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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from India

-- Session IV --

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INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES*

-- India --

1. Competition and Consumer Protection: Indian Scenario

1. India was one of the first developing countries to have an anti-monopoly legislation, with the enactment, in 1970, of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The MRTP Act covers both competition policy related provisions, mainly in terms of Restrictive Trade Practices (RTPs) and Monopolistic Trade Practices (MTPs), and consumer protection provisions in the form of Unfair Trade Practices (UTPs).

2. The process for this legislation started with the setting up of the Monopolies Inquiry Committee in 1966, which found that the Indian market was concentrated with four firm concentration ratios (CR 4) over 75 per cent in respect of products like infant food, biscuits, coffee, shirting, suiting, kerosene, coal, petroleum, stove, fan, lamp, radio, refrigerator, typewriter, vitamins, penicillin, cars, commercial vehicle, cement, roofing sheets etc. The Committee also found prevalence of a number of restrictive trade practices (RTP) in the Indian market, including hoarding; resale price maintenance; exclusive dealing; price fixing; boycott; and price discrimination.

3. While the MRTP Act, 1969 prohibited RTPs like hoarding, re-sale price maintenance, exclusive dealing, price fixing, boycott, and price discrimination, in the case of monopolistic practices it only provided that these can be referred by the government to the MRTP Commission. Regulation of Mergers and Acquisitions remained in the exclusive domain of the Government. An asset based regulatory framework was put in place, with enterprises having Rs.200 million (subsequently raised to Rs. 1000 million) in assets and dominant enterprises having Rs.10 million in assets being required to seek prior approval of central Government for expansion or for setting up of a new undertaking.

4. Pursuant to the report of a high level committee (Sachar Committee, 1977) recommendations the MRTP Act was amended in 1984 to insert Unfair Trade Practices (UTPs) like misrepresentation as well as misleading or disparaging advertisement. Also the concept of deemed illegality was introduced in respect of a host of trade practices like exclusionary behaviour, tie-in sale, re-sale price maintenance, bid rigging, allocation of market, boycott, predatory pricing etc.

5. MRTP Act, as currently administered, has jurisdiction related to RTPs and UTPs. Fourteen practices are deemed RTP. MTP can be looked at by the Commission if referred to it or on a *suo moto* basis, but the powers of the Commission are only recommendatory (to Government). The 1991 amendment to the Act deleted M & A related provisions.

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2. Competition Act, 2002

6. As a follow up of the wide ranging economic reform programme that started in 1991, a modern competition law, the Competition Act, 2002, was enacted on 13th January, 2003, which is state-of-the-art, covering prohibition of anti-competitive agreements and abuse of dominance, and regulating combinations (covering mergers, amalgamations and acquisitions). Competition advocacy is an important component of the Act.

7. The Competition Act, 2002 envisages that the MRTP Act, 1969 would stand repealed and the MRTP Commission may continue to exercise jurisdiction and power under the repealed Act for a period of two years from the date of the commencement of the Act (Competition Act, 2002). In respect of all cases or proceedings (including complaints received by it or references or applications made to it), the MRTP Act would cease to be in force. During the intervening two year period the MRTP Commission will not take up any new cases, but would complete the ongoing cases under the provisions of MRTP Act, 1969. The fall out of this for consumer protection is in terms of the fact that Unfair Trade Practices (UTPs) which are a major element of consumer protection would be left uncovered in CA, 2002, and would disappear with the MRTP Act, 1969. Keeping this in view it has been proposed to have a National Consumer Protection Authority Act.

3. Consumer Protection Act, 1986

8. The Indian Consumer Protection Act, 1986 was enacted “to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers’ disputes and for matters connected therewith”¹. The obvious objective is to protect consumers from exploitation. The Act was last amended in 2002, which came into effect on 15th March, 2003. It applies to all goods and services unless specifically exempted by the Government. Until now no sector has been specifically exempted and, therefore, it is universally applicable.

