THE NEW COMPETITION REGIME IN INDIA: WHETHER A NEW WINE IN THE OLD BOTTLE

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ABSTRACT

In 2002, Indian Parliament enacted a Competition Act which seeks to replace the Monopolies and Restrictive Trade practices Act, 1969. The erstwhile law, MRTP Act, 1969, was enacted in the era of licences, permit and control and was based on the social and economic philosophy enshired in the directive principles of the state policy contained in Indian constitution. In pursuit of globalization, India has responded by opening up its economy, removing controls and resorting to liberalization which geared its market geared to face competition from within and outside. Thus, keeping in view the economic developments of the country, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by participants in markets, in India, a new competition regime has been enacted which has made a historic shift bringing Indian competition laws and policies in the line of competition prevailing in the global market. The new act seeks to prohibit anti competitive agreements, abuse of dominance, and to regulate combinations. For achieving the purposes of the act, the act empowers the Central Government to establish Competition Commission of India which is mandated to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants in the market in India and also to undertake competition advocacy for creating awareness and impart training on competition Law. The new Act brings a sea change difference in the competition law regime in India.

Chapter I- BACKGROUND AND SUMMARY

In the absence of a generally accepted definition of the phenomenon of Competition, it has to be regarded as the object fostered and protected by Competition Policy and Law. Competition which is workable and effective

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is generally characterized by a sequence of pushing and pursuing acts of the agents in a particular market. Competition is the foundation of an efficiently working market system, which has several advantages over a planned economy and constitutes the precondition which protects freedom of decision and action of self-interested individuals or entities from leading to anarchy or chaos but rather to economically optimal, socially fair and desirable market results.[1]

Broadly defined, competition in a market refers to a situation in where no firm or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share.[2] In economic theory, a market is said to be purely competitive when the following conditions are present: (1) the product market consists of a homogeneous commodity; and (2) the number of sellers and buyers is so large, and the market share of each is so small, that no individual seller or buyer can perceptibly affect the price of the commodity by changing its output or purchases.[3] When the following conditions also are present, 'perfect' competition is said to exist: (1) there are no barriers to the entry of new firms and resources are free to move between markets; (2) all market participants have equal (perfect) knowledge of all relevant market facts; (3) producers realize all costs and benefits of production; and (4) there is continuous divisibility of inputs and outputs.[4] Competition is unambiguously a good thing

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1 See Report of the High Level Committee on Competition Policy and Law, para 1.1.1 submitted on May 22, 2000 available at www.manupatra.com (last visited on 24th Feb, 2008) (Report of High Level Committee); See also Adi P. Talati & Nahar S. Mahala, Competition Act, 2002, Law Practice and Procedure (Commercial Law Publishers: India, 2006) at 712.

2 See Objectives of Competition Policy - A Framework for the Design and Implementation of Competition Law and Policy, The World Bank and Organization for Economic Cooperation and Development (OECD), 1999, Ch. 1, p. 1(World Bank and OECD Report, 1999) vailable athttp://rru.worldbank.org/PapersLinks/Developing-Competition-Policy (last visited on 20th Feb., 2008).

3 See Sam D. Johnson & A. Michael Ferrill, Defining Competition: Economic Analysis and Antitrust Decision Making, 36 Baylor L. Rev. 583 at 587; See generally P. A. Samuelson, Economics (18th ed. 2005); M. Friedman, Capitalism and Freedom (1982); F. M. Scherer, Industrial Market Structure and Economic Performance (2d ed. 1980).

4 *Ibid.*

in the first-best world of economists.[5] In order to achieve such a best world an effective competition policy and law, as is now widely recognized, is a concomitant requirement. Such a law aims to promote and maintain healthy inter-firm rivalry in markets by limiting unnecessary interventions or abuses of power in the marketplace by the State or by private sector enterprises that adversely affect economic efficiency and consumer welfare. [6] It strengthens economic democracy and social cohesion by providing market participation opportunities through the prevention of anti-competitive practices by dominant firms, and lowers the barriers to entry faced by individual entrepreneurs, and small and medium-sized businesses.[7] Competition policy and law, in this context, thus becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power.[8]

Against this background, the Parliament of India enacted a Competition Act in the year 2002 which received the assent of the President of India on 13th January, 2003 and it seeks to replace the Monopolies and Restrictive Trade practices Act, 1969.[9] But when we say that it seeks to replace an existing Act, we ought to know as to why the necessity arose for replacing the old Act by a new Act. Secondly, we also should be able to understand what changes it intends to make in the new legislation and in what way such changes benefit the society, consumers and the business community. In order to understand these basic issues it would be helpful if we highlight the reasons for bringing in a new Act and give a brief description of the various provisions of the new legislation and compare these with the erstwhile legislation; this will bring out how the new law tries to achieve a more effective regulation compliance in the market on competition issues.

