# COMPETITION ACT AND RECENT DEVELOPMENTS AND CASE STUDIES

YUSUF IQBAL YUSUF, ADVOCATE
SUPREME COURT OF INDIA

# INTRODUCTION

- India has, in the pursuit of globalization, responded to opening up its economy, removing controls and resorting to liberalization. As a natural consequence of this the Indian market has to be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the focus from curbing monopolies to promoting competition. A High Level Committee on Competition Policy and Law was constituted by the Central Government which submitted its report on 22nd May, 2002. The Central Government consulted all concerned including the trade and industry associations and the general public. After considering the suggestions of the trade and industry and the general public decided to enact a law on Competition. Accordingly the Competition Bill was introduced in the Parliament.

# STATEMENT OF OBJECTS AND REASONS

- In the pursuit of globalization, India has responded to opening up 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 Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to promoting competition.

- The Central Government constituted a High Level Committee on Competition Policy and Law. The Committee submitted its report on the 22nd May, 2002 to the Central Government. The Central Government consulted all concerned including the trade and industry associations and the general public. The Central Government after considering the suggestions of the trade and industry and the general public decided to enact a law on Competition.

- The Competition Act, 2002 seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India and, for this purpose, provides for the establishment of a quasi-judicial body to be called the Competition Commission of India (hereinafter referred to as CCI) which shall also undertake competition advocacy for creating awareness and imparting training on competition issues.

- The Act also aims at curbing negative aspects of competition through the medium of CCI. CCI will have a Principal Bench and Additional Benches and will also have one or more Merger Benches. It will look into violations of the Act, a task which could be undertaken by the Commission based on its own knowledge or information or complaints received and references made by the Central Government, the State Governments or statutory authorities. The Commission can pass orders for granting interim relief or any other appropriate relief and compensation or an order imposing penalties, etc. An appeal from the orders of the Commission shall lie to the Supreme Court. The Central Government will also have powers to issue directions to the Commission on policy matters after considering its suggestions as well as the power to supersede the Commission if such a situation is warranted.

- The Act also provides for investigation by the Director-General for the Commission. The Director-General would be able to act only if so directed by the Commission but will not have any *suo moto* powers for initiating investigations.

# PENALTIES

- The Act confers power upon the CCI to levy penalty for contravention of its orders, failure to comply with its directions, making of false statements or omission to furnish material information, etc. The CCI can levy upon an enterprise a penalty of not more than ten percent of its average turnover for the last three financial years. It can also order division of dominant enterprises. It will also have power to order demerger in the case of mergers and amalgamations that adversely affect competition.

# REPEAL OF MRTP ACT

- The Act repealed the Monopolies and Restrictive Trade Practices Act, 1969 and the dissolution of the Monopolies and Restrictive Trade Practices Commission. The Act provides that the cases pending before the Monopolies and Restrictive Trade Practices Commission will be transferred to the CCI except those relating to unfair trade practices which are proposed to be transferred to the relevant for a established under the Consumer Protection Act, 1986.

# OBJECT OF THE COMPETITION 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 competitions in markets, to protect the interest of the consumers and to ensure freedom of trade carried on by other participants in markets, an India, and for matters connected therewith or incidental thereto.

# Competition law, or antitrust law, has three main elements:

- prohibiting agreements or practices that restrict free trading and Competition between business. This includes in particular the repression of free trade caused by cartels.
- banning abusive behavior by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing, tying, price gouging, refusal to deal, and many others.
- supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to "remedies" such as an obligation to divest part of the merged business or to offer licenses or access to facilities to enable other businesses to continue competing.

# *United States antitrust law*

- The American term antitrust arose not because the US statutes had anything to do with ordinary trust law, but because the large American corporations used trusts to conceal the nature of their business arrangements. Big trusts became synonymous with big monopolies. The perceived threat to democracy and the free market these trusts represented led to the Sherman and Clayton Acts. These laws, in part, codified past American and English common law of restraints of trade. Senator Hoar, an author of the Sherman Act said in a debate, "We have affirmed the old doctrine of the common law in regard to all inter-state and international commercial transactions and have clothed the United States courts with authority to enforce that doctrine by injunction."
- Modern competition law is modeled on the United States' Sherman Act, which aimed to "bust the trusts".

# *Competition law theory*

- Under the doctrine of laissez-faire, antitrust is seen as unnecessary as competition is viewed as a long-term dynamic process where firms compete against each other for market dominance. In some markets a firm may successfully dominate, but it is because of superior skill or innovativeness. However, according to laissez-faire theorists, when it tries to raise prices to take advantage of its monopoly position it creates profitable opportunities for others to compete. A process of creative destruction begins which erodes the monopoly. Therefore, government should not try to break up monopoly but should allow the market to work

- When firms hold large market shares, consumers risk paying higher prices and getting lower quality products than compared to competitive markets. However, the existence of a very high market share does not always mean consumers are paying excessive prices since the threat of new entrants to the market can restrain a high-market-share firm's price increases. Competition law does not make merely having a monopoly illegal, but rather abusing the power that a monopoly may confer, for instance through exclusionary practices.

