

STATE OF COMPETITION IN THE INDIAN ECONOMY

Competition Law in Action: Interface
between competition authority and
sector specific regulators

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About the Presentation

- Research is in its incipient stage
 - Commenced last month, upon award of the project
 - Inception Note/Work Outline/Plan stage
- Working thesis statement:
 - Tentative, subject to amendment upon further research
 - “Enforcement of competition law is a sophisticated, specialized field and ought to be left in the hands of competition authority in India”

About the Presentation...

I: Introduction to the topic

II: Regulation & Competition: Sector specific
regulators & competition law

III: Methodological Tools

IV: The Matrix of Possibilities

V: Concluding Observations

I: Introduction to the topic

- Section 18 of the Competition Act, 2002:
 - “it shall be the duty of the [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 markets in India”
 - S. 18 has a wide amplitude; it is agnostic about specific sectors
 - Reverberation in the preamble of the Act; same language has been used

I: Introduction to the topic...

- **Section 60: Act to have overriding effect**
 - “The provisions of [the] Act shall have effect notwithstanding anything inconsistent therewith contained in any law for the time being in force”
 - Usual *non obstante* provision in law
 - Overrides any other laws
 - But, ...

I: Introduction to the topic...

- **Section 62: Application of other laws not barred**
 - “the provisions of [the] Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force
 - *Prima facie*, there is an overlap between s. 60 and s. 62
 - Both sections are couched in mandatory language
 - Harmonious interpretation?
 - Additionally, there is s. 21

I: Introduction to the topic...

- **Section 21: Reference by statutory authority:**
 - “(1) where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission”
 - s. 21 (1) r/w current s. 62 suggests directory, not mandatory address of competition issue by other statutory authorities
 - Draft amendment bill substitutes “may” with “shall”

I: Introduction to the topic...

- Ss. 18, 60, 62 and 21 constitute the four corners of the interface between competition authority and sector specific regulators
- The ramifications of the interface requires a deeper understanding of genesis of regulation in India – part II of the presentation

Overview of Part II: Regulation & Competition

- A. Genesis of Regulation in India
- B. Inception of Indian Competition Law
- C. Regulation/Competition Dichotomy
- D. Friends or Foes?

A. Genesis of Regulation in India

- LPG v. LPG
 - Pre- 1991 LPG: License, Permit & Government
 - Post – 1991 LPG: Liberalization, Privatization & Globalization
- Government intends to focus upon its core activity – *governance* instead of manufacturing, for instance, bread or hair oil

A. Regulation in India...

- A simultaneous development has been a sudden spurt in birth of regulatory authorities
- What is Regulation?
 - Literally it means *influencing* the flow of events
 - Consists of government rules or market incentives designed to control the price, sale, entry, exit or production decisions of firms

A. Regulation in India...

- *Rationale* behind Regulation:
 - Prevention of abuses of market power; e.g. cable TVs, DTH
 - Remedy informational failures; e.g. IPOs of companies, SEBI regulations, BSE/NSE requirements, listing agreements
 - Correct externalities like pollution; e.g. Bombay Mills' land
 - Market failures; e.g. MCPS (Monopoly Cotton Procurement Scheme)

A. Regulation in India...

- Why is there a rise of new regulatory state?
 - “Risk Society” thesis: rise of the regulatory state is a response to new fears and tensions about our relationship with science and technology, e.g. nuclear energy, genetically modified organism, internet transmission of computer virus (Parker & Braithwaite)
- What is the meaning of “risk society” that we live in?
- India: crisis has almost always preceded creation of new regulatory authority e.g. SEBI

A. Regulation in India

- India increasingly relies upon market rivalry as the organizing principle for economic activity
- The textbook model of perfect competition does not exist in reality
- Real markets are replete with imperfections
- Monopolies have costs for the society
- One of the intervention strategies is that of competition law & policy

B. Inception of Indian Competition Law

A) MRTP Act, 1969 - "An Act to provide that the operation of the economic system does 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 or incidental thereto"

B. Inception of Indian Competition Law...

- Influence of the Constitution of India
- Art. 39(b) – “ownership and control of material resources of the community are so distributed as best to subserve the common good”
- Art. 39 (c) – “the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment”

B. Inception of Indian Competition Law...

- The preamble of Competition Act, 2002 reads: “an Act 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 other participants in markets...”
- The economic philosophy has undergone a momentous change

B. Inception of Indian Competition Law...

MRTTP Act v. Competition Act

- Pre-liberalisation v. Post-liberalisation
- Size of entity v. Conduct of entity
- Dominance v. Abuse of dominance
- No Penalties v. Penalties
- Unfair Trade Practices v. COPRA
- No Merger Review v. New Merger Review
- No Advocacy v. CCI's advocacy function

