

BEYOND 'MORE ECONOMICS-BASED APPROACH': A LEGAL PERSPECTIVE ON COMPETITION IN SRI LANKA

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Abstract - The Competition and consumer policy of a nation could play an important role in promoting economic growth and reducing poverty. In the absence of perfect competitive market conditions, there must be a competition policy backed by necessary legislation. It is necessary to promote competition through institutional mechanism to enhance consumer welfare. In recent years, competition law has been viewed as a way to provide better services to consumers. The research focuses whether the existing laws are adequate to promote fair competition and prevent anti-competitive practices. The objective is to find out the effectiveness of the laws governing competition and to identify whether such laws are sufficient enough to prevent mergers, acquisitions, monopolies and other anti-competitive practices. The research is exploratory in character. Research data were gathered from primary, secondary and internet sources. It is observed that even though statutory mechanisms were taken by the legislature, the effective enforcement and monitoring mechanisms capable of establishing the effective competition legal regime have been lacking. The current legislation Consumer Affairs Authority Act No.9 of 2003 has not made a serious effort to provide for comprehensive coverage of matters related to competition and consumer welfare. The main loophole is the Act fails to make provisions governing mergers and monopolies. Prominently, the Act is criticized as a mixture of competition and consumer welfare policies. Compare to the previous legislations governing this area of law, this act is considered weaker in some aspects, particular which removed the provisions to investigate monopolies and mergers. However, many improvements could be effected in this new legislation, in conformity with the three core principles of transparency, non-discrimination and procedural fairness of competition legislation.

Keywords - Anti-competitive practices, Competition, consumer welfare, mergers, unfair trade practice.

I. INTRODUCTION

'The Competition generates total consumer welfare'.¹ The term 'competition' in its ordinary meaning signifies a contest in which people strive for supremacy. In the corporate world, however, it denotes the process whereby firms strive against each other to secure customers of their products. Competition exists where there is a free play of market forces where a large number of buyers and sellers for a particular kind of product and there is no barrier for anyone to enter and exit from the market for that product.² This situation is considered as a perfect competition under which resources would be allocated more efficiently, productively, thereby maximizing the production. It also would maximize consumer welfare as prices settle at the lowest average cost to the producers, allowing the seller to only his normal profit or opportunity cost. In such markets prices would reflect social desires and the consumer is sovereign and his interest is protected.³

Perfect competition is an ideal situation. It does not exist anywhere. The real market is imperfect and the degree of imperfection ranges between perfect monopoly at one end and perfect competition at the other. In imperfect markets, depending on the degree of imperfection consumers have limited, or no power, to influence the market price. They are no longer sovereign, and their rights are in jeopardy. This imperfect situation arises due to several factors such as anti competitive practices, mergers and monopolies.

¹<http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx> ; Accessed on 23rd February 2018.

²ibid

³Professor A D V de S Indraratna , "Competition Policy and Law and Consumer protection: Sri Lankan case"

Competition Law promotes and maintains market competition by regulating anti-competition policies by Traders. The law has three main elements such as, prohibiting practices those restrict free trading, banning abusive behaviour of a firm dominating a market or anti-competitive practices that tend to lead to such a dominant position and supervising the mergers and acquisitions of large corporations.

Protecting the interests of consumers (consumer welfare) and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important aspects in recent years. Therefore Competition law aims to preserve and promote competition as a means of maximizing efficiency and achieving an optimal allocation of resources within an economy. The objective of the law is to prevent firms from protecting or expanding their market shares, except by means of greater efficiency in producing goods at the lowest possible prices. Competition law is closely connected with the law deregulation of access of market, state aids and subsidies, the privatization of state owned assets and the establishment of independent sector regulators among other market-orientated supply-side policies. In recent decades, competition law has been viewed as a way to provide better services. Therefore there is a need that the major market process which is in the hands of private sectors must be regulated by law as to prevent anti-competitive practices, mergers, acquisitions and monopolies.

II. METHODOLOGY

The nature of this paper is exploratory in character. It specifically reviews the current law and available literature and critically analyses the law in order to identify the gaps in the present laws. It provides a better understanding of the present law. Since the law relating to competition is very new and developing area, it is appropriate to analyse the laws in an exploratory kind of research. There are several kinds of data such as primary data, secondary data and qualitative data gathered from library and internet sources.