9. The basic purpose of the Act is to provide relief to four categories of persons, viz.

- consumers, who have purchased goods for consideration, if they suffer from any defect;
- consumers from whom the trader has charged a price in excess of the price displayed on the goods or package thereof or price list exhibited, or as agreed between the parties or the one fixed under any law;
- consumers who have suffered loss or damage as a result of any unfair trade practice or unscrupulous exploitation by the trader; and
- consumers of service for consideration, if it suffers from deficiency in any respect.”²

10. The Act also provides for a three tier redressal mechanism for consumer grievances, consisting of the District Forum, the State Commission and the National Commission. Pecuniary limits for original jurisdiction for the three redressal agencies have been prescribed by the Act. While the legislation is at the national level the administration at the district and state levels has been left to various States governments who have framed rules in this regard. The National Commission is constituted by the central

¹ Preamble to the Consumer Protection Act, 1986

² Duggal S.M. (2006) Commentary on the MRTP Law, Competition Law and Consumer Protection Law (Law, Practice and Procedures), 4th Edition, Vol. 2, Wadhwa and Company, Nagpur (p. 1122) – page 1122

government and has the power to make its own rules. The National Commission also has the power to review its order. Appeals from the District Fora lie to the respective State Commission and from State Commission to the National Commission. Appeal against the orders of the National Commission, in case of original jurisdiction, lie to the Supreme Court of India. As regards orders passed by the Commission in its appellate or revisional capacity there is no provision for appeal.

11. The three tier Redressal Authorities are quasi-judicial Tribunals. Their decisions can be appealed only in the manner laid down in the Act and cannot be agitated in a Civil Court. They are vested with the power: to give 'cease and desist order'; to order issue of corrective advertisement to neutralize the effect of the impression created by the misleading advertisement; to provide adequate cost to the parties; to grant *ad interim* stay or injunction; and to award compensation; and to order compensation to be paid by public servants for their *mala fide*, oppressive or capricious act, where circumstances so warrant. The provisions of the Consumer Protection Act, 1986 are in addition to and not in derogation of any other law. The Redressal forums at the District level have power to pass interim order, as is just and proper.

4. Interaction of Consumer Policy with Competition Policy

12. Consumer protection and competition law have similar, but not identical objectives. Both aim at consumer welfare. Competition laws benefit consumers in the ultimate analysis. Theoretically, policies and laws aimed at enhancing competition in the markets result in minimization of exercise of market power on the part of producers and suppliers to the detriment of the process of competition. In the absence of an enforceable competition law, the producers, including distributors and suppliers, may be tempted to deviate from the rules of the competition game, for short term gains.

13. Consumer protection generally involves compensation for the loss or damage suffered by the consumer. Competition law goes beyond this and ensures that the market functions efficiently. Consumers other than those immediately affected and who have complained would also benefit. Besides, the definition of consumer under the consumer protection law and that under Competition Act, 2002 differ. Commercial buyers stand excluded from the definition of consumers under consumer protection law, but not under the Competition law.

14. Consumer protection law and Competition law are currently administered by two separate Ministries in the Government of India. Their respective policies are also, therefore, formulated separately, but process of consultation is provided in government business rules. The MRTP Act, 1969 is still in vogue and has under its purview UTPs which consist of: misrepresentation and false or disparaging advertisement; deceptive practices; lucky draw; violation of standards; and destruction of goods, with a view to affecting price. MRTP Commission thus dispenses partly consumer protection, though except for the UTPs the rest of the consumer redressals are under the Consumer Protection Act, 1986.

5. Dual System Vs Single Agency

15. India had a mixed system with the MRTP Commission having jurisdiction over certain aspects of consumer protection (UTPs) (with the amendment to the Act in 1984) and over competition issues: MTPs and RTPs. A separate Consumer Protection legislation was enacted in 1986, while at the same time UTPs continued to be under the purview of the MRTPC. With the establishment of the Competition Commission of India in October 2003, India has a dual system in the strict sense of the term though the Commission has not become functional, with the enforcement process not yet having started. Within two years of the full functioning of the Competition Commission the MRTP Commission will cease to exist and there will be separation of consumer protection and competition policy enforcement. It is pre-mature to comment on the benefits and drawbacks of such an arrangement.

