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India's New Antitrust Regime

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I. INTRODUCTION

India passed a new Competition Act in 2002 to replace its Monopolies and Restrictive Trade Practices ("MRTP") Act of 1969. Enforcement of the new legislation was, however, delayed by more than six years. First, the Indian Supreme Court held that the qualifications and appointment procedure specified for Members of the proposed Competition Commission of India ("CCI") violated the Constitutional separation of powers between the executive and judiciary. A single Member who was appointed to the CCI in 2003 before the Supreme Court's strictures were pronounced remained in office for nearly five years. But along with his skeleton staff, he could only engage in capacity building and competition advocacy without being able to take up any cases.

An amending Act was passed in 2007 to meet the Supreme Court's objections. It provided for a Competition Appellate Tribunal ("Compat") headed by a judge to hear appeals from CCI decisions, and to exercise powers regarded as the prerogative of the judiciary (awarding compensation or imprisonment). The amending Act also made extensive changes to the sections of the law dealing with mergers and anticompetitive practices. It was not until May 2009, however, that the government appointed a new seven-member CCI and brought into force sections of the Act that empowered it to initiate investigations and to hear cases relating to anticompetitive agreements and abuse of dominance. In September 2009, the MRTP Act was finally repealed, the MRTP Commission was abolished, and its backlog of pending investigations was transferred to the CCI, with the even larger backlog of pending cases going to the Compat.

The Competition Act is not, therefore, inscribed on a blank slate. However, I shall argue that the manner in which the MRTP Act was structured, amended, interpreted, and enforced left India with very little experience or expertise relevant for enforcement of the more economically informed Competition Act. In particular, the MRTP Commission's caseload, especially in the last two decades, was dominated by matters that had little or nothing to do with competition. Many of the complaints coming before the CCI seem to be based on similar issues. For these reasons, and because some of the competition jurisprudence developed by the MRTP Commission and the Supreme Court may influence the interpretation of the Competition Act, I provide a brief review of the working of the earlier Act before turning to its successor.

II. THE MRTP ACT, 1969-2009

The MRTP Act was passed in response to growing evidence of aggregate concentration in Indian industry, manifested in the absolute size and dominance of family-owned business

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groups. Its core chapter on concentration of economic power required all firms whose assets, together with those of their "interconnected undertakings," exceeded a certain size to obtain government permission for substantial expansion, establishment of new undertakings, and mergers. The government did not have to refer applications to the MRTP Commission, and most merger cases were decided without referral. These provisions came to be seen as preventing both the growth of firms to optimal scale and also their entry into new activities, and were deleted as part of the sweeping economic reforms introduced by the government in 1991.

The Act's chapters on "monopolistic" and "restrictive" trade practices were retained. The former dealt with conduct that could be interpreted as monopolization or abuse of dominance, such as "unreasonably" limiting competition, technical development, or investment, but also with "unreasonably" maintaining or raising prices. This chapter was seldom enforced. The chapter on restrictive trade practices ("RTPs"), which drew heavily on Britain's Restrictive Trade Practices Act of 1956, listed various types of agreements that had to be registered but could be defended on certain specified public interest grounds, colloquially known (as in Britain) as "gateways." Although the listed agreements included the standard horizontal and vertical restrictions, very few cases involved competition analysis. In *Telco vs Registrar of Restrictive Trade Agreements*,[2] the Indian Supreme Court enunciated a remarkable rule of reason for vertical restraints, a few months before the landmark *Sylvania* judgment of its U.S. counterpart (*Continental T. V., Inc.*).[3] But this promising development was thwarted by an ill-advised 1984 amendment of the MRTP Act, which dictated that all the listed agreements would be deemed to be restrictive.

During the 1990s, the majority of RTP cases involved a general definition in the statute, according to which an RTP included any practice that "tends to bring about manipulation of prices or conditions of delivery … in such manner as to impose on the consumers unjustified cost or restrictions." This was invoked to condemn instances of "unfair" pricing or delayed delivery. Another chapter inserted into the Act in 1984 sought to protect consumers from "unfair" trade practices, including misrepresentation about the nature of goods or services. The same amendment also allowed the MRTP Commission to order compensation for losses incurred on account of monopolistic, restrictive, or unfair trade practices.

MRTP cases thus came to be dominated by complaints from consumers and dealers complaining about defective goods, deficient services, and "unfair" or discriminatory treatment by suppliers, with no allegation of injury to competition. Many such cases were essentially contractual disputes. The Commission's own investigative wing also initiated several complaints involving excessive pricing or underutilization of capacity, again with no evidence of injury to competition. Investigations often dragged on for years, until the Supreme Court, in a series of judgments from 1999 onwards, directed the Commission to examine the anticompetitive effects of an alleged RTP.

While the Commission was devoting its limited resources to these extraneous matters, it was unable to pursue cartels, which are usually the prime targets of an antitrust agency. Only seven cartel cases were decided between 1991 and 2007; in most of them the allegation was dismissed as it was based only on parallel price movements with no evidence of any agreement. In one 1996 case, six U.S. soda ash manufacturers who had formed an export association

[2] Telco vs Registrar of Restrictive Trade Agreements, 2 SCC 55 (1977).
[3] Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

registered under the Webb-Pomerene Act were hauled up for price-fixing. The Commission held that their *low* price threatened the survival of the Indian soda ash industry, and ordered an injunction against imports from the association. This strange decision was reversed in 2002 by the Supreme Court, which held that the MRTP Act could not be applied to firms outside India even if their conduct had an effect in India, unless the agreement involved an Indian party. Unfortunately, this removed from the purview of the MRTP Act all anticompetitive foreign conduct, including international cartels that have been increasingly targeted by antitrust authorities in several jurisdictions.

Even in domestic cases that were decided against the respondents, the MRTP Commission could at best issue "cease and desist" orders and award monetary compensation. The Act provided only for nominal fines for failure to comply with Commission orders, and although jail terms could also be awarded for non-compliance, they were never imposed as far as I am aware. The Commission was understaffed and underfunded. With its limited resources being increasingly diverted to cases involving unfair trade practices, the number of RTP inquiries declined sharply in the 1990s, and even further in the subsequent decade as the government allowed the Commission to wind down through natural attrition and the transfer of some of its staff to the new CCI in 2003. When the MRTP Commission was finally dissolved in 2009, more than 2000 cases and investigations remained pending, and were transferred to the two new bodies set up under the Competition Act.

Thus, with the legislature crippling the rule of reason that might have emerged from the Supreme Court's 1977 *Telco* decision, merger review being formally abandoned in 1991, limited resources, and a workload dominated by issues of unfair behavior and consumer complaints unrelated to competition, the MRTP Commission could not bequeath a useful legacy to the new regime that commenced in 2009.

III. THE COMPETITION ACT

This section selectively highlights some positive and negative features of the Act; it does not purport to summarize it.[4] The new Act certainly has a more modern appearance than its predecessor. It covers the usual three antitrust areas: anticompetitive agreements, abuse of dominance, and "combinations," i.e., mergers and acquisitions. Wisely, it does not deal with unfair trade practices. It defines terms that were left open-ended in the MRTP Act, and lays down several economic criteria that the new CCI should apply in deciding cases as well as detailed time-bound steps for merger review. The new Act explicitly asserts jurisdiction over foreign mergers and the conduct of firms based abroad having anticompetitive effects in India. Unlike the MRTP Act, it provides for substantial monetary penalties on firms who infringe it or fail to comply with CCI orders. It also allows for reduced penalties to induce cartel members to provide evidence of their activities, and the CCI has subsequently published well-structured guidelines for implementing this leniency program. All these are positive features.

However, the Act is riddled with loopholes and ambiguities. First, it allows the CCI to take into account the "relative advantage, by way of the contribution to the economic development" [*sic*] of a combination or an enterprise in a dominant position. Thus, competition may be sacrificed on the altar of "development," which may be variously understood. After all,

[4] The text of the Competition Act and Regulations, and the CCI's orders, organizational chart and advocacy materials, can be accessed from http://www.cci.gov.in.

the relationship between competition and development, and the meaning of development itself, are controversial even among economists who have been studying these matters for years.

Second, section 3 of the Act, which deals with anticompetitive agreements, creates unnecessary ambiguity. Instead of making them illegal *per se*, agreements involving price-fixing, output restriction, market-sharing or bid-rigging are only *presumed* to have an "appreciable adverse effect on competition" (AAEC). It is well established under Indian law that a presumption can be rebutted, and section 19(3) of the Act allows the CCI, while determining whether an agreement has an AAEC, to consider its possible benefits to consumers, improvement of production of goods and provision of services, and promotion of technical, scientific, and economic development. Contrary to international practice, cartels may thus be treated under a rule of reason, although how the CCI goes about applying these provisions remains to be seen, because none of the preliminary decisions reported so far on its website or in the media involve cartels. Clearly, a well-designed leniency program is insufficient to induce cartelists to report their activities; there must also be a high enough probability of being caught by the agency's own investigations.

Section 3 excludes efficiency-enhancing joint ventures from the presumption of an AAEC, and altogether excludes "reasonable" restrictions imposed to protect the intellectual property rights ("IPRs") recognized by six listed IPR laws. Such restrictions will thus be dealt with under a rule of reason, based on the criteria listed in section 19(3), as will vertical restrictions such as tying, exclusive supply, exclusive distribution, refusal to deal, and resale price maintenance.

However, the guidance provided by the Act for this exercise is unsatisfactory. The benefits listed in section 19(3) are similar to those in Article 101(3) of the Treaty of Functioning of the European Union, but in order to be condoned under the latter, an agreement must share the benefits with consumers, must not involve restrictions that are unnecessary to attaining the efficiency objective, and must not substantially eliminate competition. None of these conditions is required under the Indian Competition Act. Besides, unlike in the EU, the Act does not contain any provision for "block exemption" of certain types of agreements that are likely to have positive effects, involving firms commanding a small share of the market. For that matter, the Act does not exempt trade unions or cooperatives, which on a literal reading could be regarded as price-fixing agreements and thus covered by section 3. If every potentially anticompetitive agreement is to be assessed under a rule of reason, the fledgling CCI will have to undertake far more competition analysis than antitrust agencies with much greater experience and resources. Until it establishes workable principles and precedents that survive appeals to the Appellate Tribunal and the Supreme Court, India's competition regime is in for a long spell of legal uncertainty.

Third, provisions on abuse of dominance in section 4 of the Act are also potentially troublesome. In particular, they do not require evidence of an AAEC to prove abuse. This will invite allegations of unfair or discriminatory pricing or contractual breaches, of the kind that were entertained under the MRTP Act but which are not competition concerns. Most of the cases that the CCI has decided so far are of this nature, and its decisions have been, on the whole, encouraging. They are dealt with in the last section of this article. Another concern is that the Act authorizes the CCI to break up a firm to ensure that it does not abuse its dominant position, without requiring evidence that it has done so. On the other hand, the Act explicitly allows "meeting the competition" to be pleaded as a defense against an allegation of predatory

pricing. So far, there have been no decisions that would allow one to see how the CCI intends to interpret these provisions.

Fourth, the Act's revival of merger review, which was deleted from the MRTP Act in 1991, has been extremely controversial. The Act specifies that combinations exceeding certain specified thresholds in terms of the joint assets or turnover of the merging parties are subject to notification and review. The original Act provided for voluntary notification of combinations above these thresholds but, on the recommendations of a Parliamentary committee, the amending Act of 2007 made notification mandatory. Indian and foreign business interests have strenuously opposed this requirement as well as the 210-day period given to the CCI for completing the review. Consequently, the merger provisions have not yet been brought into force. Recent media reports suggest that a further amendment of the Act is being contemplated, which will shorten the review period and also require that each merging party should *individually* satisfy asset or turnover thresholds to trigger the notification requirement. This will certainly save on compliance costs and delays for firms, as well as CCI resources, for many combinations that are unlikely to create competition concerns. But it will also allow big firms to take over small "maverick" competitors without being challenged, because the Act does not allow for review of mergers below the notification threshold, even if they threaten competition.

Finally, several procedural aspects of the Act give reason for disquiet. As mentioned above, in order to address the Supreme Court's concerns about the Constitutional separation of powers, the amending Act of 2007 created an Appellate Tribunal ("Compat") to hear appeals and to award compensation based on the CCI's findings. (In the original Act, the CCI itself could award compensation, and appeals went directly to the Supreme Court.) The CCI has also been deprived of the authority to order imprisonment for non-compliance with its orders; this can only be done by a designated magistrate's court or the Compat. The CCI can impose monetary penalties, but these may need to be executed through the tax authorities. And instead of the original Act's provision for multiple benches operating in parallel, including regional benches and a specialized merger bench, the 2007 amendment required the seven-member CCI to take decisions as a collegium. There is also likely to be conflict with infrastructural and financial sector regulators, some of whom have competition-related mandates. All this will make for a cumbersome and protracted enforcement process. Moreover, the Act empowers the government to issue binding policy directives to the CCI, and to supersede or reconstitute it, thus compromising its autonomy.

IV. RECENT CCI DECISIONS

A quick review of whatever CCI decisions are in the public domain offers some indication of the way things are going. As I noted above, merger review is yet to be authorized, and there have been no reported cartel cases. Of the 25 "orders" listed on the CCI website as of mid-November 2010, fourteen terminated inquiries inherited from the MRTP Commission. The remaining eleven matters filed under the Competition Act were closed at the threshold without proceeding to the next stage of ordering an investigation. Seven of these involved issues with no competition dimension, of the kind that had frequently been raised under the MRTP Act, such as contractual disputes, or allegations of overcharging or deficiency of service. In three other matters, the CCI agreed with the government's rationale for certain policy decisions that appeared to have favored particular firms. Only in one case, in which second-hand car dealers complained about manufacturers offering loyalty discounts to customers who traded in their old

models while buying new ones, did the CCI undertake competition analysis, which it did very cogently.

However, it appears that only final orders are posted on the website, for according to media reports the CCI has in fact ordered investigations after being satisfied that *prima facie* cases exist in several other matters. These pose interesting competition issues: tying of electricity meters by power distribution companies, predatory pricing by a stock exchange, an exclusive supply agreement between the country's dominant steel producer and the railways (both state-owned), and a strategic alliance between two airlines covering fuel management, ground handling, and ticket sales. It remains to be seen what kind of competition analysis is applied in the regular hearings that will follow, and in the final determination.

As I showed above, nearly four decades of experience with the MRTP Act generated very little by way of skills that could be of use for the Competition Act. To make matters worse, well before enforcement of the new law began in 2009, the single Member and almost all the staff who were appointed to the CCI in 2003-04 and underwent capacity building were either transferred to other government departments or left to join law firms. The task of establishing sensible precedents out of the often ambiguous clauses of the Act has thus fallen on the new Members and their recently appointed staff, most of whom have been seconded from other government departments. Most staff positions remain unfilled; this personnel deficit and the backlog inherited from the MRTP Commission probably explain the CCI's inability to decide more cases in the first eighteen months of its existence.