ANTI-COMPETITIVE PRACTICES & COMPETITION LAW OF SRI LANKA – A CALL FOR REFORM

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1) Introduction

Competition law or Anti-trust law is a branch of law which promotes and maintains market competition by regulating anti-competitive practices carried out by companies thereby reducing the competition between competing companies in a market. Competition in the economic sense could be defined as the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms.

The universal goal of competition law at present is to prohibit, supervise and regulate any activity which would restrict free trade and competition between businesses. While the substance of competition law varies from one jurisdiction to another, the fundamental objectives of this law such as, the protection of interests of the consumer and ensuring the equal opportunity to compete in the open market are universal and common to all jurisdictions. Various national and regional competition authorities[1] have been formed for the purposes of specific enforcement of the law and strengthen regional co-operation to deal with issues arising from anti-competitive practices. At present competition authorities of many developed states operate alongside each other, on a day-to-day basis, with foreign counterparts for the purposes of enforcement of laws and sharing of key information.

Sri Lanka, following the footsteps of many other nations which adopted competition law to their legal regime, has enacted several Acts which specifically deal with consumer protection and competition law over a span of 40 years. However, the suitability, compatibility and robustness of the laws that were introduced through

[1]European Union, Organisation for Economic Co-operation and Development etc

these acts in contrast with the 21st century free market economy in Sri Lanka were thoroughly debated over the years and instantly paved way for the repealing of several legislative enactments. This article focuses on the amendments and changes that were brought to the prevailing laws of Sri Lanka in order to elevate the standards of conduct in the free market and enforcement of the said laws while making comparisons to existing moreover successful, foreign laws.

2) Law Governing Competition in Sri Lanka – Contrast and Criticism

2.1) Legal Framework

Competition law and policy has been, relatively, of very recent origin in Sri Lanka. Until 1977, the Governments that ruled the country alternately did not follow a policy of promoting competition through competition law and policy. Instead they followed a policy of consumer protection through consumer subsidies and price control.[2] Two years after opening the economy in November 1977, the State introduced the Consumer Protection Act of 1979, the first legislative enactment in the country which dealt with consumer protection. However, this Act failed to address the issues of unfair competition due to various reasons.

Thereafter, the Fair Trading Commission Act of 1987was introduced repealing the Consumer Protection Act of 1979. It was intended to enact legislation to deal with the control of monopolies, mergers and anti-competitive practices. However, this Act was later repealed and replaced by the Consumer Affairs Authority Act No.9 of 2003 which, at present is the governing and applicable law in relation to competition law in Sri Lanka.

It should be noted that apart from the Consumer Affairs Authority Act, The Intellectual Property Act No. 36 of 2003and Public Utilities Commission Act No.35 of 2002 of Sri Lanka play pivotal

[2]Prof. ADV de S Indraratna, "Competition Policy Law and Consumer protection: Sri Lankan Case" [2003] Asian Conference on the Post-Doha Competition Issues and on Consumer Protection, Competition Policy and Law, Kuala Lumpur

roles in upholding competition law principles embodied in the legal system of the country. It should however be stated that this article solely focuses on the issues pertaining to the Consumer Affairs Authority Act and related matters.

2.2) Sri Lankan Law on Competition vis-à-vis UK and USA Legislation

The Sri Lankan competition regime, when pitted against the UK and USA competition laws, may unravel weaknesses and lacunas in the legal structure which will hereinafter be discussed in detail. While it may seems like a comparison made between David and Goliath, such a comparison would allow the reader to obtain a broader picture with regards to unfair competition, recognized anti-competitive practices and the approaches adopted by the aforementioned states and their institutions to combat these practices mainly, to protect the interests of the consumers despite the fundamental divergences of interests between these systems of law.

Although the law on competition has been relatively of recent origin in Sri Lanka, the same cannot be said with regard to the United States' and United Kingdom's laws on competition. The United States antitrust legal regime itself is one of the two most influential and largest systems of competition regulation, the counterpart being the European Union Competition Law. The legal framework of the USA pertaining to competition comprises of the Sherman Antitrust Act of 1890[3], Clayton Antitrust Act of 1914[4] and Federal Trade Commission Act of 1914[5] et al. while the United Kingdom is empowered with the Competition Act of 1998[6], Enterprise and Regulatory Reform Act of 2013[7] and the Treaty on the Functioning of the European Union[8]et al. The contrasts of these laws

[3]The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7

[4]The Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53

[5]The Federal Trade Commission Act 1914, 15 U.S.C. §§ 41-51

[6] Competition Act1998

[7]Enterprise and Regulatory Reform Act 2013

[8] Treaty on the Functioning of the European Union [2007] Articles 101-106

and modes of improvement to the competition laws in the national legislation could be perused under several themes which will be discussed hereafter.