III. EVALUATION OF COMPETITION LAW IN SRI LANKA

The matter of Competition Law and policy is much talked in recent times; especially in light of the economic changes those took place around the world. There are about eighty

countries including Sri Lanka have adopted national legislative mechanism to promote effective competition policy. Competition law is known as antitrust law in the United States and anti-monopoly law in China and Russia. The two most influential systems of competition regulations are US antitrust law and competition Law of European Union.

Sri Lanka has not experienced such huge issues as in United States or European Union. As a developing country, the challenges for Sri Lanka within the competition policy arena are very different from those experienced by developed countries. The main agenda for many developing nations are economic development and sustainable growth. Therefore these are the overriding objectives of all policies, including competition policy. Economic development for many developing nations also translates directly into restrictive or protectionist policies which aim to promote economic welfare. The government of Sri Lanka has failed to formulate the measure for promoting competition policy through competition Law; instead they followed policy of consumer welfare through subsidies and price control. Thus, the competition policy and Law of the country has not been well developed as the laws in European Union or United States.

The first Legislation which introduced the concept of competition in Sri Lanka is the Fair Trading Commission Act No.1 of 1987 (FTC Act) which dealt with the control of monopolies and mergers and prevention of anti-competitive practices. Even though the origin of competition law has long history, the concept of competition law was introduced into Sri Lanka with the enactment of the FTC Act. The Act established a regulatory body known as Fair Trading Commission (FTC), a quasi judicial body under the Ministry of commerce and consumer affairs. The mandate of the body was to deal with monopolies, mergers and other anti-competitive practices while regulating the movement of prices of selected goods.

Even though the Act granted wide range of powers to FTC for control of monopolies, mergers and acquisitions and other sort of anti-competitive practices⁴, it is argued that the procedures introduced are in a way to provide possible interpretation to wrongdoers. Particularly, the act took a behavioural approach as opposed to structural approach. The Act provide that monopolies, mergers and anti-competitive practices were considered illegal only if

⁴ Section-5 of FCTA

they were contrary to public interest⁵. This was the main defect in the law that the particular provision was used as a justification for non- intervention where there was anti-competitive behaviour and vice versa. It is said that the lack of guidelines to interpret the elements of the 'Public Interest test' was a major limitation of the FTC Act, which was heightened by the lack of judicial decisions in this area of Law.

In early 2000, the Government of Sri Lanka decided to have a unified law to deal with competition matters. The Consumer Affairs Authority Act (CAA Act) was enacted to fill the gaps in Law. The FTC Act was repealed and replaced by the Consumer Affairs Authority Act No.9 of 2003, which is the present principle piece of legislation regulates the promotion of competition in Sri Lanka.

Apart from The Consumer Affairs Authority Act, there are certain other legislations dealing with competition. The Code of Intellectual Property Act No.52 of 1979 recognises unfair competition as a wrong actionable action against the trader and defines unfair competition as an act of competition contrary to honest practices in industrial or commercial matters.⁶ The code gave the power to the Judiciary to identify by considering the facts before it whether that acts of competition contrary to honest practice⁷. Trade mark piracy is mechanism under the code which prevents unfair competition. It is common in Sri Lanka and judiciary resolve many Trade mark issues in past. Limitation of labels and packing is another aspect of unfair competition in Sri Lanka. Traders with bad intention might confuse the consumers by trying to give his product an appearance that is very similar to other product by taking advantage of the reputation of that competing product. In *Lipton Limited v. Stassen Exports Limited*⁸ the defendant used labelling, packaging and appearance which is so nearly resembled the Plaintiff's product as to be likely cause confusion. Even though court held negatively, the Managing Director of defendant is admitted his anti- competitive practice.

Further, the Takeovers and Mergers Code of 1995 as amended in 2013 promulgated under the Securities and Exchange Commission of Sri Lanka Act No.36 of 1987 seeks to ensure equal treatment of all shareholders of the same class in the company sought to be taken over. Public

Utilities Commission Act No.35 of 2002 contained detailed provisions on the regulation of anti-competitive position, monopolies, acquisitions, abuses of a dominant position and merger situation in identified utilities industries.

