition. Finance Minister, Chidambaram (2003) highlighted the need to have a strong legal system and said "A world class legal system is absolutely essential to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters." With this zeal the Government went ahead and enacted the Competition Act, 2002.

The Earlier law and the need for change

It would be interesting to turn the pages of history and see how the earlier law, which is still in force, was enacted. In 1964, when the Indian democracy was in its nascent stage – barely 17 years old – the Government of India appointed the Monopolies Inquiry Commission to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture. The Commission submitted its report alongwith The Monopolies and Restrictive Trade Practices Bill, 1965, which was later passed by both the Houses of Parliament and received the assent of the President on December 27, 1969. It came into force on June 1, 1970 as the Monopolies and Restrictive Trade Practices Act, 1969. The Statement of Objects and Reasons mentioned that the Act was to provide that the operation of the economic system did not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith and incidental thereto (MRTP Act, 1969).

Since 1970, the Act had been amended several times to suit to the changing circumstances. However, of late, particularly after the economic reforms of early 1990s, it was felt that the MRTP Act had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there was a need to shift focus from curbing monopolies to promoting competition. The Raghavan Committee discussed the issues and concluded that the MRTP Act was beyond repair and could not serve the purpose of the new competitive environment. A new law (Indian Competition Act) may be enacted, the MRTP Act may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices (UTP) need not figure in the Indian Competition Act as they were covered by the Consumer Protection Act, 1986. The pending cases in the MRTP Commission may be transferred to the concerned Consumer Courts under the Consumer Protection Act, 1986. The pending MTP (Monopolies and Restrictive Practices) and RTP (Restrictive Trade Practices) cases in the MRTP Commission may be taken up for adjudication by the Competition Commission of India (CCI) from the stages they were in (Raghavan, 2000).

The Competition Act, 2002 (the Act) received assent of the President of India on January 13, 2003 and was published in the Gazette of India dated January 14, 2003. Some of the sections of the Act were brought into force on March 31, 2003 and majority of the other sections on June 19, 2003. However, the entire Act has still not come into force. In exercise of the power conferred upon it, the Central Government has established the Competition Commission of India having its head office at New Delhi with effect from October 14, 2003. The Commission is a body corporate having perpetual succession and a common seal. It may establish offices at other places in India. The Commission shall consist of a Chairperson and not less than two and not more than 10 other members to be appointed by the Central Government.

Phases of Implementation

As per the deliberations in the Parliament during the discussion on the Competition Bill, the Act is to be implemented in three phases. In the first year, the CCI will exclusively focus on competition advocacy which is an important compartment of the Act. In the second year, the CCI is expected to commence adjudication of enquiries relating to anti-competitive agreements and abuse of dominant position by an enterprise. In the third year, the CCI will commence regulation of certain combinations (CCI website, 2005).

The International Trend for Developing Economies

The three phases of implementation are truly in line with international trend, which is reiterated in a recent World Bank working paper No. 35, which analyses competition law and regional economic development in the Southern Mediterranean Countries, emphasis has been laid on realistic enforcement agenda (World Bank, 2004). This report also discusses competition law for developing countries and draws heavily from papers written for emerging economies. This applies to India as much as to other developing countries.

There are certain arguments that developing economies do not need a competition law framework.

First, it is sometimes argued that free trade would by itself be sufficient to protect the competitive process (Williams, 1994). This is referred to as the "Threat of Imports" argument.

Secondly, some argue, that because of the complexity of competition law analysis, combined with the weak institutional endowment of most emerging economies, adoption of a competition law regime might produce more harm than good, as the risk of mistaken decisions would be particularly high (Rodriguez and Coate, 1997).

Thirdly, the argument is made by some observers that competition law would be a luxury for rich countries, and that developing economies have other more pressing priorities. Jenny (1999) suggests that a number of developing countries are not convinced that the adoption of a competition law or policy is appropriate during the first phase of economic development.

Finally, some commentators point that implementation of competition laws in developing economies should take into account the specific characteristics of these countries. Gal (2001) argues that small economies need a specifically tailored competition policy, because they face different welfare maximization issues than large ones. Competition law in these economies should focus exclusively on the promotion of economic efficiency, which should be given primacy over other goals sometimes promoted by competitive regimes, such as dispersion of economic power and the protection of small businesses.

According to the working paper, none of these arguments hold ground. Powerful arguments suggest that adopting and implementing competition law regimes should be beneficial to emerging economies and that attention should be paid to the specific characteristics of these countries, such as high degree of concentration in some industries, their limited institutional endowment, and so forth. There is a risk that the setting up of competition regimes might not be an easy process as they are sometimes shared by government officials and industry interests. In short, competition regimes should be based on the local circumstances of each country and a realistic enforcement agenda should be developed for each country.