2.3) Enforcement through Competition Regulators

A competition regulator is a statutory authority, empowered by a legislative enactment of a country that regulates and enforces competition laws and consumer protection laws. The Consumer Affairs Authority Act provides for the establishment and constitution of a Consumer Affairs Authority of Sri Lanka (CAA) which in turn regulates and enforces the law of the country. The Authority shall consist of a Chairman and not less than ten other members who shall be appointed by the Minister from among persons who possess recognized qualifications, have had wide experience and have distinguished themselves in the field of industry, law, economics, commerce, administration, accountancy, science or health.[9] The main purposes of the Authority are to safeguard consumer rights and interests through consumer empowerment, regulation of trade and promotion of healthy competition.[10] The main functions of this Authority would be to control and eliminate anti-competitive practices, promote effective competition between companies, ensure consumer protection and promote competitive pricing of goods to name a few.[11]Further, the Act provides for the establishment and constitution of Consumer Affairs Council[12]to carry out the function of hearing and determining all applications and references made to it under this Act.[13]

While the regulative bodies in USA and UK exercise similar powers to the Authority established in Sri Lanka, it could be observed that the powers that have been conferred upon them are much wider in scope. Moreover, the powers and functions of the Federal Trade Commission (FTC) established by the Federal Trade Commission Act of 1914[14] in the United

[9] Consumer Affairs Authority Act of 2003, § 3(1)

[10]Consumer Affairs Authority, *Annual Report*(2011)

[11]*supra note 9,* § 8

[12]*ibid*, § 39

[13]*ibid*, § 40(1)

[14]The Federal Trade Commission Act of 1914 15 U.S.C. §§ 41-51

States, and the Competition and Markets Authority (CMA) established by the Enterprise and Regulatory Reform Act of 2013 in the United Kingdom, could be regarded as pure and unhindered due to the minimal interference by political authorities as opposed to the process in Sri Lanka where the Minister of Finance appoints the Chairman and Members of the Authority as well as the Council.[15]This is a mammoth drawback for an institution exercising quasi-judicial functions.

While the CAA is empowered under the 2003 Act to investigate the prevalence of any anti-competitive practices either on its own motion or on a complaint or request made to it by any person, any organization of consumers or an association of traders[16], the USA Act has improvised and adopted more advanced and progressive modes of investigation to deal with the expanding market of the 21st century. For instance, the FTC is empowered to require the filing of annual or special reports or answers in writing to specific questions for the purpose of obtaining information about the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the entities to whom the inquiry is addressed.[17]Such accumulated information could later be used against such institution where violations of antitrust laws occur. It is the opinion of the writer that the introduction of such a procedure to the Sri Lankan system would allow the regulating authority to track the harmful activities carried out by relevant institutions which in turn would ensure market equality and promote healthy competition among business entities.

2.4) Recognised Unfair Competition Practices

Another cardinal matter with regard to the law of competition would be the manner in which Unfair Competition practices have been defined in the legislation. This definition is of paramount importance in

[15]*supra note 9,* §3 &§39

[16]While §34 of Consumer Affairs Authority Act gives the ability for the Authority to conduct required investigations, §43 &§44 empowers the Consumer Affairs Council to carry out further investigations and obtain evidence

[17]Federal Trade Commission Act, 15 U.S.C., § 46

legal proceedings as it could break or make an action against anti-competitive practices carried out in reality. Although the CAA Act of Sri Lanka has provided definitions for a few unfair competition practices it has shied away from thoroughly defining the whole gamut of unfair competition practices and penalties for engaging in such practices which could adversely affect the enforcement and application of the said laws. Further, the absence of such thorough definitions would absolutely render the purpose of these laws nugatory by leaving unnecessary room for contesting the orders of the Authority. According to Section 35 of the CAA Act;

"an anti-competitive practice shall be deemed to prevail, where a person in the 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."

The Sri Lankan Act through the functions of the Authority seeks to control or eliminate the following practices[18]

- Restrictive trade agreements among enterprises.
- Arrangements amongst enterprises with regard to prices.
- Abuse of a dominant position with regard to domestic trade or economic development within the market or in a substantial part of the market.
- Any restraint of competition adversely affecting domestic or international trade or economic development.

When perusing the related USA & UK legislations however, it could be observed that the unfair competition practices and the relevant penalties recognised by the law are much wider in scope. The Sherman Act expressly provides that;

[18] *supra note 9,* § 8(a)

"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."*[19]

This provision serves as a direct blockade to prevent cartel activities[20]which takes place in the business industry. Further, it has is illegal to select customers through price discrimination and engage in the payment of commissions to promote sales.[21] Additionally, penalties for violating these antitrust laws include both criminal and civil penalties.