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5 See Jean-Jacques Laffont, Competition Information and Development (World Bank ed., 1998).

6 See generally The Fundamental Principles of Competition Policy, Background Note by the Secretariat, WT/WGTCP/W/127, 7 June 1999 available at http://www.wto.org/ english/tratop_e/comp_e/wgtcp_docs_e.htm; Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth, Note by the Secretariat; See also World Bank and OECD Report 1999, supra note 2.

7 Fundamental Principles of Competition policy, *Ibid.*

8 See Report of the High Level Committee, supra note 1, para 1.2.0.

9 The Competition Act has been amended before coming completely into force by the Competition Amendment Act of 2007.

The paper examines the need for reform of the competition law in India and provides a brief outline of the various changes in the substantive law the new act intends to make by comparing the same with the erstwhile MRTP Act, 1969. Section 1 provides a brief outline for the need of a new law in India on Competition. Here the author examines the various developments that required the changes in the competition regime. The II section provides a picture of the applicability and extent of the competition law and compares the related provision with the erstwhile MRTP Act, 1969. Section III examines the substantive standard that the competition act incorporates within its fold and compares the same with the MRTP Act. Here the author analyzes all the differences the new act brings in the substantive quality of the competition law in India. The author concludes that the new competition act differs from the previous one in many respects and it has within its fold the efficiency to promote competition and maximization of public welfare. However, the author recommends that the development of competition law in India should not be a goal in itself, the law should not become just a decorative tool, and its enforcement should aim to bring about increased economic efficiency and improved public welfare.

Chapter II- THE ERSTWHILE LAW AND THE NEED FOR CHANGE

The Erstwhile Law

The erstwhile law, MRTP Act, 1969, was enacted consequent upon the recommendations made by the Monopolies Inquiry Committee appointed by the government to enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive practices in important sectors of economic activity other than agriculture.[10] The act which was enacted in the era of licences, permit and control was based on the social and economic philosophy enshired in the directive principles of the state policy contained in Indian constitution.[11] The principle objectives sought to be achieved through the act, as stated in the preamble to the Act were prevention of the concentration of the economic power to the common detriment; control of monopolies; prohibition of mo-

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10 See S M Dugar, Commentry on MRTP Law, Competition Law, Consumer Protection Law, Vol 1, (4th Ed., Wahwa Publication, 2006) at 5 n 10; See also S. Krishnamurthi, Principles of Law Relating to MRTP (3rd Ed., Orient Law House, 1989) at 1.

11 Refer Articles 38 and 39 of the Constitution Of India; See also Dugar Vol. 1,supra note 10, p. 4.

nopolistic trade practices; and prohibition of restrictive trade practices.[12] The Central Government established set up a Commission to oversee the implementation of the Act.[13] The substantive provisions of the act as originally enacted were contained in chapters III, IV, V and VI. The Act underwent several amendments during the course of its journey till date. Prominent among them are the amendments of 1984 and 1991. In 1984, Unfair Trade Practices (UTP) Enquiries were added[14] and in 1991 the Chapter dealing with Mergers & Acquisitions was deleted.[15] The Act envisages to achieve its purposes by -

1. Controlling concentration of economic power which is to common detriment, chapter III, Sections 27-30;

2. Controlling the monopolistic trade practices, chapter IV, Sections 31 and 32;

3. Controlling certain restrictive trade practices, chapter VA, sections 33 to 36 and chapter VI, sections 37 to 41;

4. Controlling certain unfair trade practices, chapter VB, sections 36 A to 36 E.

The Need for Change

For the last half a century, the world economy has been experiencing a progressive international economic integration. There has been a marked acceleration in this process of globalization and also liberalization during the last three decades. In the pursuit of this globalization, India has responded by opening up its economy, removing controls and resorting to liberalization in 1991. The natural corollary of the globalization and liberalization is that the Indian market geared to face competition from within and outside. After the economic reforms of 1991, it was felt that the MRTP Act, 1969 had become obsolete in certain respects as it failed to fulfill the needs of a competition law in an age of growing liberalization and globalization. [16] Thus, keeping in view the economic developments of the country, to prevent practices having adverse effect on competition, to promote and sustain competition in mar-

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12 See preamble to the MRTP Act, 1969.

