



Competition Commission of India

Introduction to Competition Law & Policy
and Competition Act 2002

by

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Structure of Talk

1. History of Competition Law
2. Objectives of Competition Law
3. Economics of Competition Law
4. Competition Law, Regulation and Professions.
5. Competition Law & IPRs
6. Competition Law & Competition Policy



Structure of Talk

7. National Competition Policy
8. Competition Advocacy
9. Competition Law - International Dimension
10. History of Competition Law in India
11. Competition Act, 2002
12. Suggested Readings



History of Competition Law (Complaw)

U.S.A.

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



History of Complaw (Contd.)

UK

- Monopolies & Restrictive Practices (Inquiry and Control) Act 1948
- Fair Trading Act 1973
- Restrictive Trade Practices Act 1976
- Resale Prices Act 1976
- Competition Act 1980



History of Complaw (Contd.)

UK (Current laws)

- Competition Act 1998
 - Chap I like Art 81
 - Chap II like Art 82
 - Further power to OFT-information, investigation, penalties.
- Enterprise Act 2002
 - OFT in place of DGFT



History of Complaw (Contd.)

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



History of Complaw (Contd.)

European Union

- Treaty of Rome: Art. 85, 86 (renumbered 81,82) cover anticompetitive agreements, abuse of dominant position.
- State aid, Art. 87.
- State owned enterprises, Art. 86
- Merger Regulations, 1989.
- Enforcement through European Commission; decentralized in 2003 giving greater role to NCAs.



History of Competition Law (Contd)

Other Countries/Jurisdictions

- Several States of USA since 19th century.
- Canada 1889; but not effectively enforced for decades
- Japan 1947
- Germany, 1947, 1958; merger control, 1974



Objectives of Competition Law

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



Economics of Competition Law

- It is an economic law; economic understanding necessary for appreciation of the law.
- Economics provides :
 - conceptual basis
 - analytical tools.
- What is competition?
 - ‘a situation in which firms or sellers independently strive for buyer’s patronage in order to achieve a particular business objective, e.g.profit, sales or market share’ (EU, WB-OECD Framework)



Economics of Competition Law contd.)

- ‘a striving for the custom and business of people in the market place’ (Richard Whish)
- ‘a process of rivalry between firms--- seeking to win customers’ business over time.’ (UK-CC)

Benefits of perfect competition:

- Allocative efficiency
 - Productive efficiency
 - Dynamic efficiency (innovation); Schumpeter: ‘gales of creative destruction’
- “Invisible hand of competition”



Economics of Competition Law (contd.)

- Maximize consumer welfare
- Consumer has wider choice, better availability at affordable prices.
- At other end is monopoly:
 - Excessive pricing (lower output)
 - Allocative inefficiency (deadweight loss)
 - Productive inefficiency (X-inefficiency); easy life, wasteful expenses.



Economics of Competition Law (contd.)

Weakness of perfect competition theory:

- Neither perfect competition nor perfect monopoly exist.

Assumptions of perfect competition:

- Homogeneous products.
- Large number of sellers & buyers
- No entry or exit barriers.
- Perfect information
- Free flow of resources



Economics of Competition Law (contd.)

- Other concepts have grown:
 - Effective competition (EU, UK-OFTTEL, UTILITIES ACT)
 - Workable competition (Clark)
 - Contestable market (Free entry/exit, hit & run)
- However perfect competition remains a useful reference frame.



Economics of Competition Law (contd.)

Weakness of perfect competition theory (contd.)

- Natural monopolies (Economies of scale/scope)
e.g. transmission lines, Pipelines.
- Network industries e.g. telecom, PC operating systems.
- Influence of schools of thought
 - Harvard , 1950s-60s $S \rightarrow C \rightarrow P$, interventionist
 - Chicago, 1970s-80s. Focus on efficiency.
 - Freiburg (ordo-liberal)
 - Schumpeter. Creative destruction.



Economics of Competition Law (contd.)

- Examples of economic tools:
 - Relevant market: product, geographic
 - Elasticity of demand, supply. Cross elasticity
 - SSNIP test; cellophane fallacy
 - Market share
 - Entry barriers, sunk costs
- Structure- HHI, CR, Market Shares Economics of Scale/Scope; MES Marginal cost; cost of production



Competition Law, Regulation and Professions

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



Competition Law, Regulation and Professions (contd.)

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



Competition Law, Regulation and Professions (contd.)

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



Competition Law & IPRs

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



Competition Law & IPRs (Contd.)