B. Inception of Indian Competition Law: Objective

	US	EU
Goals/ Objectives of Competition Law	<u>Case law:</u> fairness and equality of opportunity, economic liberty <u>Law & Economics:</u> Efficiency	(1) Market integration (2) Protecting competition

B. Inception of Indian Competition Law: Objective...

- The goals and objectives of competition law as enunciated in s.18 and the preamble is similar
- A comprehensive, overall market vantage point is not available to any sector specific regulator

C. Regulation/Competition Dichotomy

Sectoral Regulator	Competition Authority
Tells businesses “what to do” and “how to price products”	Tells businesses “what not to do”
<i>Ex ante</i> – address behavioural issues before problem arises	<i>Ex post</i> (except merger review)
Focus upon specific sectors	Focus upon entire economy

D. Friends or Foes?

- Instance of an interface leading to regulatory muddle
- *P & O Australia Ports Pty Limited and Ors. v. Board of Trustees of Jawaharlal Nehru Port Trust and Anr.* (January 28, 2003 – Bombay HC) (“JNPT”)
 - JNP has two terminals - container terminal and bulk terminal
 - disqualification of P&O Australia Ports Pty Limited at the bid stage for conversion of bulk terminal to container terminal at JNP

D. Friends or Foes?...

- P&O already operated the container terminal since 1995
- Section 42(3) of the Major Port Trust Act provides that the private party will not charge for his services in excess of the tariff rates determined and published by the Tariff Authority for Major Ports (TAMP) [“ceiling”]
- Ostensible reason: “to avoid concentration of control with one private party and to increase competition and efficiency and to prevent monopoly in public interest”
- Mumbai has two ports – JNP and Mumbai port: P&O was permitted to bid for Mumbai port but disqualified from second terminal at JNP!!!

D. Friends or Foes?...

- Concern: P&O already controls Chennai Container Terminal and one of the JNP terminals and adding the second terminal at JNP would lead P&O to control in excess of 30% of the total container traffic to and from India
- Is “market” entire India? Does a ship entering Mumbai port has a realistic choice of entering through Chennai?

D. Friends or Foes?...

- JNPT is a clear case of “competition”
- Board of Trustees, JNPT was inept in handling it
- By excluding P&O at the bid stage, perhaps JNPT unwittingly affected “conditions of competition” at the bidding stage
- Presumably, existence of a player such as P&O at the bidding stage would have goaded other competitors to come up with their best possible bids (“market rivalry”)
- This argument wasn’t taken up by counsels (“Competition Advocacy”?)

D. Friends or Foes?...

- Potential areas of statutory overlap
 - SEBI Act (e.g. Takeover Code)
 - TRAI Act (e.g. s. 11)
 - Electricity Act [e.g. preamble, ss. 23, 60, 61, 62, 79(2)(a)(ii), 86(2)(i), 131(5)(a)]
 - RBI/IRDA/NCDRC/PNGR

III: Methodological Tools

- Economic Analysis of Law:
 - Normative analysis using CBA
 - Kaldor-Hicks efficiency (“The move from allocation X to Y is an improvement in efficiency if and only if those who benefit from the move gain enough extra benefits so that they could fully compensate those who lose out from the move”)
 - Posner’s wealth maximization (“how much a person is willing and able to pay to obtain it, if she does not already have it, or how much she asks for in order to give it up, if she does already possess it”)

III: Methodological Tools...

- Principles of Justice – John Rawls
 - *Principle of liberty*
 - *Difference principle*
- Comparative
 - Canada's RCD
 - US/EU/UK

IV: The Matrix of Possibilities

- Competition authority as the super-regulator?
 - Seems politically unacceptable in India
- Sector specific regulators as sovereign in their fields
 - Undesirable, lack of expertise in competition issues

IV: The Matrix of Possibilities...

- Common Appellate Authority for all the regulators?
 - Still no guarantee that expertise in “competition” would be available as there would be absence of accumulated wisdom
- Delineating clear jurisdiction for each regulator
 - Requires clear, cogent definition of “competition” that the Indian Competition Act doesn’t have!!!
- Any other? E.g. reliance upon courts to apply general law v. special law jurisprudence
 - Too risky, given the history

V: Concluding Observations

- Each of the above matrix of possibilities would be subjected to methodological tools outlined in section III in order to come to a definitive conclusion
- And, conclude whether the thesis statement is satisfied/discredited
 - [“Enforcement of competition law is a sophisticated, specialized field and ought to be left in the hands of competition authority in India”]

Thank You

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