DEVELOPMENT OF US ANTI-TRUST LAWS

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ABSTRACT

The US have competition law as a regulatory framework dealing with competition in market since last decade of 19th century. Historical events leading to the enactment of Sherman Act and other legislations needs elaboration as to understand the circumstances and issues, which lead to the enactment and enforcement of Competition laws in the US as well as the objectives which they purported to accomplish. Issues relating to market spawned when the flourishing the US economy faced a menace due to consolidations of firms in a particular industry in the form of trusts (Ex. Sugar Trusts) thereby reducing competition between firms resulting into exploitation of firms and exclusion of potential entrant in the market. Although Sherman Act dealt with such issue but not in an efficient approach so Clayton Act 1914 and Federal Trade Commission Act 1914 were enacted to supplement Sherman Act. Clayton act was further amended by Robinson Patman Act 1936, Celler Kefauver Act 1950 and Hart Scott Radino Act 1976. Although there are plethora's of Acts dealing with competition law in US, yet there are several loopholes, which are addressed by judicial system. After going through this paper one can analyze that, the US Judicial system has played an important role in shaping the Anti trusts laws in US.

***Keywords**: Anti-trust laws, Competition Law, Sherman Act, Market, Judicial system.*

Introduction

In the US, there are two sets of laws dealing at different level with Competition, one at state level operating intrastate and other is Federal Law, which operates interstate. In case of conflict between the two Federal law prevails over state laws. The Sherman Antitrust Act was based on the constitutional power of Congress to regulate interstate commerce. First part of Section 8 of U.S. Constitution provides "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

Needless to mention that these legislations are enacted to regulate trade and commerce but it is worth mentioning as to how these laws accomplish their objectives. These Laws in substance prevents unlawful restraints, monopolization, attempt to monopolies market etc and encourages production of quality goods and services, promotes welfare of public by fulfilling consumer's demands. The Anti trusts laws being based on the premises that free trade benefits economy and consumers, endeavors to make a free & fair competition market. The thrust of anti trust laws are to limit market power or prohibit undesirable business practices. The main provisions, which are under consideration under this paper, are section 1 & 2 of Sherman Act, which were subsequently amended. Enforcement agencies, the Federal Trade Commission and US Department of Justice and Administration are responsible for the enforcement of anti-trust laws, which may issue orders to violators of laws. These laws cover agreements between competitors, contractual planning between sellers and buyers, mergers, monopoly and other activities, which hamper competition and consumers in market. However, prior to Sherman Act, competition between firms in market was governed by common law, that is only those activities, which were determined unreasonable by the court, were held to be invalid. However, it is worth mentioning that even after enactments the provisions left much to be determined by court through interpretations.

Sherman Act 1890

Sherman Act of 1890 is the oldest federal law dealing with competition in US. It makes those activities illegal which limits competition, price fixing, gives rise to monopoly etc. It also provides provisions for penalty for violation of laws. Sherman Act is a criminal and civil statute. The primary enforcement agency is Anti trust Division of Justice Department.

Sherman Act came into existing to counter problems of Trust. Trust is an arrangement or set up where stockholders of different companies pool up their shares and in return obtain certificate via which each stockholders get a specified profit gained by consolidation of shares. In 1800, many firms formed Trusts to form giant business, through which they were able to control certain sections of economy like railroads, oil Trust, steel Trust and sugar Trust. US Steel and Standard Oil Trust were the two most famous Trusts, which controlled the supply of product as well as price. Eventually the standard Oil Trusts controlled 90% of US oil refining capacity. Another example was American tobacco, which gained 90% of market share. Since there will be no competition in market in such situation, consumers will be left with no other option but to buy whatever is supplied by the Trust

and quality, choice was no priority then. (Johnsen, 2004).