13 Refer Section 5 of the MRTP Act, 1969.

14 See Chapter V B (consisting of sections 36A to 36 E), inserted by Act 30 of 1984 (w.e.f 1-8-1984).

15 Part A of Chapter III (consisting of sections 20 to 26) omitted by Act 58 of 1991(w.r.e.f 27-9-1991).

16 See Report of high Level Committee; supra note 1, chapter 1 and VII.

kets, to protect the interest of consumers and to ensure freedom of trade carried on by participants in markets, in India, a new competition regime has been enacted[17] which has made a historic shift bringing Indian competition laws and policies in the line of competition prevailing in the global market. The new act seeks to prohibit anti competitive agreements,[18] abuse of dominance,[19] and to regulate combinations.[20] For achieving the purposes of the act, the act empowers the Central Government to establish Competition Commission of India (CCI).[21] CCI is mandated to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants in the market in India[22] and also to undertake competition advocacy for creating awareness and impart training on competition Law.[23] Thus, the new competition law regime has been enacted to yield to the changed and changing scenario on the economic and trade front which the old regime failed to present. The next sections provide a detail outline of the changes the new act brings in the competition law of India by comparing it with the MRTP Act, 1969.

Chapter III- APPLICABILITY AND EXTENT OF THE COMPETITION ACT

Applicability of the Competition Act

Competition Act, 2002 is applicable on enterprises.[24] The term enterprise is defined in section 2(h) which provides it is applicable on persons and Departments of Government but it is not applicable on sovereign functions of the Government and activities carried on by the Departments of the Central Government dealing with atomic energy, currency, defence and space.[25] The term person is also been exhaustively defined in section 2(l) of the Act. Thus every person, organization, institution, society, scientific society (Min-

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17 See the Preamble to the Competition Act, 2002.

18 Refer Section 3, Competition Act, 2002

19 Refer Section 4, Competition Act, 2002.

20 Refer Sections 5 and 6, Competition Act, 2002.

21 Refer Section 7, Competition Act, 2002. The CCI has been established vide notification dated 14th Oct., 2003.

22 Refer section 18, Competition Act, 2002.

23 Refer section 49, Competition Act, 2002.

24 Refer sections 3-7, Competition Act, 2002.

25 Refer Section 2(h), competition Act, 2002.

istry of IT, Department of Science and Technology and CSIR) and the like which can legally be conceived shall fall within the ambit of definition of "enterprise" except of course, the exceptions listed out in Section 2(h) of the competition Act..[26] On the other hand the MRTP Act was applicable on the undertakings, [27]which is defined in section 2(v) of the Act.[28] Section 3 of MRTP Act limits its application as it provides for its non application to any undertaking owned or controlled by the government or government company, any undertaking owned or controlled by a corporation (not being a company) established by or under any Central, Provincial or State Act; any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees; any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorization made by the Central Government under any law for the time being in force; any undertaking owned by a co-operative society formed and registered under any Central, Provincial or State Act relating to co-operative societies and any financial institution. [29] Thus, the MRTP Act is not applicable to the Government departments, government controlled or owned undertakings, cooperative societies, trade union and financial institutions.

This brief overview of the application of the both the acts clearly establish that the Competition Act, 2002 has been given a much wider coverage than the MRTP Act which includes all government departments, government controlled or owned undertakings (with the exception of government entities engaged in sovereign functions), cooperative societies, trade union and financial institutions as there are no valid justification for the exclusion of these entities from the ambit of law in such an era of globalization and privatisation. Moreover, the definition of enterprises under competition act appears to be more explanatory rather than definition of undertakings under MRTP Act which remained a subject matter of issue in many cases.[30]

Extra territorial Jurisdiction

Unlike the MRTP Commission, the CCI has extraterritorial jurisdiction in that it has the power to inquire into an agreement, abuse of dominant posi-

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[26] Refer section 2(l) of the

[27] See chapters III, IV, V and VI of the MRTP Act.

