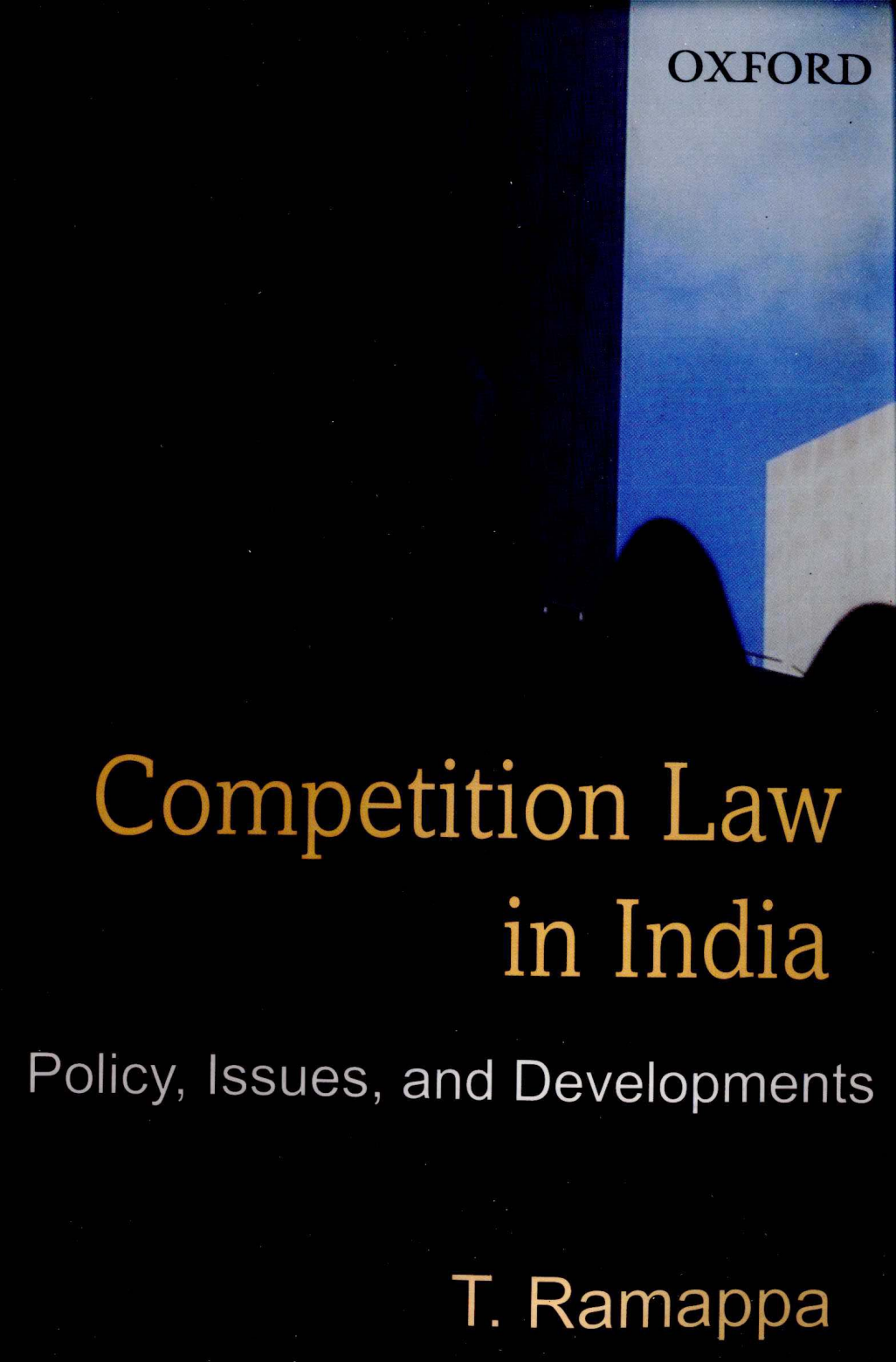
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Competition Law in India
Policy, Issues, and Developments
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Preface

The need for evolving and stating the competition policy of India can hardly be overemphasized. In fact, it has long been overdue. What has pushed it to the forefront by the government now is the entry of multinational industries which have significant positions in international markets and which should be expected to use this to their advantage. Indian industry, used to protection, has belatedly recognized the gross inequality between them, and the multinationals, in terms of size and experience, and now expects the government to lay out what is customary called a 'level playing field', to borrow a cliché from the language relating to sports, a field not compatible with the spirit in which commerce should usually be expected to be carried on.

What seems to have been overlooked in all this discussion on what the government should do is the position of the consumer of the goods and services for whose benefit all this toil is exercised. There ought to be a greater emphasis on subserving the interests of the consumer, through a supply of the necessary range of goods and services, meaning eschewing miniscule product differentiation of no commercial significance, at reasonable prices.

After allowing suppliers of goods and services the freedom to choose their form and mode of activity, consistent with domestic law, a mechanism should be provided to ensure that in providing such supply they do not do anything in the way of upsetting the balance among the needs of the consumers, the suppliers of goods and services themselves and the economic and social concerns of the society in which the industries operate. In simple terms, this means that the task of the government will only be to ensure that there are no attempts, direct or indirect, to tinker with the market.

The experience of industrially advanced countries, the US, for example, shows that direct intervention of the government in the running of industries

through controls is inappropriate as a means to speed up industrial progress. The government's role is best limited to laying the basic rules for operating in the country, and providing the means for preserving the freedom of both sellers and buyers, so that there is the minimum of 'a working competition'.

That takes us to the question of appropriate machinery for enforcing such a competition policy. This again is determined by the structure of the country's market and is to be one suited to deal with its special problems.

One certain criterion for evaluating the usefulness of any mechanism is its effectiveness in achieving the purposes for which it has been set up. For a number of reasons, the Monopolies and Restrictive Trade Practices Act, by all accounts did not achieve, in a coherent and cogent manner, the regulation of anti-competitive conduct, even though that Act contained some provisions to do it in a noticeable manner. It is clear that a specific law for preserving competition is necessary in the wake of the influx of large multinational companies, on the opening up of the economy of the country and, the enlargement of the range of goods and services offered to the consumer.

Obviously, in meeting such a challenge, each country will have to evolve its own model, though consideration of the experience of other countries, which have their own unique social and economic setting, will be a useful guide.

The Competition Act, 2002 received the assent of the President of India on 13 January 2003, and many of the provisions have, over a period of time, been brought into force. The key sections 3 to 6 regulating anti-competitive conduct can only be made operational on the constitution of the Competition Commission of India and filling up of the positions, which will follow after amendments are made to the Act to make the Competition Commission an expert body. The other proposed amendments relate to the creation of an appellate body to hear appeals from the decisions of the Commission and to provide that the Commission's orders be executed by courts lower than the High Courts and not the High Courts as at present.

The law is stated as on 1 December 2005.

Needless to add, no advice of any kind, legal or otherwise is deemed to be given to the readers by the author, or for that matter, the publishers, on any of the issues covered by this book.

Chennai
December 2005

T. RAMAPPA

Acknowledgements

I would like to express my grateful thanks to all the institutions, organizations and governmental and other bodies abroad who have given me access through their web pages to much of the information relevant to the subject covered by this book. Reference to the source of information thus obtained has been made in all cases in the text of the book.

I sincerely thank the Government of the UK, which has permitted the use of the material made available on their web site, subject to the condition that Crown copyright in the material is acknowledged and the source of the material indicated. I acknowledge Crown copyright in all the material of the Government of the UK thus obtained and used in this book, the major ones being the Competition Act 1998, the Enterprise Act 2002, and many of the publications of the Office of Fair Trading (OFT), from which, extracts, to a reasonable extent, have been used as necessary. The names of all these publications and that they are OFT publications are stated in the text at the appropriate places.

I am also deeply grateful to the European Union (EU) for permitting use of material collected from their web sites, the requirement being that the source is indicated. Most of the material used by me in this book was collected through their main site *http://europa.int/lex-eur*. The titles, dates, etc., of the Directives and Recommendations and, the references to decisions of the European Commission and the European Court have been given in the text at places where the references to them are made.

In a subject such as what the book attempts to cover, without the information provided by key agencies like the Federal Trade Commission (FTC), the Department of Justice, the Department of Commerce, and other departments of the Government of the US, the text would lack balance. I thank them for giving access to their major reports and other public

documents on antitrust. The use of such material taken from published reports of public bodies has been appropriate to the purpose. At all places of references to them in the book, the source of the material is indicated. The Sherman Act, Clayton Act, and other related statutes have been taken from the web site of the Department of Justice. Most of the decisions of the US Supreme Court were obtained from the *findlaw* and some from the Legal Information Institute of Cornell University. I thank them for making the information available.

I also thank the WTO for giving access to many of their public documents needed for reference in writing this book.

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An Introduction and Overview

The Competition Act, 2002, 'the Act' received the assent of the President on 13 January 2003, subsequent to which various sections have been brought into force from time to time. The object of the Act, set out in the Preamble, is to provide for the establishment of a Competition 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 incidental matters. The basic objective is to provide a law relating to competition among enterprises that will ensure that the process of competition is left free without stronger trading enterprises manipulating the market to their advantage and following from that, to the disadvantage of consumers. The key provisions include section 3, which deals with anti-competitive agreements, section 4, which discusses abuse of a dominant position, and section 5, which deals with combinations. Section 6 deals with the regulation of combinations. A combination may be an acquisition or a merger. The Commission will deal with complaints under these sections and the Act provides for the procedure for dealing with the complaints and the reliefs that may be granted in each case.

ANTITRUST ISSUES

What are the basic antitrust issues that any legislation should provide against? Whatever the system, the question, in essence, is one of dealing with conduct that impairs the process of competition. In a theoretical market, suppliers have the freedom to compete amongst themselves and the consumers have knowledge of the suppliers, the relative prices and quality, and decide to buy or not depending on their preferences and purchasing power. Market

forces are stated to determine the price of a product or a service. However, the actual market is entirely different from this description.

Consumers everywhere, and this includes purchasers even in the most developed countries, have poor information of the necessary particulars of any product, including the current market price, the price range or the quality of the suppliers, and comparable products or services. Suppliers, who over a period of time, have acquired, on account of various factors, the power to manipulate the market, do everything in their power to prevent the development of a market that is free from interference. One reason for this is their intention of retaining a fixed percentage of profits, and this is possible only by either restraining or eliminating competition. Eliminating competition altogether is their objective. The means to achieve that objective are myriad and that is the reason why any legislative definition of an anti-competitive practice or conduct is general, inclusive and also states that the practices prescribed as anti-competitive are not exhaustive.

Section 1 of the Sherman Act, the principal antitrust statute of the US, and perhaps, the earliest in the world, enacted in 1890, proscribes agreements in restraint of trade in the most general terms. The opening sentence of the section states that: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' The US Supreme Court in *Standard Oil Co. of New Jersey* v. *US*[1] declared: 'That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.' The Court also added that the standard for determining whether there was a violation of the statute was the rule of reason. The concepts behind the 'rule of reason' and the 'per se' violation will be discussed later in this chapter.

Once again, the US Supreme Court explained in *Business Electronics Corp.* v. *Sharp Electronics Corp*[2] the scope of the term 'restraint of trade' in section 1 of the Sherman Act thus: 'The term "restraint of trade" in the Sherman Act, like the term at common law before the statute was adopted, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances.'

Article 81 of the Treaty of Rome is the law of the European Union relating to anti-competitive agreements. It is also very broad in the definition of the prohibition, though it refers to certain specific practices also as falling under the prohibition. Article 81(1) is set out as follows:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

COVERAGE OF THE ACT: THE NEW REGULATORY SYSTEM

The antitrust issues that are specifically covered by the Act are: (*a*) anti-competitive agreements (section 3), (*b*) abuse of a dominant position (section 4), and (*c*) any combination, whether by way of an acquisition of an enterprise or merger of enterprises, above the prescribed threshold level of the assets or turnover of the enterprises involved in the combination (sections 5 and 6). The substance of these sections is discussed in the following paragraphs.

Anti-competitive Agreements

Section 3(1) of the Act is very general and broad in scope. It prohibits and declares void any agreement between enterprises 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. There are no statutory illustrations of anti-competitive practices or conduct. Each case is to be decided on its particular facts, under the rule of reason, which means that the appreciable adverse effect on competition has to be established as a fact in each case.

The usual anti-competitive agreements relate to: price-fixing, resale price maintenance, allocation among suppliers of the areas in which each will operate, reducing supply or output enabling the imposition of high prices, exclusive dealing agreements, and tie-in arrangements, all of which will have the intended effect of shutting out other sources of supply to the consumers. These are anti-competitive practices that may be engaged in by any enterprise. As should be obvious, the aim of all anti-competitive activity is to reduce competition that will increase the power of the anti-competitive enterprises to fix prices and conditions of supply.

Section 3(3) specifies certain anti-competitive agreements that may be entered into, or practices that may be carried on, by enterprises supplying similar or identical goods or services, or cartels. Under section 3(3), those agreements or practices carried on by that class of enterprises are presumed to have an appreciable adverse effect on competition. They are per se violations of the Act.

Section 3(4) deals with what are termed vertical restraints. These are restrictions amongst enterprises at different stages or levels of the production chain in different markets. This would cover supply of goods as well as services. A typical example of this relationship is between a manufacturer and a retailer selling his goods. A manufacturer stipulating that a dealer shall not sell the goods purchased from him below the price indicated by the manufacturer is engaged in the anti-competitive practice of resale price maintenance. The vice consists in restricting the freedom of the dealer to sell at a price considered by him to be profitable. What is restricted is the ability of the dealer to compete. Vertical restraints are to be examined under the rule of reason. The appreciable adverse effect on competition has to be established in each case.

Section 3(5) provides certain exceptions from section 3. The first set of exceptions protect the right of an owner of any of the intellectual property rights under the enactments listed in the subsection, to restrain any infringement of any of his rights, or to impose reasonable restrictions necessary for protecting any of those rights.[3] Also excepted under section 3(5) are terms of an agreement relating exclusively to the export of goods or supply of services abroad.[4] All these are considered in detail in the next chapter.

Abuse of a Dominant Position

Section 4 prohibits certain practices that are considered to be abuse of a dominant position by an enterprise. Some of them are: imposition of