IV. COMPETITION UNDER CONSUMER AFFAIRS AUTHORITY ACT NO.9 OF 2003

The Consumer Affairs Authority Act was enacted by Parliament with several objectives such as to establish the Consumer Affairs Authority Act, protection of effective competition and the protection of consumers. The Act provides for both an investigative body and an adjudicative body in the form of Consumer Affairs Authority and Consumer Affairs Council respectively. It is less discriminatory in that it brings under its surveillance all goods as well as all services including professional services. It does not, as up to now, exempt from investigation enterprises, either approved under the BOI Law, or which enter into agreements with the Government. The law also more effective in that the penalties of fines and imprisonment prescribed for errant traders and manufacturers have been enhanced many fold and made very deterrent.

The three main previous legislations, the Fair Trading Commission Act No.1 of 1987 (FTC), Consumer Protection Act 1979 and Control of Prices Act 1950 were repealed by Consumer Affairs Authority Act. Amongst others it repealed the FTC Act, which has previously regulated the promotion of competition. The FTC Act has provided the law relating to monopolies, mergers and anti-competitive practices. It has defined the term 'merger' and provided a procedural guideline for a merger situation. Control or dominance of the market test and public interest test were the two mechanisms introduced by the Act to regulate merger. It is submitted that under FTC Act many positive attempts were taken by the legislature to promote competition policy. Unfortunately the Consumer Affairs Authority Act does not provide such measure; particularly it fails to deal with mergers and monopolies.

Consumer Affairs Authority Act mainly focuses on promotion of competition through consumer welfare. Consumer Affairs Authority was set up to maintain and promote effective competition between persons supplying goods and services and to investigate into anti-competitive practices and abuses of a dominant position. The functions of Authority are identical to those contained in the FTC

⁵ApsaraThurairatnam; Sri Lanka; Competition Regimes in the World- A Civil Society Report.

⁶Sec.142 of the Code of Intellectual Property Act.

⁷Sec.142

⁸CA602/92

Act. However, in contrast to Fair Trading Commission which had both investigative and adjudicative powers, CAA Act has conferred such jurisdiction to two different bodies. It was argued that a body, which engages in search, seizure and investigation, cannot perform judicial function in a fair and impartial manner; hence the need for the separation of powers.⁹

The objectives of Consumer Affairs Authority Act are to protect consumers against marketing of hazardous goods, protect against unfair trade practices, guarantees that consumers' interest shall be given due consideration, ensure the consumers adequate access to goods and services at competitive prices and to seek redress against unfair trade practice. It is stipulated that the functions of the authority are to control of restrictive trade arrangements, investigation of anti-competitive practices, promotion of effective competition between traders and manufactures and protection and promotion of consumers welfare. On the other hand, the Consumer Affairs Council performs adjudicative function which makes determination on the basis of the investigation report of the Authority.

On comparing the laws under Consumer Affairs Authority Act with previous FTC act, it has failed to deal with the major anti-competitive practices such as monopolies and mergers. Since these two are crucial to prevent by the law, omission of such even weaker and more undefined than the previous legislation on competition and consumer protection. Interestingly, it had been intended by the legislature at draft bill stage to include separate provisions to deal with mergers and monopolies. Those provisions were not, however, included in the Act and it is uncertain as to when new legislation will be enacted to deal specifically with monopolies and mergers.¹⁰ Therefore in the circumstances, a merger is subject to control only if it amounts to the prevalence of an anti-competitive practice within the meaning provisions under Consumer Affairs Authority Act.

An anti-competitive practice is deemed to prevail under the Act where a person in course of business, pursues a course of conduct which of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition

of goods in Sri Lanka or the supply or securing of services in Sri Lanka.¹¹

The Consumer Affairs Authority Act has failed to define the term 'unfair trade practices'. It is argued that the rationale behind this that there are other statutes which can make specific provisions for monopolies, mergers and unfair trade practice. However, the undefined term gives wide discretionary power to the judges to control a range of trade activities as unfair and anti-competitive. Although the concept of anti-competitive practice is possible of interpretation in wider terms under Consumer Affairs Authority Act, when interpreting the provision the court took a narrow and strict view. In the case of *Ceylon Oxygen Ltd. v. Fair Trading Commission*¹² the Court of Appeal refused to recognize that predatory pricing, discriminatory rebates or discounts in pricing policies and exclusive dealings fall under the category of anti-competitive practices.

The Consumer Protection Act No.01 of 1979 has been replaced by the Consumer Affairs Authority Act which combined both competition regulation and consumer protection provisions. It should be noted from the consumer welfare perspective; this is not an improvement as it does not make provisions to establish the institutions for consumer protection. The CAA Act resembles a Consumer welfare Law rather than a Competition Law. Even though one of the objectives of the Act is the promotion of effective competition, the Act fails to provide adequate provisions to achieve it. The lack of clear statutory provision and guiding principle meant that effective implementation of competition law in Sri Lanka has become more complicated.

The Authority investigates the prevalence of the anti-competitive practice either on its own motion or on a complaint or request made it by any person or organisation of consumers or an association of traders¹³. It is not bound to hear a merging party or an interested third party. For the purpose of such investigation, the Authority has the powers of a District Court such as to issue notices and require the attendance of any witness, to require the production of documents or records and to administer any oath or affirmation to any witness. Upon the conclusion of the investigation, the authority makes an application to the Council for it to make a determination on the matter investigated by the Authority.

⁹ ibid

¹⁰ D. C. Jayasuriya, 'Guide to the consumer Affairs Authority Act Sri Lanka'; 1st edition Asian Pathfinders Publishers and Booksellers, 2004, p.141.

¹¹ AluwihareGunawardene; "Merger control world wide- Sri Lanka"; <http://antitrustasia.com/> ; accessed on 23rd February 2018.

¹² SLR-Year-1997 -Vol.2p 372

¹³ Section-34 of CAA Act

In an instance where the Authority decided not to make an application to the Council in respect of an investigation carried out and completed by the Authority, the person, any organisation of consumers or association of traders, as the case may be, on which complaint or request such investigation was carried out may, by application in writing.¹⁴ The Council may carry out an investigation which deems necessary in order to make determination on the matter before it. Council is bound to hear the parties whose rights will be affected by its decision. It should be noted that although the Act does not contain express provision to this effect, the Judiciary generally implies into statutory provisions a rule that the principle of natural justice apply in instances where a statute is silent.¹⁵

The Act has been criticized for giving too much of powers to the minister. The minister has the power to prescribe the good or service, as 'Specified good or service' if he or she feels that it is essential to the life of the community.¹⁶ The Act doesn't set out any guidelines for the determination of such goods or services as specific terms. Further, the appointment of members to the authority and the council is made by the minister. Thus it is alleged, it would deny the autonomy and independence, which a competition and consumer authority like this very much needed.

V. CONCLUSION

From the forgoing analysis, it is observed that Sri Lankan government's approach on competition policy has not been accompanied by a clear-cut economic policy framework; as a result competitions concerns still tend to be dealt with in an ad hoc manner in response to sectoral needs. It is obvious; the absence of comprehensive competition policy has resulted in a weak competition regime that fails to effectively prevent market anti-competitive practice. Under a perfect competition, not only resources are allocated efficiently but also consumer welfare is maximised. Since this ideal condition does not exist and markets are imperfect to varying degree, a competition policy backed by legislation is necessary to promote competition.

To make this policy very effective, however, other Government policies must be in harmony with it. In instances of weak institutional enforcement capacity and regulatory authorities, there is a role for government to

do whatever possible to make conditions favourable for pro-competitive behaviour. Such measures include trade liberalization and avoiding the creation of monopolies via artificial barriers to entry and exclusivity clauses, as well as steering away from implementing ill-conceived protection policies.

Consumer Affairs Authority Act has not made a serious effort to provide for comprehensive coverage of matters related to competition and consumer protection. While the objectives of the government are to be infusing a better competition culture into the economy, the Act is a step back in many ways. The Act has the aspirations and the expectations of a number of stakeholders, including the private sectors as well as practitioners. It would be another matter whether it delivers its goals.

One thing is clear; the Act should not be another piece of legislation that lacks the support system to harness the objectives and goals outlined. The key to the effectiveness of the legislation lies in promoting an effective competition culture among business transactions or ethics of the private sectors as well among government sponsored transactions. Thus, competition law should be designed in a manner in which it is flexible enough to accommodate the dynamics of competition policy. In the future, this issue would need to be addressed in order to formulate a comprehensive and effective competition policy framework for Sri Lanka.

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¹⁴ Section-37,38

¹⁵ Ammsenci v. Lndd Reform Commission (1977) 79 NLR 505

¹⁶ Section.18