For any violation of the Clayton Act, individuals injured by antitrust violations can sue the violators in court for three times the amount of damages actually suffered. These are known as treble-damages, and can also be sought in class-action antitrust lawsuits.

Therefore, upon careful perusal it could be observed that, even though the Sri Lankan law has room for interpretation, it lacks the specificity that is essential for the enforcement of the laws by the Authority.

While the need for specific provisions regarding anti-competitive mergers, cartel activities, criminal sanctions and private rights are of prime importance, the fact that the Authority has so far been concerned mostly with matters pertaining to pricing and the protection of consumers rather than carrying out investigations into areas where anti-competitive practices are alleged to have been carried out can be seen as a total letdown from the point of view of the general public.

2.5) Further Criticism of the Sri Lankan Competition law

While the Consumer Affairs Authority Act could be identified as a stronger legislative enactment than the earlier legislation, it may be less effective solely as competition legislation which curbs and controls acts committed against the interests of consumers. This is mainly due to the fact that it does not directly address and

[19]Sherman Antitrust Act of 1890, §1

[20]A cartel is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them. Action against cartels is a specific type of antitrust enforcement.

[21]Clayton Antitrust Act of 1914, §2

differentiate between the recognised anti-competitive practices such as unfair mergers and acquisitions, cartel activities and monopolies. Even though the inclusion of the provisions to investigate any anti-competitive practice in general may somewhat fill this vacuum, the State must soon introduce legislation in respect of unfair monopolies and cartels to effectively implement its competition policy as the absence of these provisions could leave room to contest the orders of the authority .[22]

The Act is also subject to criticism in several quarters for other reasons. It has been criticised for giving far too much power to the Minister. The appointment of members to the Authority and the Council by the Minister, for instance, could potentially affect the autonomy and independence, which a competition and consumer authority like this very much needs. The fact that the minister has been given the free will to appoint members could hinder the basic purpose of establishing the authority since such minister's affiliations could easily influence any decision taken by such body.

The conclusion that emerges from all the above discussed matter is that CAA Act by itself is weak as competition legislation; it has to be complemented by anti-monopoly legislation without delay. Provision also must be made for interface with other regulatory bodies. There are other deficiencies with regard to definitions and interpretations.[23]The successful implementation of competition regulations in other nations showcases the effectiveness of their legislation as opposed to our failing legislation.

3) A Call for Change

With the development of economy and current social infrastructure, it would be prudent for the legislature to improve the standards of the prevailing competition law. This could be done through introducing new provisions to cover up the lacunas and the legally grey areas

[22]The aspect of unfair mergers and acquisitions have somewhat been curbed by the Company Take-overs and Mergers Code 1995, as amended in 2003 which was introduced by the Securities and Exchange Commission of Sri Lanka

[23]*supra note 5*

including ensuring impartiality and independence of the Consumer Affairs Authority. The Act shall further address issues which the consumers and companies as well as the Authority itself may have to encounter while dealing with the modern market economy. Moreover, the Consumer Affairs Authority should be given the opportunity to interact directly with corporations and other commercially-driven entities regularly which would in turn, give the Authority an 'upper hand' when tackling illegal competitive practices.

Amending the prevailing law itself will not solely contribute to overcome the challenges our market and the Authorities are facing. These issues should be looked at from a socio-political point of view as well. The lack of knowledge regarding competition laws and economic practices of the country of the general population and, the consumers' inability to realise his vital role has caused many issues in the modern day market. To tackle this, competition issues should be made part and parcel of both the law and economics curriculum at universities and other institutes of higher and professional education to create a broader base of professionals.

Ultimately it should be stated that none of these above mentioned suggestions to change the prevailing system will be of any effect unless there is a strong legal regime backing the Authority. Therefore, it should be necessary to bring the Sri Lankan law in line with widely recognised, competitive legal systems as we observed.

4) Conclusion

The developed legal culture of Sri Lanka combines elements of several traditions. Much of the law about property and matrimonial matters can be traced to the Dutch-Roman law and the prevailing customary laws while the laws dealing with companies, financial and intellectual property matters derives more from English sources. The legal aspects relating to competition policies in Sri Lanka have also been drawn from the system which prevailed and still prevails in the British Commonwealth. Despite this strong influence of English law on our competition legal regime, the consumer protection policies and the related

institutions in Sri Lanka appear frail upon comparison.

It would be correct to state that while the competition policies of developed nations have blossomed into a near-perfect system of laws, the national laws and institutions have stagnated over the course of time. These issues could be averted through establishing impartial and unbiased institutions, implementing practical policies and building a strong economy with a free market. While it may seem simple at the outset, it would take decades for the fruition of such a task. This issue again could only be avoided through the proper implementation of policies in a benevolent manner, by the decision making authorities of the country.