[28] Refer section 2(v), MRPT Act, 1969.

[29] Refer section 3, MRTP Act.

[30] See e.g. Carew & Company Ltd. v. Union of India, (1976) 46 Comp Cases 121 (SC); Union of India v. Tata Engg. & Locomotive Co. Ltd., (1972) 42 Comp Cas 72 (Bom).

tion or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.[31] This is notwithstanding that an anti-competitive agreement has been entered into outside India, a party to such agreement is outside India, any enterprise abusing a dominant position is outside India, a combination or party to a combination is outside India.[32] In contrast, the MRTP Commission had no statutory extraterritorial jurisdiction and the same was precluded by the judgment of the Supreme Court of India in *Haridas Exports v All India Float Glass Mfgrs Association*[33] that the MRTP Act does not have extraterritorial operation and cannot apply to goods intended to be exported to India or where neither party to the agreement is carrying on business in India. Thus, the Act provides a statutory reversal of the Haridas judgment which is most required in the era of liberalization, privatization and Globalization.

Jurisdiction of the Civil Courts

Section 61 of the competition act bars the jurisdiction of the civil courts in respect of any matter in which the CCI is empowered to act, including the grant of injunctive relief.[34] On the other hand, under the MRTP act, the count of session and courts superior to it were also empowered to try the offences listed under the act.[35] Thus, the competition act provides exclusive jurisdiction of all offences mentioned under the act unlike the MRTP Act. The bar to the jurisdiction of the civil courts is essential as all the competition issues need to be dealt by a specialized Tribunal.

Chapter IV- SUBSTANTIVE STANDARD UNDER THE COMPETITION ACT

Today, most of competition laws focus on mainly three areas. These are Horizontal and Vertical Restrains; abuse of dominant position or monopolization and mergers, amalgamations, acquisitions and take-overs among en-

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31 See generally Natashaa Shroff, Bilateral Antitrust Cooperation Agreements, 9th June, 2005, available at http://www.competition-commission-india.nic.in (last visited on 23rd Feb., 2008).

32 Refer Sections 32, 18, Competition Act 2002 .

33 (2002) 111 Comp Cases 617.

34 Refer section 61, Competition Act, 2002.

35 Refer section 56, MRTP Act, 1969.

terprises.[36] The new competition act covers all the three areas of anti competitive practices. It prohibits anti competitive agreements (vertical and horizontal restrains), abuse of dominance and regulate combinations (mergers, amalgamations, acquisitions and take-overs). MRTP Act even covered Restrictive Trade Practices (Horizontal and Vertical Restrains without any distinction between the two) and Monopolistic trade practices and Concentration of Economic power (Abuse of Dominant position) but after the amendment act of 1991 the provisions relating to Mergers were deleted.[37] Moreover, MRTP Act also covered unfair trade practices[38] but now all cases of unfair trade practices has been transferred under the consumer protection Act.[39] This chapter analyzes the differences between the substantive standard of both the acts.

Agreements among Enterprises

Section 3 of the Competition Act prohibits any person, enterprise or association of enterprises from entering 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*, and declares any such agreement void. [40] The term "agreement" includes any arrangement or understanding or action in concert whether or not the same is formal or in writing or whether or not the same is intended to be enforceable by legal proceedings. [41] To determine anti competitive practices, the Competition act provides the test of appreciable adverse effect on competition.[42] Though the phrase has not been defined, the act provides certain factors to be considered by the commission to de-

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[36] See Overview of Members' National Competition Legislation, Note by the Secretariat, T/WGTCP/W/128/Rev.3, 27 November 2003, available at http://www.wto.org/ english/ratop_e/comp_e/wgtcp_docs_e.htm (last visited on 21st Feb., 2008).

[37] Supra note 15.

[38] Supra note 14.

[39] Refer section 66(4), competition Act, 2002.

