INDIAN COMPETITION REGIME IN COMPARISON TO ITS AUSTRALIAN COUNTERPART: WITH SPECIFIC REFERENCE TO ANTI-COMPETITIVE AGREEMENTS

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ABSTRACT

India is hailed as a green-field competition regime. However, India's competition law jurisprudence is older than many of its developing country counterparts. The (erstwhile)Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") was the first competition related legislation of India followed by the later enactment of the Competition Act, 2002 ("Act"). This Article provides for a comparative snapshot between the Indian competition law framework and that of Australia and discusses the provisions with specific reference to Anti-Competitive Agreements. It embarks on a comparative analysis of the two regimes. The Paper concludes by highlighting the similarities and differences that exist between the two jurisdictions and the lessons to be learnt therefrom.

Keywords: Restrictive Trade Practices, Anti-Competitive Agreements, competition law, Commonwealth

INTRODUCTION

Competition is the process by which rival businesses strive to maximise their profits by developing and offering desirable goods and services to consumers on the most favourable terms.[1] An anti-competitive agreement is generally one, which has the effect of preventing, distorting or restricting competition. In particular, a practice which tends to obstruct the flow of capital or resources into the stream of production is an anti-competitive agreement. Likewise, manipulation of prices and conditions of delivery or flow of supply in the market, which may have the effect of imposing on the consumer unjustified costs or restrictions are regarded as anti-competitive agreements.[2]

The issue of anti-competitive agreements, both domestic and cross-border character, is not new and is increasing as the world heads towards greater economic integration. Whilst countries are adopting competition laws, their capacity to deal with competition issues, which have their roots outside their borders, continues to remain an enigma. To deal with such issues, the national competition authorities would need cooperation from foreign competition authorities, but how far such co-operation will be available is a debatable proposition.[3]

INDIAN COMPETITION LAW REGIME

The Constitution of India has mandated the State to direct its policy towards securing a just society. Article 38 and 39 of the Constitution of India, which are part of the Directive Principles of State Policy, mandate, inter-alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political- shall inform all institutions of national life, and the State shall, in particular direct its policy towards securing:

- That the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
- That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

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1 Harper Review Issues Paper para 1.1.

2 Pradeep S. Mehta, *A Functional Competition Policy for India*, 27 (2006)

3 Pradeep S. Mehta, Nitya Nand, Alice Pham, "Multilateral Competition Framework: Is WTO the only alternative?", in Dipankar Sengupta, Debashis Chakraborty, Pritam Banerjee (Eds.), *Beyond the Transition Phase of WTO*, 665 (2006)

Competition law for India was triggered by the above-stated Articles 38 and 39 of the Constitution of India. The first Indian Competition law was enacted in 1969 and was christened the Monopolies and Restrictive Trade Practices Act, 1969. The Preamble to the Act says that the Statute is enacted 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.[4]

According to Section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969, a 'Restrictive Trade Practice' means a trade practice which has or may have the effect of preventing, distorting or restricting competition in any manner and in particular,

1. Which tends to obstruct the flow of capital or resources into the stream of production, or
2. Which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions.

In October 1999, the Government of India appointed a High-level Committee on Competition Policy and Law, under the chairmanship of S.V.S.Raghawan, to advise a modern competition law for the country in line with international developments and to suggest a legislative framework which may entail a new law or appropriate amendments to the MRTP Act.[5]

The new competition law i.e. the Competition Act,2002 was enacted in January, 2003 after taking into considerations the recommendations of the Raghawan Committee. As per the statement of objects and reasons, this enactment is India's response to the opening up of 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. The Act seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in markets within India and for this purpose establishment of a quasi-judicial body was considered essential.

The rubric of the new law i.e. the Competition Act, 2002 has essentially four compartments:

- Anti-competitive agreements

[4] Pradeep S. Mehta, *A Functional Competition Policy for India*, 41 (2006)
[5] Pradeep S. Mehta, *A Functional Competition Policy for India*, 50 (2006).

- Abuse of Dominance
- Combinations Regulation
- Competition Advocacy

For the purpose of the present study, 'anti-competitive agreements' are significant. Section 3 of the Competition Act, 2002 prohibits agreements 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 in India and declares such agreements as void.