The Indian Experience so far

Indian experience with the competition regime so far has vindicated it. In India, the European and American models may not work, as India has a unique chemistry and very different socio-political

and economic conditions. The setting up of the competition regime in India has so far proved to be a much more difficult task than envisaged. There are a number of reasons which may be equally true in any developing economy. Besides all those reasons, India is facing the unique challenge from Judiciary.

Indian judicial system is one of the strongest and most powerful judicial systems in the world. The Indian Supreme Court is arguably the most powerful court in the world (Verma and Kusum, 2000). When on October 14, 2003, the Central Government appointed Mr. Dipak Chatterji as Chairperson of the CCI for a period of five years from the date on which he entered upon his office, or till he attained the age of sixty-seven years, whichever is earlier, no one knew that even after one and a half years, the CCI would not have a chairperson (Gazette, 2003). A petition was filed in the Supreme Court challenging the appointment of Chatterji as the chairperson. The grounds of challenge, *inter alia,* being that Chatterji – a senior bureaucrat – cannot sit in judgment over retired High Court and Supreme Court judges. The Supreme Court admitted the petition and issued notice to the Central Government to file its reply. The Central Government agued that the CCI was more of a regulatory body that requires expertise in the field and such expertise cannot be supplied by members of judiciary. It was also contended that the CCI was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers. This argument did not find favour with the judiciary. It is important to note that the Constitution of India provides for independence of judiciary. Due to this independence and wide powers under Articles 226 and 32 of the Constitution of India, the High Courts and the Supreme Court respectively are able to exhibit such judicial activism which is unheard of in other countries. The Supreme Court took a firm stand of not accepting the Central Government's argument.

In January, the Central Government assured the Supreme Court that amendments would be made in the Competition Act to enable the Chairperson and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. The Supreme Court on January 20, 2005 disposed off the petition in view of the submission made by the Central Government (Supreme Court, 2005). This judgment has paved the way for the Central Government to amend the Competition Act and thus make the CCI a truly functional body.

Challenges and the Task Ahead

For the last more than a year, the CCI has been working without the Chairperson. There has been some arrangement by the Central Government in the form of personnel on deputation and some activities to give a semblance of a working commission. However, due to uncertain future of the CCI, earlier because of the petition pending in the Supreme Court and later due to the expected amendment in the Competition Act, the existing CCI has not been able to do what was envisaged. There have been half-hearted efforts to spread competition advocacy. The personnel manning the show are birds of passage and would go back to their parent cadre after some time. A few lectures are organized to spread competition advocacy. One such lecture was also organized at the writer's educational institute – Indian Institute of Management Ahmedabad – on February 22, 2005. It was well received by the audience, but the feeling is that there need to be more such lectures and more of interaction and debate regarding the various functions of CCI. There are also efforts made to devise a curriculum for different schools – business, law and economics – so that competition policy and law may be taught to younger generations (CCI website, 2005). This is a challenging task to merge the issues of business, law and economics and present a curriculum which is acceptable to all. Many of the above activities are currently being undertaken. The Concept note on the Advocacy Activities of CCI says that the activities will get scaled up eventually once the Commission gains in experience and certain administrative and financial impediments are resolved (Concept Note, 2003). However, with personnel on deputation from different departments, this appears to be a non-realistic approach. There is a need to have personnel solely for the work of CCI so that the system may get the benefit of their experience.

According to the time schedule, the second phase – of adjudication – should start anytime. But it does not appear to happen in the near future. One of the most important aspects of the adjudication process would be that the judicial and executive members work in tandem. It is easier said than done. Though India has a successful history of tribunals where the adjudicating members are a mix of judicial and non-judicial persons, the CCI would be a different ball game altogether. It is one such commission which is more of regulatory in nature than adjudicatory. But, it has adjudicatory functions and these functions can be manned best by persons trained in law. As the task of CCI has international economic dimensions, the training of persons manning this body must be very thorough and with international exposure. The Supreme Court (2005) has said that there may be two bodies – one with expertise that is advisory and regulatory and the other adjudicatory. There may be an appellate body to sit in appeal over the orders of the lower adjudicatory body. And, the jurisdiction of the Supreme Court under Article 136 shall always remain unquestioned. The question may arise: should the High Courts be given the power to review the judgments of the appellate body under Article 226? Experience has shown that High Courts are reluctant to let this power go away. It creates problems later and it would be in the interest of all that while amending the Competition Act, the legislature takes due notice of this fact.