[40] Section 3(1)-(2), Competition Act 2002. The prohibition under section 3 is similar to the Chapter I prohibition in the UK Competition Act, 1998, modeled on Art.85 of the EC Treaty, which prohibits agreements which prevent, restrict or distort competition and may affect trade within the United Kingdom.

[41] Refer Section 2(b), Competition Act 2002.

[42] For a detail analysis of the appreciable adverse effects test see Concept paper on creation of Data Bank, available at http://www.competition-commission-india.nic.in (last visited on 23rd Feb., 2008).

termine such appreciable adverse effects.[43] On the other hand MRTP defined restrictive trade practices as a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular (i)which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified cost or restrictions.[44] The competition act provides a distinction between a distinction between horizontal and vertical agreements between the firms which were put under the same umbrella under the MRTP Act.

The horizontal agreements are agreements among the enterprises which are at the same stage of production chain, and in the same market.[45] These are certain agreements or practices, which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate enquiry as to the precise harm they have caused or the business excuse for their use.[46] Section 3(3) of the Competition Act creates such a legal presumption under which several types of horizontal agreements or practices are presumed to have appreciable adverse affect on competition and thus are deemed to be anti-competitive agreements. The presumption that certain agreements are per se void is taken from US law as per the High level Enquiry Committee recommendations.[47] Under s.3(3), any agreement entered into between enterprises or persons or association of enterprises or persons, or between any person and enterprise, or any practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services which:

(1) directly or indirectly determines purchase or sale prices;

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43 Refer section 19(3), Competition Act, 2002.

44 Refer section 2(o), MRTP Act, 1969.

45 *Ibid* at para 4.3.4.

46 Northern Pacific Railway Co v United States, 356 US 1 (1958); See also Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) (stating that certain group boycotts are per se unlawful because they 'are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations'). See also Thomas G. Krattenmaker, Per Se Violations in Antitrust Law: Confusing Offenses with Defenses, 77 Geo. L.J. 165, 172-73 (1988).

47 See Report of High level Enquiry Committee, supra note 1 at paras 4.3.4-4.3.8.

(2) limits or controls production, supply, markets, technical development, investment or provision of services;

(3) shares the market or source of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way,

(4) directly or indirectly results in bid rigging or collusive bidding

is presumed to have an appreciable adverse effect on competition, and therefore, constitute an anti-competitive agreement. [48]

Vertical agreements are agreements between the enterprises which are at different stage of production chain, and therefore in different market.[49] Section 3(4) of the Act provides that a vertical agreement between enterprises are considered anticompetitive agreements only if such agreement causes or is likely to cause an appreciable adverse effect on competition in India and thus are subjected to the test of rule of reason.[50] The Act provides the following five examples of such vertical agreements which are prohibited if a showing as to an appreciable adverse effect on competition is made:

(1) tie in arrangement;

(2) exclusive supply agreement;

(3) exclusive distribution agreement;

(4) refusal to deal;

(5) re-sale price maintenance. [51]

However, under the MRTP Act, there exist no distinction between the horizontal and vertical agreements and both are presumed to be restrictive trade practices.[52] Moreover, there was a requirement of all such agreements of earlier registration under the MRTP[53] which has been eliminated under the competition act, 2002. Though it may appears that many of the anti competitive practices wrapped under the Competition Act may be covered by any of clauses of section 33(1) of the MRTP Act. But the High level Enquiry committee noted that "Experience shows that there has been a plethora

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48 Refer section 3(3), Competition Act, 2002.

49 See Report of High level Enquiry Committee, supra note 1, para 4.3.9.

50 Refer Section 3(4), Competition Act 2002.For the meaning of Rule of Reason see Alan J. Meese, Price Theory, Competition, and the Rule of Reason, 2003 U. Ill. L. Rev. 77.

