

INTERSECTION OF LAW AND ECONOMICS – AN ECONO-LEGAL ANALYSIS OF THE COMPETITION ACT, 2002

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ABSTRACT

Civilized world witnessed economic theories and codified rules for the conduct of human activities. Their developed activities of both economic and legal nature which gradually intersected and formal studies began to develop. Competition economics and law is one such arena which saw the intersection of economics and law. This research paper makes an econo-legal study of the Competition Act, 2002 and attempts to put forward suggestions which can enhance the working horizons of the Act.

1. INTRODUCTION

The growth of human civilization is a dynamic concept. Different theories are suggested by learned authors of the evolution of human civilization. Historically speaking, human civilization underwent fundamental changes. Gone are the days when people mutually exchanged goods for goods – known as barter system. Then a system of monetary economics developed which involved introduction of money into the society wherein governments printed and circulated money. Countries across the world gradually began to adopt the monetary economics. Today, all dealings involve money, be it purchase of goods, property, etc. People exchange goods for money. This process of circulation of money was regulated by governments across the world by enacting laws.

Another sphere of economic development was the growth of business enterprises dealing with good and services. With the increase in demand and supply of goods and services, the world witnessed monstrous incorporation of business enterprises to cater to the increasing consumption patterns of the society. The economy at that point of time was characterized by competitive landscape wherein the businesses engaged in healthy and pro-competitive ventures. As times passed by, the business enterprises began to adopt certain practices which were detrimental to the growth potential of various stakeholders namely customers, society and other competitors. Various economists propounded theories which viewed such practices to have negative effects.

To condemn such practices, the governments across the world enacted competition laws so safeguard the competitive ethos of the economy. In this direction, India has enacted a law – The Competition Act, 2002 – the primary legislation to safeguard the market against anti-competitive business activities. According to the preamble of the Act,

“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”¹

2. Competition Law and its growth

In reaction to the profound shifts in global political and economic thought that have occurred, competition law has expanded at an astounding rate in recent years. Currently, the world has over 130 different competition law systems. A few of them have been in existence for a long time. The competition laws have been framed and implemented in different jurisdictions beginning from the United States of America wherein the legislators thought it fit to codify the competition laws and as a result of such codification process was the enactment of Sherman Act, Clayton Act and Federal Trade Commission Act.

The majority of competition laws across the globe are considerably recent than this. The twenty-first century has seen the adoption of numerous new ones, as seen in Nigeria, Ecuador, India, Singapore, Malaysia, Hong Kong, Egypt, and Swaziland.

All six continents have competition laws, as do all economic types. Rich, developed nations are by no means the only ones with competition laws; many developing nations also have them. The existence of competition laws does not depend on a nation's size. For example, countries with populations of over three billion, like China and India, also have laws in place.

3. Confluence of Economics and Law

There is a compelling case to be made for laws to guarantee the proper operation of the market insofar as a nation chooses to use the free market as its tool for economic policy. The possibility that a firm or firms with a certain level of market power could hurt competition, as well as customers and ultimately consumers, is a major worry of competition law and policy. To speak economically, market power is characterized by presence of the potential to change the level of production patterns and various other parameters.

To assess the presence of market power, economists' opinions are frequently sought after by attorneys and their corporate clients in order to arrive at sound and convincing conclusions when assessing market power. The same is true of the kinds of actions that competition law deals with, such as discriminatory pricing, predatory pricing, tying and bundling, mergers, and refusals to deal. These are not issues that lend themselves to a rule-based analysis.

Both competition economists and lawyers need to be knowledgeable about legal procedures and economic concepts. Today, it is normal—and much appreciated—for competition attorneys to take economics courses, and vice versa. The study of competition law involves conducting an economic analysis of markets within a legal framework; the specifics of each case will vary.

4. Competition Theory – An Analysis

Competition denotes the level playing field wherein different business enterprises adopt business practices which are conducive to organic and natural economic development.

¹ Competition Act, 2002, Preamble, No. 12, Acts of Parliament, 2003 (India).

Throughout the twentieth century, the conflict between capitalism and communism was a defining aspect. Many nations were the most skeptical of free markets and saw advantages in government economic planning and management. But as the year 2000 drew nearer, significant shifts occurred that resulted in extensive demonopolization, liberalization, and privatization.

These occurrences unleashed hitherto unseen levels of power in the economy, along with the quick advancement of technology and the expansion of global trade. These changes have a variety of effects on people and societies, some of which can be uncomfortable. But underlying them all is an increasing agreement that, generally speaking, markets produce better results than government planning, and that the competitive process is essential to the concept of a market.

5. Beneficial aspects of Competition – An Economic Analysis

Competition is characterized by means of a level playing field wherein business enterprises undertake their commercial activities not in derogation of other business enterprises. Commercially, in an uncompetitive business landscape, business ventures adopt certain business practices which are considered pre-judicial to the efficient functioning of other ventures. Practices such as tie-in agreements, resale price maintenance agreements, etc are considered to adversely affect various stakeholders like other competitors, consumers and economy at large. All these agreements are considered to adversely affect the economy and hence condemned by the competition laws across different jurisdictions.

Economists globally viewed such practices to be detrimental to national economic development and propounded various economical concepts to distinguish between effects in situations of competitive and uncompetitive business landscapes. Hence, to condemn such practice, in India, the Competition Act, 2002 makes it invalid of certain agreements which are proven to have detrimental effects on national economic development. Some of the provisions are worth noting –

“Anti-competitive agreements. —

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement 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 within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

(4) Any other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons] at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive dealing agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.”²

6. Consumer Welfare – Econo-Legal Analysis

Although the term "consumer welfare" is well defined in economics, it is still debatable and unclear in antitrust law. The incapacity of the jurisprudence to reach a consensus on a fundamental term is quite disheartening, as scholars and practitioners of antitrust law often boast that the legislation is a collection of economically sound principles. According to Herbert Hovenkamp,

“Once we have decided that maximizing consumer welfare is an efficiency goal and not a distributive one, however, we are left wondering exactly what kind of efficiency goal it is. All efficiency goals purport to make the whole of society better off—though they do not all purport to make every individual in that society better off. If “maximizing consumer welfare” is simply a synonym for “maximizing everybody’s welfare,” then we still do not have a definition of efficiency, but only a homily that the antitrust laws ought to promote efficiency. We are told that the

² Competition Act, 2002, § 3, No. 12, Acts of Parliament, 2003 (India).

antitrust laws should strive for efficiency, but are not told how it should be achieved.”³

6.1 Allocative Efficiency

When there is perfect competition, economic resources are distributed among various goods and services in a way that makes it impossible to improve the situation of one person without making it worse for another. This results in the largest levels of total surplus, which is the sum of producer and consumer surplus, and consumer surplus, which is the net gain to a consumer when purchasing a product. Consumers divide up goods and services based on the prices they are willing to pay, and ultimately, price is equal to the marginal cost of production. This is known as allocative efficiency.

6.2 Productive Efficiency

Perfect competition ensures that society's wealth is expended as little as possible in the production process, allowing goods and services to be produced at the lowest possible cost. Reducing production costs is one strategy used by businesses in a competitive market to try and undercut their rivals' prices. Monopolists may be expensive producers because they are not constrained by competition. It follows that competition is said to promote productive efficiency.

Long-term production costs will tend to drive producers to take on the lowest costs in order to turn a profit at all; this will lead to the inevitable equilibrium of price and average cost of production. Consequently, inefficient producers will be forced out of the market and prices will never rise above costs. In contrast, if price dropped below cost, capital would leave the market, which would lead to a decline in output and a return of price to the competitive level.

6.3 Dynamic Efficiency

Due to presence of other competitors in the market, business enterprises will be constantly striving for improving their manufacturing facilities and allied sectors like distribution channels. Thus, business enterprises will invest more in technological up gradation and this will pave way for the business enterprise to compete effectively with other businesses. Hence, competition among business enterprises leads to dynamic efficiency.

7. Supreme Court decisions on intersection of economics and competition law

The apex court, the Supreme Court of India, has time and again given notable judgements which took into account the intersection of economics and law. The economical aspect of competition laws have been taken note of by the Court in a plethora of cases. In Competition Commission of India v. Steel Authority of India, the Supreme Court made the following observations –

“As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive

³ Herbert Hovenkamp, Distributive Justice and Antitrust Laws, 51 GEO. WASH. L. REV. 1, 5–6 (1982).

efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.”⁴

The above case illustrates the objectives sought to be achieved by the competition law and economical aspect does play a pivotal role in shaping the competition policy and law of a nation.

8. Conclusion

The liberalization policies adopted by governments across the world helped to open up the economy and resulted in reduction of trade barriers and finally paved the way for the overall economic development of the nations. In situation of free economic controls, business enterprises entered the markets and contributed to the economic development of countries. Concessions of different sorts were provided to enterprises to pave way for opening up of businesses. But some business ventures, in order to gain supremacy position in the market, adopted various anti-competitive practices which were detrimental to various stakeholders like economy, competitors and ultimate consumers.

To check such practices and to ensure that the economic development is not hampered, the countries across the world adopted competition policies and laws to streamline the business activities. Competition policies and laws were tuned in to suit the economic rationale of competitive business activities and codified laws were mandated across different jurisdictions.

This research paper has examined the economic rationale of adopting competitive business practices and has analysed the various competition theories behind the adoption and codification of competition laws. In conclusion, this research paper has brought out the economic rationale behind every law and it can say that economic and laws are inseparable and these two subject arenas go hand in hand in codification of national legislations affecting the economic development of the country.

⁴ Competition Commission of India v. Steel Authority of India Ltd. (2010) 10 SCC 744.