AUSTRALIAN COMPETITION LAW REGIME

Australia's core competition law provisions are contained in Part IV of the Competition and Consumer Act, 2010 (CCA).[6] In addition, separate prohibitions have been created in relation to anti-competitive conduct in the telecommunications industry and a regime for access to essential facilities has been developed.[7]

There was no objects clause in the original Act, but in his Second Reading Speech, the then Attorney-General, Senator Lionel Murphy, stated that its purpose was 'to control restrictive trade practices and monopolies and to protect consumers from unfair commercial practices'. The purpose of the Act was also described as being "to promote efficiency and competition in business, to reduce prices and to protect all Australians against unfair practices".[8]

In 2005, the Competition Policy Reform Act, 1995 inserted an objects clause in Section 2, which provides: "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". In 2014-2015, a major Competition Policy Review was conducted in Australia.

Section 45 of the Competition and Consumer Act, 2010 (CCA) prohibits contracts, arrangements or understandings containing a provision which has the purpose, effect or likely effect of substantially lessening competition. These arrangements will generally be horizontal

6 Previously named the Trade Practices Act, 1974.
7 *Available at:* http://www.australiancompetitionlaw.org/.
8 *Ibid.*

in nature, but this is not a requirement of Section 45.[9] The Legislation[10] introduced in 2006 permits certain collective bargaining arrangements. A joint venture exemption is also available where the joint venture itself does not have an anti-competitive purpose or effect.[11]

Cartel conduct is now[12] prohibited by the Competition and Consumer Act, 2010 (CCA).[13] It is prohibited civilly and it constitutes a criminal offence. The former definition of price fixing in Section 45A has been repealed. Cartel conduct is now defined[14] as including four forms of activity: price fixing (defined in the same way as the former Section 45A, market division, restricting outputs and bid rigging. This conduct is prohibited where made or given effect to in a 'contract, arrangement or understanding' and two or more of the parties involved are competitors (or would be but for the conduct). In relation to price fixing, the provision must have the 'purpose or effect' of price fixing; in relation to the other forms of conduct the provision must have the requisite 'purpose'.[15]

Criminal penalties of up to $220,000 per offence or up to 10 years imprisonment can be levied on individuals found to have committed a cartel offence. The civil penalties for making or giving effect to a cartel provision are the same as those currently available for other contraventions of Part IV.

In addition to prohibiting anti-competitive agreements generally, Section 45 prohibits exclusionary provisions[16] (more commonly referred to as primary boycotts) *per se*. This is in addition to the prohibition on output restrictions contained in the new cartel prohibitions. A limited defence is available in relation to joint venture agreements that do not substantially lessen competition.[17]

Further, Section 46(1) prohibits a corporation with substantial market power taking advantage of that market power for a prohibited anti-competitive purpose. In 2007, Section 46(1AA) was introduced to specifically target predatory pricing. Under this provision, predatory pricing is prohibited where a corporation having substantial market share supplies

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9 As a number of anti-competitive vertical arrangements are caught by other more specific provisions in Part IV, anti-overlap provisions will give those specific provisions priority over Section 45.

10 Trade Practices Legislation Amendment Act, 2006.

11 *Available at:* http://www.australiancompetitionlaw.org/.

12 Since 24 July 2009.

13 Division 1 of Part IV of the Competition and Consumer Act, 2010 (CCA).

14 Section 44ZZRD of the Competition and Consumer Act 2010 (CCA).

15 *Supra* note 11.

16 For a definition of exclusionary provisions, Section 4D.

17 *Supra* note 11.

goods or services below cost for a sustained period for one of the three prohibited anti-competitive purposes.

Various forms of exclusive dealing are prohibited by the Competition and Consumer Act, 2010[18] (CCA). Broadly, it captures two types of anti-competitive vertical transactions:

(1) the conditional supply (or acquisition) of goods or services (conditions may relate to the ability to re-supply, exclusivity, limits on ability to acquire from competitors etc.).

(2) refusing to supply for specified reasons (e.g., because purchaser refuses to agree to a conditional supply).

Most forms of exclusive dealing (including full line forcing) are captured only if it can be demonstrated that they substantially lessen competition.[19]

Furthermore, resale price maintenance is also prohibited[20] as being anti-competitive. It captures various forms of minimum RPM, both in relation to goods and services (including withholding supply as a result of failure to agree to or adhere to a RPM requirement).[21]