51 See Report of High level Enquiry Committee, supra note 1, para 4.3.9.

52 Refer section 33, MRTP Act, 1969.

53 Refer section 35, MRTP act, 1969.

of decisions on some of the clauses of section 33(1) of the Act, often at variance with one another. For instance, in dealing with concessions, benefits, discounts, etc., there has been a string of decisions not necessarily in consonance with each other. Cartels, to give another illustration, are not mentioned or defined in any of the clauses of section 33(1) of the MRTP Act."[54] Moreover, the committee even noted that "while complaints relating to anti-competition practices can be tried under the generic definition of restrictive trade practice, the absence of specification of identifiable anti-competition practices always gives room to different interpretations by different courts of law, with the result that the spirit of the law may escape being captured and enforced. While a generic definition may be necessary and may form the substantive foundation of the law, it still will be necessary to identify specific anti-competition practices and define them so that the scope for a valve or opening on technical grounds for the offending parties to escape indictment may not obtain."[55] Thus based on the recommendations of the High level Enquiry Committee, the new act provides a detailed analysis of all anti competitive practices with a proper definition which does not provide any ground for offending party to escape the indictment. For instance the new act now defines cartels, bid rigging and all vertical agreements.[56] Thus, the Competition act covers all anti competitive agreements in a more beautiful and detailed manner as required in the present era.

Abuse of Dominant Position

Section 4(1) of the competition Act prohibits any enterprise or group to abuse its dominant position.[57] The act also states that there shall be an abuse of dominant position if an enterprise or group imposes unfair or discriminatory conditions or prices in the purchase or sale of goods or provision of services; if it limits or restricts production of goods or provision of services or technical and scientific development; it denies market access or; uses its dominant position to enter another market or makes conclusion of contacts subject to acceptance by other parties of supplementary obligation which, by their nature or according to commercial usage, have no connection with the subject of such contracts; sells goods or provides services at prices which is

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54 See Report of High level Enquiry Committee, supra note 1, para 7.2

55 *Ibid* at para 7.2.1.

56 Refer section 2(c), explanation to section 3(3) and explanation to section 3(4) respectively, Competition Act, 2002.

57 Refer section 4(1), Competition Act, 2002 as amended by the Competition Amendment Act, 2007.

below the cost-the predatory price. [58] Under the MRTP Act the nomenclature of monopolistic trade practices was used instead of abuse of dominant position. [59] Though the definition of the two terms is by and large the same, there exist few differences. It is interesting to note that dominant position under the Competition Act, 2002 is not defined on the basis of any arithmetical parameters or any particular share of the market as is the case in the MRTP Act, 1969.[60] On the other hand, dominance of an enterprise under the Competition Act is judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour, in the relevant marketing, in India.[61] The Competition act brings the concept of relevant market to determine the position of dominance of an enterprise which was not there under the MRTP Act. The act also provides the test for the determination of relevant market which may be determined with reference to the relevant product market or the relevant geographic market or with reference to both.[62] Furthermore, the act defines relevant product market and relevant geographic market and provides certain factors for their determination.[63] The Competition Act also lays down a number of factors which the Commission needs to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as market share, size and resources of the enterprise, size and importance of competitors, economic power of the enterprises, vertical integration of the enterprises, entry barriers, etc. which would involve a fair amount of economic analysis and the same were again absent under the MRTP Act.[64]

The competition act also makes the predatory pricing as an offence under abuse of dominant position and provides a definition of it which was not de-

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58 Refer section 4(2), Competition Act, 2002 as amended by the Competition Amendment Act, 2007.

59 Refer section 2(i) read with section 31, MRTP Act, 2002.

60 Refer 2(d), MRTP Act, 1969.

61 Refer Explanation (a) to section 3(2), Competition Act, 2002.

62 Refer section 2(r), Competition Act, 2002.

63 Refer sections 2(s) and 2(t), Competition Act, 2002 for the definitions of relevant geographical market and relevant product market respectively. See sections 19(6) and 19(7), Competition Act, 2002 for the factors for determining relevant geographic market and relevant product market respectively.

64 Refer section 19(4), Competition Act, 2002.

fined under the MRTP Act and the same was a restrictive trade practice under 33(1)(j).[65]

Thus, though, the new competition act retains many concepts of MRTP Act in relation to abuse of dominant position but provides certain new concepts like relevant market, relevant product market, relevant and relevant geographic market and also provides the predatory pricing as an offence under it with a an unambiguous definition.