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



Competition Law & Competition Policy

- Two elements required to sustain competition:
 - Competition Policy
 - Competition Law
- Competition Policy: Set of Government measures which enhance competition, give primacy to market forces, facilitate entry and exit, reduce administrative controls, and minimize regulations (Dhall)
- Competition Law: statute to prohibit and penalize anti-competitive practices and regulate potentially anti-competitive measures (Dhall)
- Both elements mutually complementary.



Competition Law and Competition Policy (Contd.)

- Policies affecting competition:
 - Trade (quantitative controls, tariffs)
 - Industrial (licensing, locational, FDI)
 - Public Sector (preferences, reservations)
 - SME (preferences, reservations)
 - Government procurement (preferences, reservations)
 - Privatization/disinvestment
 - Fiscal policy (taxes, incentives)



Competition Law and Competition Policy (Contd.)

Policies affecting competition (contd.)

- Subsidies/State Aid
- Labour
- Regulatory policies
- State restrictions/barriers (transport permits, tax barriers)
- **Conflict with 'industrial policy'**
 - Protection to local industries.
 - Anti-dumping measures.
 - Promoting national champions; (Michael Porter's observations)



National Competition Policy

Principles advocated by Competition Commission for Policies:

- Effective Competition Law
- Competitive neutrality
- Rule bound, transparent, non-discriminatory procedures.
- Institutional separation between policy making, operations, regulation.
- Competition driven regulation



National Competition Policy (Contd.)

Principles advocated by Competition Commission for Policies (contd):

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



National Competition Policy (Contd.)

Need for NCP :

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



National Competition Policy (Contd.)

Examples of NCP:

- Australia
- Botswana
- UK
- Denmark
- Turkey



Competition Advocacy

Advocacy with Government: examples:

- Postal Amendment Bill
- Warehousing Bill
- Shipping
- Road Transport

Advocacy with Regulators: examples:

- RBI
- TRAI



Competition Advocacy (Contd.)

Advocacy with industry; public awareness:

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



Competition Law - International Dimension

Multilateral organizations :

- UNCTAD, OECD, ICN, WTO

Bilateral Agreements: Legislation/Regional:

- BTAs, CECAs, RTAs
- Need for including competition in India's BTAs/CECAs; Graded level of cooperation



History of Competition Law in India

- Monopolies Enquiry Commission Report, 1965 on prevalence of monopolistic and restrictive practices (Agricultural and PSUs excluded).
- High Level of Economic Concentration in 64/100 industries:
 - Prevalence of MTPs e.g. price discrimination, predatory pricing, RPM, exclusive dealing.
 - Prevalence of RTPs e.g, price fixing, cartelization, boycott.



History of Competition Law in India (Contd.)

- Let to MRTP Act/Commission, 1969.
- High Power Expert Committee (Sachar Committee) to enquiry inter alia improvements/changes in MRTP Act. Recommended strengthening of MRTPC.
- Amendments to MRTP Act 1984:
 - UTPs included
 - Concept of deemed illegality in RTPs.
 - MTP and M&A provisions not changed.



History of Competition Law in India (Contd.)

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



Competition Act 2002

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



Competition Act 2002 (contd.)

- Revised Competition (Amendment) Bill 2007 passed by Parliament September 2007.
- During above period Commission functioning with one Member/acting Chairman plus small compliment of staff.
- Work done by Commission during this period:
 - Competition advocacy
 - Professional groundwork
 - Capacity building



Competition Act 2002 (contd.)

Substantive provisions:

- Prohibition of abuse of dominance
- Regulation of combinations
- Prohibition of anti-competitive agreements
- Competition advocacy and public awareness.



Suggested Readings

- Report of the High Level Committee (Raghavan Committee)
- The Competition Act, 2002 as amended (along with Statement of Objects & Reasons) and the notifications issued by the Central Government.
- Competition Commission of India Website: www.competitioncommission.gov.in
- OECD, Competition Policy and Law Division. Website: <http://www.oecd.org/competition>
- UNCTAD Competition and Consumer Policies. Website: <http://www.unctad.org/en/subsites/cpolicy/index.htm>
- International Competition Network. Website: www.internationalcompetitionnetwork.org



Suggested Readings (Contd.)

- WTO Competition Policy. Website: <http://www.wto.org/>
- World Bank/OECD (1999): "A Framework for the Design and Implementation of Competition Law & Policy".
- Richard Whish (2005): "Competition Law " 5th Ed., (Oxford University Press)
- Jones & Sufrin (2004): "Introduction to Competition Law"
- Slot and Johnson(2006): " An Introduction To Competition Law", Hart Publishing (US and Canada)
- Vinod Dhall(2007): "Competition Law Today", Oxford University Press
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