Setting up adjudicatory bodies requires capital as well as revenue expenditure. Except the Supreme Court and the High Courts, whose expenditure is charged on the Consolidated Fund of India, all other judicial bodies depend upon the government – central or state. Recently, the Central Government refused to allocate funds for the 1,734 Fast Track Courts, established a couple of years back. The Supreme Court had to intervene and give a direction to the Central Government to grant funds to these courts. Still the future of these courts hangs in the balance (Times Of India, 2005).

It has been envisaged that in the third year, the CCI will commence regulation of certain combinations. This is just wishful thinking. Merger control requires very complex assessments and risks of mistaken decisions are high, specially when such assessments are made by insufficiently experienced competition authorities. There is a serious dearth of trained professionals in this field.

So, there is a word of caution: in the excitement to enforce the full authority of CCI and make it fully functional, it should not be overlooked that half baked so-called experts would do more harm to the competitive environment in India. It is certainly going to take time and a surely a couple of years before India starts getting a regular supply of personnel trained in competition policy and laws and who can handle merger control. Haste is going to be fatal. There are still debates going on the curriculum for the competition policy and law courses to be taught in various schools. Different schools have shown willingness to teach such a course, however, there are constraints of time and qualified faculty which prevent these schools from starting courses on competition policy and law. It is very difficult in such a scenario to see that competition law is enforced shortly.

Awareness

To set up a competition regime, it is essential that awareness is spread and limited resources are used in the most effective manner. For this, the agenda has to be truly realistic. First of all, adequate time should be allocated for the first phase of activities – competition advocacy. One year is too short a period for this. It may be enough for developed countries, but for India, a lot more time, may be two to three years, or even more, is required. During this time period there should be a concerted effort from the CCI, the government, bar associations, business communities and the educational institutions. The most important is the inclusion of competition curriculum in the business, law and economic schools. It is a process which shall take about two

to three years time and the desirable results can only be obtained when the students are well prepared to take the challenge of putting into practice what they learnt in the class room.

Role of Lawyers

"The first thing we do, let's kill all the lawyers" (Shakespeare). Lawyers are not the most likable section of the society and it is known that the lawyers' association is a very strong and powerful body. It has tremendous clout and also has a strong say in the policy formulation of the government. Due to this reason, entry of foreign law firms in India is fought tooth and nail by the bar associations across India. In such a scenario, it would be detrimental for the society to start the adjudication process in the CCI without creating awareness about it.

Let us see some other effects of starting it prematurely. If adjudication process comes, can the lawyers be far behind. So, the scenario is going to be something like this: very few people know what is competition policy and law, lawyers get an entry into the CCI and they become the know-all of the competition law, the truth is that very few know it, others just join the scene, with whatever knowledge they have, they start throwing their weight around and slowly but surely a CCI Bar Association comes into existence, lobbying starts, more facilities for Bar members, more lawyers joining the Bar, the place becomes saturated. During this process, new precedents, norms and practices get established – needless to say, a number of these are way off the mark what the CCI had envisaged. The concerned authority tries to put the house in order, there is stiff opposition from the Bar and arguments such as 'intervention in the rights of the Bar', 'blow to independence of lawyers' and ultimately 'anti-people, against public interest' are made. Protest processions can be seen everywhere on the streets. Media give a good coverage and the general public gets the message that the government and the CCI authorities are becoming arbitrary and doing something which has never happened in the history of CCI. Things become murky and it becomes almost impossible to have a working system. What we get in the end: a body called CCI which has been hijacked by the lawyers and is almost a toothless body and is simply a poor shadow of the original CCI. Ironical it may appear, but there is no fault of the lawyers. It is the fault of the system which gives some knowledge to the lawyers or an opportunity to these professionals to learn something with the tools of jurisprudence and legal theory as compared to the common man – the businessman and other players. If India does not want this to happen, the first phase of competition advocacy should be given sufficient time. For instance, a time period of three years is planned. Before the end of three years there should be a review of the situation at that time in the country. If the situation is not suitable to advance to the second phase, time for the first phase should be extended.

Jurisdiction

There are issues which still need clarity about the forum – the MRTP Commission, Consumer Courts, Competition Commission, regular courts or other tribunals – which has to be approached in cases of competition disputes and the procedure which has to be followed. The provisions on unfair trade practices, in the course of being copied from the MRTP Act into the structure of the Consumer Protection Act (CPA), have acquired a new meaning. Within the CPA, a 'consumer' cannot take up a case of an unfair trade practice before a consumer forum. It can only be taken up by a consumer association, central government or the state governments. Thus, within the existing law, a manufacturer whose product is disparaged has no *locus standi* to seek a remedy. The only option is to bring it to the notice of a consumer association or represent the case to the central or the state government. These are only oblique routes of seeking justice (Pathak, 2005). Issues of jurisdiction of different related forums need to be addressed by the legislature in the forthcoming amendment.