Mergers, Amalgamations, Acquisitions and Take-overs (Combinations)

Though mergers and acquisitions are considered as a legitimate means by which firms can grow and are generally as much part of industrial evolution and restructuring as new entry, growth and exit but sometimes merger and amalgamation create market power which may be abused.[66] A merger may have anti-competitive effects in two ways: either the competitors of the merged firm have no capacity to react to a possible reduction in output arising from the merger or competitors do have the capacity to do so, but do not use it because a collusive behaviour is sustainable.[67] In order to control the abuse of mergers, acquisitions, amalgamations and take-overs, the Competition Act provides a regulatory mechanism. The Competition act provides that no person or enterprise shall enter into a combination, in the form of an acquisition, merger or amalgamation, which causes or is likely to cause an appreciable adverse effect on competition in the relevant market and such a combination shall be void.[68] All combinations do not call for scrutiny unless the resultant combination exceeds the threshold limits specified in terms of assets or turnover specified under the act.[69] It is to be noted that the Competition Act does not make a distinction between horizontal, vertical and conglomerate mergers and provides the same threshold test for all of them.

Part III of the MRTP Act, 1969 provided for the prior approval of central government for any scheme of merger or amalgamation or for any takeover relating to an undertaking the value of assets of which (alongwith its interconnected undertakings) was not less than Rs. 100 crores or which was a dominant undertaking having the value of its assets (alongwith its intercon-

65 Refer Explanation (b) to section 3(2), Competition Act, 2002.

66 See generally Report of the high level Committee, supra note 1, paras 4.6.1-4.6.3.

67 See Poulami Chatterjee, Horizontal Mergers Guidelines available at http://www. competition-commission-india.nic.in

68 Refer section 6(1), Competition Act, 2002.

69 Refer section 5, Competition Act, 2002 annexed as Annexure G.

nected undertakings) not less than 1 crore.[70] The said provisions of law were deleted by the MRTP amendment act, 1991.[71] The said provisions of law, it seems, have again been revived under section 5 of the competition act with certain changes as to the threshold limit of the value of assets or turnover. However, test under the MRTP Act, 1969 was the likelihood of concentration of economic power to the common detriment or the likelihood of being prejudicial to public interest.[72] On the other hand the Competition Act incorporates the appreciable adverse effects test.[73] Moreover, the new act brings various new concepts under the provision of Combinations like relevant market, assets/turnover outside India etc. Furthermore, the power to regulate combinations under the Competition Act vests with the CCI while under the MRTP Act, the power rested with the Central government.[74] Furthermore, after the Competition Amendment Act, 2007, the Completion Act also imposes a mandatory notice requirement on parties entering into a merger or acquisition.[75] A person or enterprise is mandated to give a notice to the CCI of the proposed combination within thirty days of: i) approval of the proposal by the board of directors of the enterprises concerned or execution of any agreement or other document for acquisition or; ii) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section..[76] It is also to be noted that both the acts provides for the division of undertakings. Section 27 of MRTP provides that the central government, if it is of the opinion that the working of an undertaking is prejudicial to the public interest, may order for the division of any trade of the undertaking or division of the undertaking or interconnected undertakings.[77] Similarly, the CCI may recommend to the central government for the division of an enterprise enjoying dominant position. [78]

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70 Refer the repealed sections 20 and 23, MRTP Act, 1969.

71 Supra note 15.

72 Refer repealed section 23A, MRTP Act, 1969.

73 Refer section 6(1), Competition Act, 2002.

74 Refer repealed section 23, MRTP Act, 1969. See also sections 29-31, Completion Act, 2002.

75 Refer section 6(2), Competition Act.

76 *Ibid.*

77 Refer section 27, MRTP Act, 1969

78 Refer section 27(f), Competition Act, 2002.

Thus, apart from the threshold difference and few other conceptual differences the provision of combinations under the Competition Act appears to be a revival of the repealed provisions of MRTP Act (sections 20-26) and hence the same can be called an old wine in a new bottle. However, the incorporation of the provisions on combinations under the Competition Act is to the need of the present liberalization, privatization and globalization.