16. However, a dual system has been found necessary and practical primarily because of the continental size of the country (3.288 million sq kms) and its population (1.1billion). Consumer protection issues are generally large in number, small in size and need urgent attention and can be sorted out in a short to medium term.

17. The dual role that is unfolding in the country is justified also because of the stage of development of the country. Consumer issues in a developing country differ from those in a developed industrial economy, which is in the 'age of mass consumption', and where the level of information asymmetry is much lower compared to that in developing countries. In fact, the concept of consumer protection legislation was originally envisaged because of the introduction of new and diversified products as modernization advanced, with more and more sophisticated products advertised through print and electronic media, resulting in information asymmetry and consequent chances of consumers being misled about the quality, end use and price of the product/service on offer. Thus over pricing, misleading advertisement, violation of terms and conditions of contract for sale, negligence in providing service etc are matters directly affecting the consumers.

18. The thrust of competition law, on the other hand, is on deviations from the rules of the market that have or that are likely to have appreciable adverse effect on competition in markets in the country. Thus anti-competitive agreements among enterprises and abusive acts by enterprises stand prohibited and anti-competitive combinations are regulated under the Act. The benefits of competition regulations may not benefit any specific individual or any specific group of consumers. The benefits of competition would eventually accrue to the consumers in general, though in the short to medium term the efficiency enhancing effects of an agreement or combination may not be directly transferred to the consumer. In many competition law jurisdictions, *rule of reason* is applied while evaluating acts by enterprises from the competition angle. Under the Indian Act, horizontal agreements, other than four types specified in Sec 3 (3) and all vertical agreements and combinations will be examined in terms of *rule of reason* i.e. by weighing benefits and costs from the perspective of competition. Even in respect of horizontal agreements in the form of joint ventures (JVs) efficiency enhancement criteria are available under the Act (proviso to sec 3). However, there is no stipulation that the efficiency enhancement will have to be passed on to the consumer(s) immediately in order that efficiency enhancement be treated as not having appreciable adverse effect on competition in markets in India, unlike the Art. 81 (3) provisions in EC.

19. Competition law analysis is more complex and time consuming with analysis of the relevant market in most cases and analysis of the generation of abuse of dominant position in the relevant market. Detailed analysis of any act as regards its impact on the market is not generally the concern of consumer protection law and policy. The major, and in most cases the only, concern is related to redressal of consumer grievances. It may in most cases be confined to redressal of the grievances of an individual consumer. Competition law, on the other hand is concerned about the impact of an anti-competitive act by an enterprise or a group of enterprises on competition in the market. The market process and its distortion is more important than whether and what an individual consumer has suffered.

20. There is also the inter-temporal differences as between the objectives of consumer protection laws and competition law. Consumer protection aims at redressal of consumer harm in the short run. On the other hand the benefits of the implementation of competition law to consumers may not be in the short or medium term. The benefits may accrue to consumers in the long term only, through increased efficiency in the economy as a whole and in the specific sector concerned. Though such benefits or efficiency gains may not be transferred to the consumers in the short run, these may come back to them in the medium to long run in the form of newer and more diversified products or the same products at lower prices, arising, *inter alia*, out of new investments by enterprises from the accumulated efficiency gains.

21. An important point to note is that efficiency gains in one sector or sub-sector by an enterprise may be shared with consumers not in the same sector or sub-sector, but in a different sector or sub-sector, so that while there may be losses or grievances by consumers in one sector or sub-sector due to the acts of an enterprise efficiency gains or benefits may accrue in an altogether different sector or sub-sector. Such is the case when an enterprise diverts funds for the purpose of Research and Development (R&D) and training of personnel, which will result in higher prices for the consumer for the existing products (at least for the present), but may result in the production of a new product benefiting the consumers of such new product.