There is also and issue of fairness. Despite the practical importance of fairness in competition policy, it would be difficult to have a practical yet socially agreed-upon concept of fairness due to diverse individual value judgments (Choubey and Mishra, 2004).

Conclusion

As planned now, the adjudication process starts just after one year – the entire business community and the lawyers are not ready for the new law. Going for the adjudication stage prematurely would lead to such matters going to the lawyers who have not been trained for the new competition regime. As the new regime requires a totally different mindset and attitude – more towards internationalism and resolution of disputes with a not-so-strict-legal perspective – the lawyer, who has been till now trained with the traditional tools, would not be fit to serve the purpose. The role of a lawyer as envisaged in the new competition regime would never be taken up by the present day lawyers without proper training and providing adequate time for it. No doubt that there are lawyers who would adapt to the changing circumstances quite fast, however, unfortunately their number is very small.

The competition regime must be brought slowly and cautiously. Agreed, too much circumspection leads to inaction. But, justice hurried is justice buried. Not to go with the Shakespearean doctrine of killing all the lawyers, but training them before making the CCI to function is the *sine qua non*. Half baked lawyers will wreck havoc. There is no need to rush into the competition regime without full preparation. Until and unless awareness is made adequately, the CCI should not jump to the second phase. If it rushes into the second and then to the third phase without satisfactorily completing the first phase, it would be a classic case of *fools rush in where angels fear to tread.* Make haste slowly.

References

CCI website (2005), "Brief Note On The Provisions Of The Competition Act, 2002 And The Jurisdiction, Powers And Duties Of The Competition Commission Of India", http://www.competition-commission-india.nic.in/

Chidambaram, P. (2003) "Law and Commerce: And the Twain shall Meet." *The Sunday Express,* Ahmedabad, October 26.

Choubey, Akash and Mishra, Saurabh (2004), "Competition Law: Glancing Back, Looking Ahead", *Practical Lawyer Web Journal 17,* Available at http://www.ebc-india.com/lawyer/articles/733.htm

Concept Note (2003), "Concept Note on the Advocacy Activities of CCI", available at "Advocacy" on CCI's website http://www.competition-commission-india.nic.in/

Gal, Michal S. (2001) "Size Does Matter: The Effects of Market Size on Optimal Competition Policy." *Southern California Law Review,* Vol. 74, p. 1437

Gazette of India (2003), Part-II, section 3, sub-section (ii), Extraordinary, Ministry of Finance, (Department of Company Affairs), S.O. 1200 (E)., dated October 14.

Jenny, Frédéric (1999) "Globalisation, Competition and Trade Policy: Issues and Challenges." In Roger Zach ed., *Towards WTO Competition Rules, Key Issues and Comments on the WTO Report on Trade and Competition.* Kluwer Law International.

MRTP Act (1969) *Monopolies and Restrictive Trade Practices Act,* Number 54 of 1969.

Pathak, Akhileshwar (2005), "Comparative Advertising in India: Need to Strengthen Regulations." *Vikalpa, Indian Institute of Management, Ahmedabad,* Volume 30, No. 1, pp. 67 – 75.

Raghavan (2000), Report of the High Level Committee on Competition Policy and Law under the chairmanship of S. V. S. Raghavan.

Rodriguez, A.E. and Malcom B. Coate (1997) "Competition Policy in Transition Economies: The Role of Competition Advocacy." *Brooklyn Journal of International Law,* Vol. 23, p. 365.

Shakespeare, William, *Henry VI,* Part 2

Supreme Court (2005), Brahm Dutt v. Union of India, Writ Petition (civil) 490 of 2003, Date of Judgment: January 20, 2005.

Times of India, The (2005), "SC extends FTCs' life by a month", March 31, Ahmedabad.

Verma, S. K. and Kusum (2000) *Fifty Years of the Supreme Court of India: Its Grasp and Reach,* Oxford University Press.

Viswanathan, Suresh T. (2003) *Law and Practice of Competition Act, 2002,* Bharat Law House, New Delhi.

Williams, Mark (1994) "The Effectiveness of Proposed Antitrust Programs for Developing Countries." *North Carolina Journal of International Law and Commercial Regulation,* Vol. 19, p. 209.

World Bank (2004), Working Paper No. 35, Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries.