VOLUME 12 ISSN 2456-9704

HEAVY ENTRY BARRIERS, A BOON OR A BANE? AN EXAMINATION OF THE COMPETITION LAW POLICY IN INDIA IN LIGHT OF THE NATIONAL COMPETITION POLICY, 2011

By Akanksha Pandey, Shivani Trichnopoly Ravi Kanth
From Symbiosis Law School, Pune

Abstract

A strong need for the creation of an inclusive and all-encompassing competition policy has been expressed by a multitude of economists and scholars around the world in the field of competition law. Similar need has been expressed by the law makers in India and, repeated attempts to implement such a policy have been taken from time to time, however, to no avail. The National Competition Draft Policy, 2011 is the culmination of the combined efforts of the numerous working committees and boards set up to reinforce the regulations and tailor them to suit the changing dynamics of Indian Market.

This paper aims to examine and analyse the actions proposed in the said draft policy which has not yet seen the light of the day. The authors also study the application of the policy to modern day market which has witnessed a steady influx of technological based firms. The proposal of removal of heavy entry barriers shall also be discussed with emphasis on the possible factors the lead to the development of such entry barriers

Keywords: *Competition, Anti – competitive agreements, national competition policy, Strategic barrier, economies of scale, economies of scope, barriers to entry.*

INTRODUCTION

The term 'competition' stands undefined as under the Indian Competition Act, 2002 (**'Act'**). However, this law aims at keeping a check on the different kinds of practices that are undertaken by the institutions in the market. The Act prohibits trade practices that are detrimental to the competition in India. The Government had prearranged for the Mahalanobis Committee of Distribution of Incomes and levels of living which submitted its report in 1960 highlighting growing income inequalities in India in the post-independence period[1]. This in turn led to the formation of the Monopolies Inquiry Commission which gave its report in the year of 1965. On placing reliance on the same, The Monopolies and Restrictive Trade Practices(**'MRTP)** Act, 1969 was brought into force. This Act was designed in a manner as to full-fill the objective of both thwarting the intensity of private undertakings and safeguarding the interest of public in terms of various economic activities. With the introduction of various Economic concepts like liberalization and different kinds of reforms for the purpose of meeting the demands of globalization, another committee called the Raghavan Committee was formed in the year 1999. This committee was formed for the purpose of improving and understanding the needs of the growing Competition in India. The Raghavan Committee was of the understanding that the

[1] Mr. Amit Kapur, History and Establishment of Competition Regime, Competition Regulation-history, Insights and Issues for The Way Forward, 2009 (June 23rd , 6:37 PM). http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=ebaae57c-b2aa-43b7-af9f-ac02df0a35b2&txtsearch=Subject:%20Commercial.

MRTP Act provided for the regulation of certain kinds of anti-competitive practices which was not the case in various other countries. The MRTP Act seemed highly insufficient in terms of promoting the competition in the market. Also, the existence of the law for the past 30 years had been considered of having a strong binding value. However, these interpretations were considered as insufficient by various Judicial pronouncements. With its report, the Committee implied the phasing out of the old MRTP Act and the introduction of a modern Competition Law.

The Indian Competition Law had been enacted by the Indian Parliament in the Month of December, 2002 and obtained the assent of the President on January 13, 2003. The Act, Provides for the following: -

- Prevention of such Trade Practices that have an adverse effect on Competition;
- Promotion and Sustainability of Competition in markets;
- Protection of interests of the Consumers;
- Ensuring the freedom of Trade that is being carried on by various participants in India.

LITERATURE REVIEW

INCEPTION OF THE COMPETITION LAW REGIME IN INDIA

Competition Act, 2002[2] was enacted to replace the archaic Monopolies and Restrictive Trade Practices Act, 1969 (Hereinafter, 'MRTP Act, 2002')[3] in light of the economic reforms adopted by India in 1991. Both Competition Act, 2002 and the MRTP Act, 1969 had been in place with concurrent jurisdictions until September 1st, 2009 on which date, the MRTP Act, 1969 was finally repealed and the MRTP Commission was abolished vide Section 66 of the Competition Act, 2002. [4]

While, the MRTP Act, 1969 aimed at imposition of penalty and curbing restrictive practices, Competition Act, 2002 was instituted to enable regulation and advocacy in addition to restricting anti – competitive practices in the market. These being the primary differences between the two acts, numerous attempts have been made to modify the existing competition act in India into an inclusive Competition policy.

EFFORTS UNDERTAKEN TO CREATE A CODIFIED COMPETITION POLICY

Competition Act, 2002, despite being formulated in 2002 and signed into force in 2003, has been enforced in various phases. Various committees have been set up to ensure the creation of a National Competition Policy (NCP). The first attempt has been in the form of the creation of a Working Group under the able guidance of Mr. Vinod Dhall, a member of the Competition Commission of India. The recommendations of this working group included among various others, a need for improvement of competition in domestic markets, synergy between the various sectors and framing of policies taking into view the best prevalent international practices. While, the entire list of recommendations has not been brought into force, a good number of recommendations have been included in the 11th Five Year plan. Pursuant to this, the Competition Commission of India was established in 2009, the Competition Act, 2002 was fully brought into force and the

[2] The Competition Act, 2002 (Act 12 of 2003).
[3] The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969).

[4] The Competition Act, 2002 (Act 12 of 2003).

MRTP Act was finally repealed.[5] The Competition Commission of India (Hereinafter CCI) was also finally set up in 2009. Since, the year 2009 numerous cases have been taken up by the CCI and the Competition Appellate Tribunal. Issues such as anti – competitive practices, tying agreements, formation of cartels etc have been taken up by these bodies.[6]

ANALYSIS

BARRIERS TO ENTRY UNDER THE COMPETITION ACT, 2002

There are certain regulations which are created upon the firms by virtue of government intervention or have been created by the firms. The role of entry barriers in the market is to ensure that there is minimum entry or exit from the market along with ensuring that the practices undertaken by these players are fair. In order to maintain the spirit of competition, these barriers ensure that the market pricing of the commodities and those imposed by the players are fair. In order to understand the durability of the firm in the market, the competition agencies examine the barriers and their possible effects on the timely entry of the firms in the market. It is also necessary for the new entry to be powerful enough to defeat the existing firm who is allegedly powerful. Therefore, this analysis must assess the likelihood in the light of cumulative impact of all such market barriers.[7] There are three kinds of barriers; namely, structural, strategic and regulatory. These barriers are discussed as follows:

a) **Structural barriers to entry**- these barriers are a result of various supply factors such as the economies of scale, sunk costs, scarce inputs and various demand factors of the firm. **Sunk costs** are referred to the amount of money which spent in case of investments which pose as a necessity for the purposes of entry in the market. These investments act as a risk factor as it does not guarantee a profitable entry into the market. These costs include manufacturing facilities, research and development costs, costs in relation to research on the various consumers of the market. Another factor involved is the **Economies of scale** which takes place in situations when the per unit of cost of product declines with the increase in production of the commodity. This acts as a barrier by compelling fresh entries to either compete on a large scale by making small scale competitions unattractive. This, puts the investment at a high risk. In addition to this, **Economies of scope** is another factor which acts as a barrier as it amounts to a long-term reduction in the costs due to supply and distribution of multiple products. If this holds a significant weight, then a prosperous entry in a market might require a successful entry in several other market which will require higher investments to enter. Lastly, the **Reputation of firm** is essential for differentiated consumer products and is required for industrial products. The consumers might be accustomed to a certain product. Therefore, in order to make them purchase the new products extravagant

[5] Draft National Competition Policy, 2011, Ministry of Corporate Affairs (June 21st, 09:43 P.M.), http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition Policy.pdf.

[6] Udai S Mehta, A Competition Law Alone is not enough, The Hindu Business Line, 24th June, 2014.

[7] Report of the Working Group on Competition Policy, Planning Commission, Government of India, February, 2007.

marketing strategies is required to be undertaken by the new entrant. This calls for excessive investment.[8]

b) **Strategic barriers to the entries**- these barriers are formulated for the purpose of imposing new sunk costs by depending upon the ability of the new entrant to cause delay in the ability of a new competitor to eliminate a material rise in the price. This behavior can occur pre- or post- entry into the market.[9] However, this behavior does not imply an abuse of dominance and is an evidence to a pro-competitive attitude. Thus, it is necessary to understand whether this conduct amounts to an abuse of dominance in the market. Entry can be deterred by a significant player in the market by threatening to increase the output as a response to the entry made by the new player thereby reducing the prices and making the entry unprofitable for the new player. The incumbent's existing contracts in the market will reduce the ability of the fresher to enter into the market by limiting the access to various supplies. In case such an incumbent is vertically integrated, the access to scarce inputs or distributed systems to which the freshers shall have a difficulty in gaining access. Thus. The incumbent holds the power to block such an entry by the means of denying access.[10] Situations like competing of the incumbent against a new entry also deters the entry.

c) **Regulatory barriers to entry**- government and administrative regulations may restrict the number of firms, licensing requirements, IP rights and materializes into a statutory monopoly. The government regulations focus on factors that affect the public such as health and safety, environmental protection, urban planning. Thus, it is important for market players to conduct themselves in a manner that adheres to these goals as focused upon by the government. These circumstances may act as a restriction to enter the market. These regulatory standards do not act like a hinderance to entry in cases where it is uniformly applicable to all competitors and do not affect the costs for new entries in the market. Nonetheless, the costs of complying with these regulations may trigger a hike in sunk costs and economies of scale. **Licenses** are restricted in various sectors due to the availability of sufficient amount of resources. Telecom and air transport services are a classic example of the same. **Intellectual property rights ('IPR')** suggest a dominant position in the market when such commodity which is protected by an IPR corresponds to relevant technology or commodity and thus creates a legal monopoly. Therefore, in case where the product gains popularity as compare to the product protected under an IPR, it shall become highly unlikely that the IPR holder will still continue to hold a dominant position in the market. however, having a protection under the IPR regime may pose as an advantage to the same.

The three categories as mentioned above act as a strong deterrent. Along with this, the **power of a buyer, significance of the buyer to the seller, buying habits and procedures** act as a supplement in causing hinderance for new entries to the market.

THE 2011 MCA DRAFT

[8] Abir Roy & Jayant Kumar, Competition Law in India 220 (2nd ed. 2018).

[9] Appendix I Of The Merger Enforcement Guidelines: Additional Information On Sunk Costs, OECD Policy Roundtables (2005), https://www.oecd.org/daf/competition/abuse/36344429.pdf.

[10] Supra footnote 3, Pg 222.

Competition policy has been defined by both the apex organisations regulating trade and competition at the international level. The definitions proposed by both, the WTO and the World Bank can be summarised as the complete extent of measures, rules and regulations adopted by any government to regulate enterprises in the markets within the confines of its economy.[11] In the light of issues with respect to heavy entry barriers, the Ministry of Corporate Affairs decided to introduce the draft of 2011. An ideal policy ought to include policies to enhance and impose reasonable restrictions to curb anti – competitive measures.

The National Competition Policy was proposed with transparency, good governance and the creation of an inclusive national market transcending the invisible barriers which were a result of numerous policies in place at the state level. In addition to these, the competition policy has also been aimed at preservation of competition process, protection and encouragement of competition in the domestic market with a view to enhance competence. The premise on which a strong need for a national policy has been proposed is that, fragmented markets act as impediments to competition and this calls for a single national market.

Some of the measures already undertaken and reiterated in the Draft National Competition policy have been specified in **Annexure I** to the Draft NCP.[12] Consumer Protection has been attributed utmost priority. Important measures include, creation of a single national accreditation and standards body across India so as to ensure uniformity. A National Consumer Protection Authority was suggested to be set up in addition to creation of awareness campaigns. It also encouraged investment in the private sector and removal of differences between the state and national policies pertaining to competition. It sought to make the competition law regulations uniform throughout the nation.

The draft NCP also mentions the parameters for undertaking competition assessment. These include:[13]

Limits on the number or range of suppliers through various methods such as granting of exclusive rights to a supplier, establishment of licenses, permits or other modes and processes of authorisation, creation of geographical barriers among others.

CONCLUSION

The Indian Competition Act provides for the regulation of competition in the Indian market and to prevent such practices that promote and healthy competition in the market and not have an adverse effect on the competition in the market. The Act prioritizes the interest of the consumers and ensures that there is a freedom to trade in the market. However, there are certain businesses that wish to keep the competition barriers high and undertake measures like paying large

[11] Draft National Competition Policy, 2011, Ministry of Corporate Affairs (June 21st, 09:43 P.M.), gh',

[12] Annexure I, Draft National Competition Policy, 2011, Ministry of Corporate Affairs (June 21st, 09:43 P.M.), http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition Policy.pdf.

[13] Annexure III, Draft National Competition Policy, 2011, Ministry of Corporate Affairs (June 21st, 09:43 P.M.), http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition Policy.pdf.

sum of money for the purposes of advertisement and marketing. The draft of 2011 seeks to rectify such issues by analysing the mechanism for assessing such heavy entry barriers for the new entries to the market. The 3rd Annexure as provided under the draft bill provides for the various modes of assessment of such barriers and has not yet been notified by the legislation. The question arises as to whether removal or reduction of these entry barriers would be feasible for the Indian economy. According to the authors, it would be feasible as it would not only promote the growth of the Indian economy, but also ensure a definite growth to the new players by giving them a chance to introduce new inventions that benefit our country. Being a developing economy, India requires new inventions in order to ensure a positive growth. As we say 'practice makes a man perfect' allowing new entries would also mean that there would be new business strategies that can be implemented thereby improving the skills of the existing businesses in the market and allowing them to flourish smoothly.

SUGGESTIONS

The authors seek to provide the following suggestions that could be implemented for ensuring a fair practice for the new entries.

a) The costs undertaken by marketing companies for advertising purposes can be reduced;
b) The concept of indirect penetration should be included in the draft policy of 2011 for the purposes of assessment;
c) The costs of compliance with regulatory norms should be reduced;
d) The procedure to obtain licenses and permits should be made less cumbersome.

REFERENCES

STATUTES

a) The Competition Act, 2002 (Act 12 of 2003).
b) The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969).

OTHER AUTHORITIES

a) Draft National Competition Policy, 2011, Ministry of Corporate Affairs
b) National Competition Policy 2011, Government of India, Ministry of Corporate Affairs, November 2011
c) Report of the Working Group on Competition Policy, Planning Commission, Government of India, February, 2007

ARTICLES

a) Aditya Bhattacharjea , India's New Competition Law: A Comparative Assessment, 4 J. Competition L. & Econ. 609
b) Competition Laws in India, An Overview, Kocchar & Co.
c) Jordan Dresnick & Thomas Ronzetti Price and Non-Price Vertical Restraints, 58 U. Toronto L.J. 317 · Vertical Price Agreements in The Wake Of Leegin
d) Mr. Amit Kapur, History and Establishment of Competition Regime, Competition Regulation-history, Insights and Issues for The Way Forward, (2009)
e) Tilottama Raychaudhuri (Assistant Professor, WBNUJS), Shouvik Kr. Guha (Research Associate, WBNUJS) and Madhulika Kanaujia, Shayonee Dasgupta, Shruti Jere and Jaimini Vyas (students, B.A/B.Sc. LL.B. Hons., WBNUJS), Comment on The Draft National Competition Policy Statement of the Government of India, West Bengal National University of Juridical Sciences, Kolkata,

Comment submitted to the Ministry of Corporate Affairs, Government of India.

BOOKS

a) Abir Roy & Jayant Kumar, Competition Law in India 220 ,2nd ed. 2018
b) S.M Dugar Guide To Competition Law, 5th Edition, 2010, Volume 1

*****