

REGULATORY FRAMEWORK OF MERGER & ACQUISITIONS LAW IN INDIA : TRANSFORMATION OF MRTP ACT INTO COMPETITION ACT

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ABSTRACT

This paper, addresses the logic behind the transformation. In the context of the new economic policy paradigm, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into the new law, Competition Act, 2002. The new law is designed to repeal the extant MRTP Act. As of now, only a few provisions of the new law have been brought into force and the process of constituting the regulatory authority, namely, the Competition Commission of India under the new Act, is on. The remaining provisions of the new law will be brought into force in a phased manner. For the present, the outgoing law, MRTP Act, 1969 and the new law, Competition Act, 2002 are concurrently in force, though as mentioned above, only some provisions of the new law have been brought into force.

INTRODUCTION

With a sustained growth for over a decade, Indian Corporations are now showing willingness to peer with global giants through international acquisitions and mergers. Tata, an Indian conglomerate, is a recent example to acquire Britain's Corus by way of a leveraged buy-out and also Jaguar and Land Rover in a significant cross border transaction. Both the transactions involved the acquisition of assets in a foreign jurisdiction; however they were governed by Indian domestic law.

Whether a merger or an acquisition is that of an Indian entity or an Indian entity acquiring a foreign entity, such transactions would be governed by Indian domestic law. In this paper we would try to discuss different aspects and implications of this kind of laws focusing on the enactment and transformation of Monopolies and Restrictive Trade Practices Act, 1969.

Since independence Indian governance has adopted and followed policies comprising "command-and-control" laws, rules, regulations and executive orders. One such example is the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act hereafter). But with the widespread economic reforms under the umbrella of liberalisation in 1991 many countries including India opted for effective competition establishments and economy based on "command-and-Control" has been superseded by the economies based on free market principles.

In the context of the new economic regime, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into Competition Act, 2002 which was designed to repeal the extant MRTP Act. As of now, only a few provisions of the new law have been brought into force and the process of constituting the regulatory authority, namely, the Competition Commission of India under the Competition Act, is on.

The remaining provisions of the new law will be brought into force in a phased manner. For the present, the outgoing law, MRTP Act, 1969 and the new law, Competition Act, 2002 are concurrently in force.

MRTP ACT, 1969

MRTP Act, 1969 enacted during the era of "Permit and License Raj" was the law on competition matters. Pegging on the Directive Principles, 'Public Interests' and 'Consumer Welfare' were preferred as core principles of competitive law relegating monopoly and domination as bad exercise. The implementing body of this law, "The MRTP Commission", had powers to issue orders directing a respondent to 'cease and desist' from the alleged monopolistic, restrictive and unfair trade practices but did not have the power to levy penalty for breach of law. The principal objectives sought to be achieved through the MRTP Act are:

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- prevention of concentration of economic power to the common detriment;
- control of monopolies;
- prohibition of Monopolistic Trade Practices (MTP);
- prohibition of Restrictive Trade Practices (RTP);
- prohibition of Unfair Trade Practices (UTP).

The Act underwent several amendments during this period with amendments of 1984 and 1991 as most conspicuous. In 1984, unfair trade practices enquiries were added and in 1991 the chapter dealing with mergers and amalgamation was deleted.

However, the increasing complexities of liberalised business environment took the concept of competition to much elevated levels. Technological advancement and cutthroat competition liquefied the physical boundaries of countries to add new dimensions into competition issues.

India too went through cutting edge developments in market competition realizing the resultant inadequacy of extant competition law i.e., MRTP Act, 1969. Slowly MRTP Act had become obsolete in certain respect and government shifted its focus towards promoting competition. Accordingly a new law on competition was promulgated in the name of Competition Act, 2002.

TRIGGERS AND EFFECTS

Competition Law was triggered by Articles 38 and 39 as a part of Directive Principles of State Policy of the Constitution of India. Articles 38 and 39 of the Constitution of India 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 the institutions of the 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.

There were essentially three enquiries/studies, which acted as the lodestar for the enactment of the MRTP Act.

- A Committee chaired by Mr Hazari which studied the industrial licensing procedure under the Industries (Development and Regulation) Act, 1951. The report of this Committee concluded that the working of the licensing system had resulted in disproportionate growth of some of the big business houses in India (Hazari, 1965).
- A Committee chaired by Professor Mahalanobis was set up in October 1960 to study the distributions and levels of income in the country. The Committee presented the report in February 1964 noting that the top 10 percent of the population of India cornered as much as 40 percent of the income (Mahalanobis, 1964). The Committee noted that big business houses were emerging because of the 'planned economy' model was exercised by the Government and suggested the need to collect comprehensive information relating to the various aspects of concentration of economic power.
- The Monopolies Inquiry Commission (MIC) under the Chairmanship of Mr Das Gupta was appointed by the Government in April, 1964. It was enjoined to enquire into the extent and effects of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity (other than agriculture). The Monopolies Enquiry Commission presented its report in October 1965, noting therein that there was concentration of economic power in the form of product-wise and industry-wise concentration. The Commission also mentioned that a few industrial houses were controlling a large number of companies prevailing large-scale restrictive and monopolistic trade practices.

As a corollary to its findings, the MIC drafted a Bill to provide for the operation of the economic system so as not to result in the concentration of economic power to the common detriment. The Bill provided for the control of monopolies and prohibition of monopolistic and restrictive trade practices, when prejudicial to public interest.

AMENDMENTS IN 1991

The MRTP Act, 1969 was amended as a part of the economic reforms set in motion by the Government in 1991. The amendment resets the objectives enshrined in the original statute of 1969. And Out of the five aforesaid objectives first two had been de-emphasised. The emphasis has not only shifted to the last three objectives but they have been re-emphasised. In the context of the objective (ii) to the extent monopolies tend to bring about Monopolistic Trade Practices, the MRTP Act continues to exercise surveillance which existed prior to the 1991 amendments. This is because a Monopolistic Trade Practice is understood to be synonymous with anti-competitive practice. Anything, which distorts competition, can lead to a monopoly situation that is likely to prevent or distort competition, is regulated by the statute. Tersely, the MRTP Act is designed against different aspects of market imperfections. For instance before the 1991 amendments, a merger which increased the dominance of the combine or resulted in a large share in the market could be looked at in terms of the provisions thereof and the objectives governing them.

Monopoly is a concept of power which manifests itself to:-

- control production, supply, etc.
- control prices
- prevent, reduce or eliminate competition
- limit technical development
- retard capital investment
- impair the quality of goods.

THE COMPETITION ACT, 2002

The Ministry of Corporate Affairs, Government of India had issued a notification dated 28th August 2009, whereby the most controversial MRTP Act, 1969 stands repealed and is replaced by the Competition Act, 2002, with effect from September 1, 2009.

The MRTP Act was *anaide-mémoire* of the “license-quota- permit-raj” of pre-liberalised India. The Act had become redundant post 1991 after new economic policy was announced and Chapter III of the MRTP Act dealing with restrictions on M&A activities was made inoperative. The MRTP Commission would continue to handle all the disputes filed prior to September 1,

2009 for a period of 2 years. It would, however, not entertain any new case after the day.

The provisions relating to M&A transactions (Sections 5 & 6 of the Competition Act) are yet to be notified as provisions to be effective are ambiguous. It is also not flawless if the new provisions will be applicable in cases where definitive agreements have been signed before the notification but closing of the transaction has not happened. Likewise transitional provisions below:-

Dated: September 1, 2009

SUBJECT TRANSITIONAL PROVISIONS – THE MRTPACT, 1969 TO THE COMPETITION ACT, 2002 W.E.F. SEPTEMBER 1, 2009

The following transitional provisions would apply as provided in Section 66 of the Competition Act, 2002:-

1. MRTP Commission

- (a) The MRTP Commission will continue to exercise jurisdiction and power under the repealed MRTP Act in respect of any case or proceeding filed before 1 September 2009, for a period of two years. It will not, however entertain any new case arising under the MRTP Act on or after 1 September 2009.
- (b) Upon the expiry of the specified two year period, the MRTP Commission shall stand dissolved.

2. Transfer of pending cases

Upon the expiry of two years from 1 September 2009, cases pending before the MRTP Commission will be transferred as follows:-

- (a) **Monopolistic or restrictive trade practice cases:** All pending cases pertaining to monopolistic or restrictive trade practices, including cases having an element of unfair trade practice, shall stand transferred to the Competition Appellate Tribunal, which shall adjudicate such cases in accordance with the provisions of the repealed MRTP Act.
- (b) **Unfair trade practice cases:** All pending cases relating solely to unfair trade practices shall stand transferred to the National Commission as constituted under the Consumer Protection Act, 1986, which may in turn transfer such cases to a

State Commission constituted under the said Act under circumstances it deems appropriate. These cases will be dealt with by them in accordance with the provisions of the Consumer Protection Act.

- (c) **Cases relating to giving false or misleading facts disparaging the goods, services or trade of another person under the MRTP Act :** All such pending cases shall be transferred to the Competition Appellate Tribunal which will be dealt in accordance with the provisions of repealed MRTP Act.

3. Investigations/proceedings undertaken by the Director General under the MRTP Act

With effect from 1 September 2009, all pending investigations and proceedings by the Director General relating to:-

- (a) Monopolistic/ restrictive trade practices will be transferred to the Competition Commission

of India (CCI), who may conduct such investigations/ proceedings in any manner it deems appropriate.

- (b) Unfair trade practices will be transferred to the National Commission under the Consumer Protection) Act 1986.
- (c) Cases giving false or misleading facts disparaging the goods, services or trade of another person will be transferred to the CCI.

CONCLUSION

After the Act was available on the web-site and came into the public domain, a question more often than not asked is whether it is not still the old law in substance although not in form. A precise answer to this question is the title of this paper itself. The Competition Act is a new wine in a new bottle. The differences between the MRTP Act, 1969 and the Competition Act, 2002 are elucidated in the table below:

MRTP Act, 1969		Competition Act, 2002
1	Based on the pre-reforms scenario	Based on the post-reforms scenario
2	Based on size as a factor	Based on structure as a factor
3	Competition offences implicit and undefined	Competition offences explicit and defined
4	Complex in arrangement and language	Easily comprehensible
5	14 per se offences negating the principles of natural justice	4 per se offences and all the rest subjected to rule of reason.
6	Frowns upon dominance	Frowns upon abuse of dominance
7	Registration of agreements compulsory	No requirement of registration of agreements
8	No combinations regulation	Combinations regulated beyond a high threshold limit.
9	Competition Commission appointed by the Government	Competition Commission selected by a Collegium
10	Very little administrative and financial autonomy for the Competition Commission	Relatively more autonomy for the Competition Commission
11	No competition advocacy role for the Competition Commission	Competition Commission has competition advocacy role
12	No penalties for offences	Penalties for offences
13	Reactive and rigid	Proactive and flexible
14	Unfair trade practices covered	Unfair trade practices omitted

The Act is therefore old wine in a new bottle. Wine gets better as it ages. The extant MRTP Act 1969 has aged for more than three decades giving birth to the new law (the Competition Act) in line with the changing economic state in India and the world and concurrently with the current economic discourses comprising liberalisation, privatisation and globalisation.

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