- First it is necessary to determine whether a firm is dominant, or whether it behaves "to an appreciable extent independently of its competitors, customers and ultimately of its consumer." Under EU law, very large market shares raise a presumption that a firm is dominant, which may be rebuttable. If a firm has a dominant position, then there is "a special responsibility not to allow its conduct to impair competition on the common market". Similarly as with collusive conduct, market shares are determined with reference to the particular market in which the firm and product in question is sold. Then although the lists are seldom closed, certain categories of abusive conduct are usually prohibited under the country's legislation. For instance, limiting production at a shipping port by refusing to raise expenditure and update technology could be abusive.

- Tying one product into the sale of another can be considered abuse too, being restrictive of consumer choice and depriving competitors of outlets. This was the alleged case in *Microsoft v. Commission* leading to an eventual fine of €497 million for including its Windows Media Player with the Microsoft Windows platform. A refusal to supply a facility which is essential for all businesses attempting to compete to use can constitute an abuse. One example was in a case involving a medical company named *Commercial Solvents*. When it set up its own rival in the tuberculosis drugs market, Commercial Solvents were forced to continue supplying a company named Zoja with the raw materials for the drug. Zoja was the only market competitor, so without the court forcing supply, all competition would have been eliminated.

- Forms of abuse relating directly to pricing include price exploitation. It is difficult to prove at what point a dominant firm's prices become "exploitative" and this category of abuse is rarely found. In one case however, a French funeral service was found to have demanded exploitative prices, and this was justified on the basis that prices of funeral services outside the region could be compared. A more tricky issue is predatory pricing. This is the practice of dropping prices of a product so much that in order one's smaller competitors cannot cover their costs and fall out of business.

- in *France Telecom SA v. Commission* a broadband internet company was forced to pay €10.35 million for dropping its prices below its own production costs. It had "no interest in applying such prices except that of eliminating competitors" and was being cross-subsidized in order to capture the lion's share of a booming market.

- One last category of pricing abuse is price discrimination. An example of this could be offering rebates to industrial customers who export your company's sugar, but not to customers who are selling their goods in the same market as you are in.

# *Mergers and acquisitions*

- A merger or acquisition involves, from a competition law perspective, the concentration of economic power in the hands of fewer than before. This usually means that one firm buys out the shares of another. The reasons for oversight of economic concentrations by the state are the same as the reasons to restrict firms who abuse a position of dominance, only that regulation of mergers and acquisitions attempts to deal with the problem before it arises, *ex ante* prevention of market dominance.
- The theory behind mergers is that transaction costs can be reduced compared to operating on an open market through bilateral contracts. Concentrations can increase economies of scale and scope. However often firms take advantage of their increase in market power, their increased market share and decreased number of competitors, which can adversely affect the deal that consumers get.

# CASE STUDIES

1. DLF CASE
2. NSE-MCX CASE
3. JETAIRWAYS-KINGFISHER CASE
4. CHARGING OF DIFFERENTIAL INTEREST BY BANKS

# DLF CASE

- Belair Residents Association versus DLF Limited

- The informant in this case had alleged unfair conditions meted out by a real estate player. It has been alleged that by abusing its dominant position, DLF Limited (OP-1) has imposed arbitrary, unfair and unreasonable conditions on the apartment - allottees of the Housing Complex ‘the Belaire’, being constructed by it.

- The commission examined the various aspects of the matter especially the conduct of DLF Ltd. in the case in context of the information filed. Briefly, these are recapitulated below:
- i. Commencement of project without sanction/approval of the projects
- 
- ii. Increase in number of floors mid-way
- 
- iii. Increasing of Floor Area Ratio (FAR) and Density Per Acre (DPA)
- 
- iv. Inordinate delay in completion and possession
- 
- v. Forfeiture of amounts
- 
- vi. Clauses of agreement are heavily biased in favour of DLF Ltd. and against the consumers

- The Commission held the view that there are several clauses that show how heavily loaded the buyers' agreement is in favour of DLF Ltd. and against the buyer. Under normal market scenario, a seller would be wary of including such one-sided and biased clauses in its agreements with consumers. The impunity with which these clauses have been imposed, the brutal disregard to consumer right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair. The course the progress of the project has taken again indicate that DLF Ltd. beguiled and entrapped buyers through false solicitations and promises.

# Decision under section 27 of the Competition Act, 2002

- Keeping, in view the totality of the facts and circumstances of the case, the Commission considered it appropriate to impose penalty at the rate of 7% of the average of the turnover for the last three preceding financial years on OP-1. Therefore, in exercise of powers under section 27 (b) of the Act, the Commission imposed penalty on DLF Ltd. as computed below:
- **Turnover for year ended 31.03.2009 Rs 10,035.39 crores**
- **Turnover for year ended 31.03.2010 Rs 7,422.87 crores**
- **Turnover for year ended 31.03.2011 Rs 9,560.57 crores**
- **Total Rs 27,018.83 crores**
- **Average (Total ÷ 3) Rs 9006.27 crores**
- **7 % of average Rs 630.43 crores**
- **Penalty rounded off to nearest number Rs 630 crores**
- **(or Rs 6.3 billion)**

- In this manner, the CCI imposed a penalty of Rs. 630 Crores on DLF Limited. The said Order is under challenge and appeal has been filed with the Competition Appellate Tribunal.

# The NSE-MCX Stock Exchange matter

- The present information was filed under section 19(1)(a) of the Competition Act, 2002 by MCX Stock Exchange Ltd. (MCX-SX) on 16 November 2009 against the National Stock Exchange India Ltd. (NSE), DotEx International Ltd. (DotEx) and Omnesys Technologies Pvt. Ltd. (Omnesys).
- The information related to anticompetitive behaviour and abuse of dominant position by NSE aimed at (i) eliminating competition from the CD segment (ii) discouraging potential entrants from entering the relevant market for stock exchange services and (iii) achieving foreclosure of all competition in the market for stock exchange services.

# Reliefs sought

(a) To investigate infringement of section 4 of the Act by NSE;

(b) To direct the NSE to discontinue transaction fee, data-feed fee and the admission fee waivers in respect of the CD segment and to impose transaction fees, data-feed fee and admission fee in the said segment equal to that in the other segments of NSE;

(c) To order NSE to require its members to maintain deposits for the CD segment at a level that is consistent with the levels of other segments;

(d) To grant an injunction restraining the NSE from continuing the transaction fee, data-feed and admission fee in respect of the CD segment in line with those in other segments; and (iii) mandate NSE to collect deposits from members at a level on par with those in its other segments, pending final disposal of the complaint;

(e) To order NSE to pay all of the complainant' costs and impose the highest level of penalties on the NSE in accordance with the Act, so as to have deterrent effect and ensure free and fair competition in the relevant market

# Commission held the view that

- the intention of NSE was to acquire a dominant position in the C.D. segment by cross subsidizing this segment of business from the other segments where it enjoyed virtual monopoly.
- It also camouflaged its intentions by not maintaining separate accounts for the C.D. segments.
- NSE created a façade of the nascency of market for not charging any fees on account of transactions in the C.D. segment.
- The competitors with small pockets would be thrown out of the market as they follow the zero transaction cost method adopted by the NSE and therefore in the long run they will incur huge losses.
- The past conduct of NSE and the conduct in the C.D segment shows a longing for dominance in any segments in which the NSE operated by dominating its competitors.

# PENALTY LEVIED

- Considering the fact that there was a clear intention on the part of NSE to eliminate competitors in the relevant market and also considering the fact that Competition Act is a new Act, The Commission held that it would suffice if penalty at the rate of 5% of the average turnover is levied.
- Therefore, in exercise of powers, under section 27(b) NSE was directed to pay penalty of Rs. 55.5 crores within 30 days of the date of receipt of the order which is 5% of the average of its 3 years' annual turnover as indicated below:
- Average turnover of three years Rs.1109.66 crores is rounded to Rs. 1110 crore.
- Penalty levied @5% of the average turnover of Rs. 1110 crores is Rs. 55.50 crores

# JETAIRWAYS-KINGFISHER CASE

- In this case, the two airlines had announced a strategic alliance and the issue had been placed before the Competition Commission inter alia alleging violation of Sections 3 & 4 of the Competition Act. The Commission was pleased to direct the Director-General to conduct an investigation and report was received by it.

- However, after a careful appraisal of the matter, the Commission was of the view that the ultimate beneficiary was the consumer and that the alliance was pro-consumer. The Commission also noted the Kingfisher airlines had suffered losses during the term of the alliance and that the market share of none of the airlines had increased on account of the said alliance. Therefore, the Commission felt that there was no violation of the Competition Act, 2002.

# CHARGING OF DIFFERENTIAL INTEREST BY PRIVATE BANKS VIS A VIS NATIONALISED BANKS

- In this case also, the Commission examined the issue of charging of differential interest between private banks and nationalised banks and was pleased to hold that the same did not harm consumers in any manner as it was a matter of choice. Therefore, the Commission did not intervene in the matter at all

# CONCLUSION/ INFERENCES :-

- A study of the provisions of the Competition Act, 2002 and the Judgements which have been dealt with hereinabove would lead us to infer that the prime focus of the Competition Commission as on date is the welfare and benefit to consumers. It is seen that the Commission has taken effective steps in order to curb instances of anti-competition and pro-monopolistic in cases where the Consumer has suffered. However, the Commission has refrained from interfering in cases where the consumer is the ultimate benefit.