Even though individuals may commence actions for damages and other remedies, the Australian Competition and Consumer Commission (ACCC) is the primary enforcer of Part IV of the CCA. If the ACCC believes there has been a contravention of the CCA, it may commence remedial proceedings under the Act. It has powers to obtain evidence and subject to obtaining a search warrant, has search and seizure powers to assist in its investigations.[22] The ACCC also provides a semi-judicial role, having the power to grant 'authorisation' of conduct that would otherwise contravene Part IV on public benefit grounds.[23] It also has the power to revoke notifications made in respect of exclusive dealing or collective bargaining, again on public benefit grounds.[24] The Tribunal's main function is to hear appeals from decisions of the ACCC relating to authorisation and notification. Since the passage of the 2006 Amendment Act, the Tribunal now hears merger authorizations applications directly and they may hear appeals from formal merger clearance decisions of the ACCC. Further, the Commonwealth Director of

18 Section 47 of the Competition and Consumer Act, 2010 (CCA).
19 Section 47(10).
20 Section 48 of the CCA.
21 *Supra* note 11.
22 Section 155 of the CCA.
23 Appeal from such orders lies to the Australian Competition Tribunal (ACT).
24 *Ibid.*

Public Prosecutions (CDPP) determines which matters it will prosecute as a "cartel offence". The ACCC will make recommendations to the CDPP about which matters it considers appropriate to pursue criminally and the CDPP makes a determination based on the MOU between the ACCC and CDPP and on the Prosecution Policy of the Commonwealth. The CDPP may also grant immunity from prosecution for whistle-blowers meeting set criteria.

The National Competition Council (NCC) was established in 1995. It is composed of a President and three other members, having the primary roles of advising about competition law matters and making recommendations in relation to access declarations. Further, the Federal Court of Australia has primary jurisdiction in relation to competition law matters (to the exclusion of other courts). The Federal Court is also given exclusive jurisdictions under the state and territory Competition Codes.

The remedies available under the CCA include both civil remedies and criminal penalties for contraventions of Part IV of the CCA. Civil remedies include pecuniary penalties,[25] damages,[26] injunctions,[27] divestiture (in relation to mergers),[28] non-punitive orders (e.g., community service),[29] punitive orders - adverse publicity orders,[30] disqualification from directorship,[31] other orders.[32] Criminal fines and imprisonment for up to 10 years is available for contraventions of the cartel provisions in Division 1 of Part IV of the CCA.

The ACCC has developed a policy to encourage cooperation and, in the case of cartels, an immunity policy to encourage whistle-blowers. A new immunity and cooperation policy was published by the ACCC on September 10, 2014.

Thus, in Australia, the common law doctrine of restraint of trade continues to operate where it does not conflict with the Competition and Consumer Act, 2010. In short, the doctrine renders provisions which impose restrictions on a person's freedom to engage in trade as illegal and therefore unenforceable at common law unless they are demonstrated to be reasonable.

[25] Section 76.
[26] Section 82.
[27] Section 80.
[28] Section 81.
[29] Section 86C.
[30] Section 86D.
[31] Section 86E.
[32] Section 87.

Comparative Analysis

An analysis of the Australian competition regime discussed suggests a number of observations relevant to India. Before embarking upon a discussion on the differences in the two regimes, which are few to say, it is essential to consider their similarities *inter se*. The basic architecture of the two legal regimes discussed provides some indications of similarity with the position in India. In both the jurisdictions, both vertical as well as horizontal anti-competitive agreements are prohibited. Also, there is a leniency policy in place in both the jurisdictions. Moreover, stand-alone or private actions are provided for in both the jurisdictions. In terms of cross-border provisions too, both the jurisdictions provide for the same.

In terms of the differences, the law governing competition in Australia is the Competition and Consumer Act, 2010 and in India, it is the Competition Act, 2002. In Australia, there are criminal as well as civil penalties for engaging in cartel conduct both for companies as well as individuals. While in India, there are only civil penalties for the same. In Australia, there are three competition regulators, Australian Competition and Consumer Commission (ACCC), the Australian Competition Tribunal and National Competition Tribunal whereas in India, there is only one, that is the Competition Commission of India.

The objective of competition law throughout the world is consumer welfare. However, the complexities of the provisions in different jurisdictions have diverse implications and approaches. The enforcement policies must have a direct connection with economic policies and developmental goals of developing countries. It may differ from economy to economy and blanket imitation of policies prevelant in other jurisdictions and their implementation in India is going to be marred by obstacles.[33] Of all the reasons for further comparative analysis, one is particularly important from a practical point of view. India is emerging as one of the largest players in world trade today with the window of opportunity for exporters becoming ever larger and more transparent. It is obviously in the interests of those traders and of India as a whole to ensure that obstructions to the competition in the market within India are kept to a minimum.

[33] K.D. Raju, "Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India", 2 *Intel Prop Rights,* 115 (2014). doi:10.4172/ipr.1000115.