6. Competition in The Market And “No Frills” Versions Of Products

22. India does not have any specific legal or administrative requirement as regards, provision of ‘no frills’ products, except in the case of bank accounts. However, the concept of ‘no frills’ products has gained currency in sectors like civil aviation, mobile telephone services and banking. As regards airlines only the core facility/service is provided at competitive prices by certain airlines while value added services are offered by the same service providers or others at higher prices. In the banking sector, the banking regulator has recently required that banks offer ‘no frills’ account to their customers so that the objective of ‘inclusive banking’ is achieved and more persons from the lower income groups enter the banking service net. The mobile phone revolution in the country was also ushered in by new entrants in the market in the early part of this decade who offered low cost mobile services with not ‘no’ but (rather) ‘low frills’ connections to the consumers. This made mobile connectivity affordable and within the reach of millions of consumers paving the way for a near revolution in the sector.

23. In the civil aviation sector the recent entry of a low fare ‘no frills’ carrier led to accessibility of air travel to millions of new consumers because of its affordability. This has resulted in over-all reduction in the fares across the country which has been sustained over a decade. Consolidation tendencies are now visible in the market, which are likely to reverse the trend.

24. One clear fall-out of the trend towards ‘no frills’ products is the difficulty in distinguishing the pricing strategy by these enterprises and predatory pricing which is frowned upon under sec 4 (2) (a) (ii) of the Competition Act, 2002. Predatory pricing has to be invariably by a dominant enterprise. Sec. 19 (4) requires that the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the factors, which include, besides market share, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise concerned, vertical integration, dependence of consumers on the enterprise, statutory monopoly position, existence of entry barriers, countervailing buying power, market structure and size of the market, social obligations and social costs, contribution to economic development by the enterprise concerned, and any other factor that may be found relevant by the Commission.

25. Tackling predatory pricing by the Competition Commission could be considered anti-consumer in some cases, because predatory pricing benefits consumers in the short to medium run until the enterprise engaging in predatory behaviour recoups the losses from the consumers.

7. International Cooperation between Competition Authorities and Consumers’ Representatives

26. An area where the interests of consumer protection and competition policy and law converge is the case of cartels, especially cartels of a hard core nature, involving price fixing, market sharing, quantity or supply limiting and bid rigging. These four types of horizontal agreements are considered in several competition jurisdictions as *per se* anti-competitive and prohibited. The Competition Act, 2002 envisages that agreements of the four types indicated above are presumed to have appreciable adverse effect on

competition and, therefore, prohibited. Any such agreement would be void and would run the risk of penalties. In the case of cartels the penalties would be to the tune of three times the profits or ten per cent of the turn over for the entire period of the working of such cartel. Such presumptive logic is based on the understanding that such practices bring benefits only to the perpetrators of such agreements and results in dead-weight losses to all other stakeholders in the market, including consumers and competitors.

27. International cooperation is essential to address cartels of a cross border presence, keeping in view the fact that international cartels are common, with presence in a number of jurisdictions, making it difficult to prove cartelization without the cooperation of the competition authorities of the countries.

8. Conclusion

28. There is strong commonality between competition policy and law on the one hand and consumer protection policy and law on the other. An effective competition policy lowers entry and exit barriers and makes the environment conducive to promoting entrepreneurship, which also provides space for the growth of small and medium enterprises and consequent employment expansion. Competition law concentrates on maintaining the process of competition between enterprises and tries to remedy behavioural or structural problems in order to re-establish effective competition on the market. The consequence of this is higher economic efficiency, greater innovation and enhancement of consumer welfare. Thereby the consumer experiences wider choice and greater availability of goods at affordable prices. On the other hand, the consumer protection policy and law are primarily concerned with the nature of consumer transactions, trying to improve market conditions for effective exercises of consumer choice. Thus, the two disciplines focus on different market failures and offer different remedies, but are both aimed at maintaining well functioning, competitive markets that promote consumer welfare. The two disciplines are mutually reinforcing.