CONCLUSIONS AND RECOMMENDATIONS

In the absence of a generally accepted definition of the phenomenon of Competition, it has to be regarded as the object fostered and protected by Competition Policy and Law. Competition is said to be an essential element for the promotion of economy efficiency and overall welfare. In this light, India government passed the Monopolies and Restrictive trade practices Act, 1969. The Act was enacted in the line of socialist economic model and focused on preventing the concentration of economic power to common determinant, controlled monopolies and prohibited monopolistic, restrictive and unfair trade practices. And after years of following a strategy of state planned economic development, involving myriad controls and licenses, India embarked upon the road to a market driven economy. In order to respond to these economic reforms, the Indian government, based on High Level Inquiry Committee recommendations enacted a new Competition Act in 2002. This competition act seeks to replace the existing MRTP Act, 1969. It establishes Competition Commission of India to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants in the market in India. The Competition Act prohibits Anti competitive agreement, abuse of dominant position and regulate combinations. The new Act brings a sea change difference in the competition law regime in India. Following are the major changes brought in the Competition law in India by the Competition Act, 2002.

1. The Competition Act has been given a much wider coverage than the MRTP Act. It is applicable on all government departments, government controlled or owned undertakings (with the exception of government entities engaged in sovereign functions), cooperative societies, trade union and financial institutions. Whereas, the MRPT Act is not applicable on the above entities.

2. The Competition Act gives CCI extraterritorial jurisdiction which was not provided under the MRTP Act.

3.Competition Act bars_the jurisdiction of the civil courts in respect of any matter in which the CCI is empowered to act, including the grant of in-

junctive relief whereas the MRTP never barred the jurisdiction of civil courts.

4. The Competition Act has adopted the "appreciable effects test" with respect to anticompetitive agreements and concerted practices.

5. The Competition Act subjects certain horizontal agreements to the per se rule of invalidity while vertical agreements are subjected to the "rule of reason" test. On the other hand under MRTP Act there exist no distinction between the horizontal and vertical agreements and both are presumed to be restrictive trade practices.

6. MRTP Act provides for registration of agreements as compulsory whereas in the new act there is no requirement for registration.

7. The Competition Act now defines cartels, bid rigging and all vertical agreements.

8.The “dominant position” under the Competition Act is not defined on the basis of any arithmetical parameters or any particular share of the market as is the case in the MRTP Act.

9.The Competition Act brings the concept of “relevant market” to determine the position of dominance of an enterprise which was not there under the MRTP Act. It also provides certain factors for its determination. Furthermore, the act defines relevant product market and relevant geographic market and provides certain factors for their determination.

10. The competition act also makes the predatory pricing as an offence under abuse of dominant position and provides a definition of it which was not defined under the MRTP Act and the same was a restrictive trade practice under it.

11 The Competition Act revives the repealed provisions of MRTP Act under such 20-26 relating to Mergers and Acquisitions and provides a new threshold limit for the application of the provision.

12. The Competition act brings various new concepts under the provision of Combinations like relevant market, assets/turnover outside India etc.

13 The power to regulate combinations under the Competition Act vests with the CCI while under the MRTP Act, the power rested with the Central government.

To sum up, the Act represents a paradigm shift from the socialist concern that only the state should be allowed to concentrate economic power to the promotion of competitive markets thereby promoting investor confidence in the liberalised Indian economy. However, it is to be noted that many countries have adopted competition laws but have never quite managed to suc-

cessfully enforce them.[79] This is not to say that the challenges for India should be insurmountable. As stated by the economic Nobel laureate Joseph Stiglitz, "strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies."[80] The development of competition law in India should not be a goal in itself, the law should not become just a decorative tool, and its enforcement should aim to bring about increased economic efficiency and improved public welfare. From this perspective, competition law enforcement is in line with India's ideological aspiration towards "economic justice", "equality of status and opportunity" and "fraternity assuring the dignity of the individual and the unity and integrity of the nation."[81]

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79 For instance Thailand enacted its first law in 1979, which was never implemented and the enforcement records of the new law promulgated in 1999 were extremely poor; Egypt took almost a decade to enact a competition law since the first draft in 1995, and even after adoption, there was no certainty that the law could be implemented effectively. More or less similar situations can be found in countries like Indonesia, Pakistan, Sri Lanka, and Malawi. See generally CUTS International, Introductory Chapter: Promoting a Healthy Competition Culture around the World in Competition Regimes in The World--A Civil Society Report (Pradeep S. Mehta ed., 2006).

80 Joseph E. Stiglitz, Competing over Competition Policy (Aug. 2001), http://www.project-syndicate.org/commentary/stiglitz5 (last visited on 23rd Feb., 2008).

81 See Preamble to the Indian Constitution, 1950.

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