Other events, which lead to the development, were drastic change in transportation and communication; railways extended in many parts and formed giant business which gave them powerful incentive to exploit economies of scale and scope.[1] Due to liberalization of laws, acquisition and mergers created large firms which tents to monopolize market. There were merger waves in 1880s and 1890s. In the last part of 19th century, there was instability in prices due to improper operation of macroeconomic factors leads to economic crisis. Firms entered into agreements through cartels and trusts. Further firms, which invested a large amount of money, in an attempt to operate at full capacity they started practicing activities which ensures their long existence in market like decreasing prices which gave rise to price wars etc. To solve the issue of price wars they entered into agreements through which they fixed prices and affected competition, economy and consumers. All these activities pressurized political force and public sympathy behind the situation lead to creation of state anti trust laws, and then with enough consensus in 1890 Sherman act was adopted. (Diane P. Wood, 1993)

In this paper, focus will be on two important sections i.e. Section 1 and Section 2 of Sherman Act. Section 1 deals with contracts, combinations, and conspiracies which restraints trade and Section 2 deals with monopolization and attempt to monopolization, conspiracy to monopolize. The Act carries criminal penalties and requires the US Federal Government to investigate the matter. Section 1 outlawed Trusts altogether and Section 2 prohibited individual from monopolizing or attempting to monopolies, The law in essence attempts to promote free and fair competition by prohibiting the artificial rising of prices by restriction on trade and supply. However, Section 2 prohibits monopoly, which is achieved by illegal activities and not achieved by innocence. If a firm obtains monopoly not by virtue of illegal activity but by virtue of its efficiency, by proving quality goods and services then it cannot be said to be a monopoly within section 2. The Anti trust laws are there to promote competition and not to protect competitors. As explained by the US Court "The purpose is not to protect business from working of market; it is to protect the public from failure of the market." (Spectrum Sports, Inc. v. McQuillan, 447 (1993)

Criticism of Sherman Act 1890

Sherman Act was put to criticism many times because of its generality. The Provisions of Act were found to be very general and wide enough to encompass within its ambit, (as stated in Section1- "Every contract, combination in the form of trust or otherwise, or conspiracy….") every contract irrespective of the fact that whether such contract is reasonable of not. The US Supreme Court took different approach in different cases and struggled for many years before they could agree on a uniform principle to follow because of the fact that there was no certainty and specificity as to the nature of activities giving rise to anti competitive conduct.. As rightly stated by legal scholar, (Levy, 1919) "The Sherman Law has been given a most comprehensive and drastic interpretation by the Federal courts, so that practically all agreements among competitors whereby competition among them is substantially reduced, are declared unlawful, without respect to the fact that such agreements may be based upon good motives and upon beneficial economic results." Therefore, we can say that literal approach of section 1 will invalidate all agreements.

Further, the Act does not define terms like 'Trusts'. 'Combinations', 'restraint of trade' and many more which again leave the court to ponder on the intention of legislation together with the facts and circumstances of case. Section 2 also deals with monopoly but prohibits only unlawful maintenance or acquisition of monopoly, Mergers were not covered and were therefore legal so firms who try to monopolize by merging were excluded from the Act. Moreover, court has to determine what constitutes monopoly is it 90%, 70% or 50% control over the market.

However, Sherman Act was not strictly enforced in its first decade. In 1895 in EC Knight case, it was challenged before Supreme Court that American Sugar Refining Company control 98% nations' output by purchasing four independent operations. However, Supreme Court ruled that acquisition of businesses within a state bore no direct relation to interstate commerce and therefore there is no violation of Act. This decision stimulated the growth of formation of Trusts. But, in 1899 Addyston Company Gas Case Supreme Court unanimously held that 6 producers of cast iron who formed agreement to eliminate competition were held to be liable unlike above case. Further court held that such agreement has a direct impact on interstate commerce and it cannot be argued that

[1] An economy of scale is that situation whereby with an increase in production, unit cost of production falls. And economy of scope is that situation where unit of cost falls because of production of two or more products.

Congress has no power to regulate private contracts.

In another case of United State v. Trans Missourie Freight Association, Free trade Doctrine was evolved whereby court applied per se Rule and held that fixation of fair by Trusts of 18 Railway firm are contract in restraint of trade and court need not to go into the question of reasonableness or unreasonableness. In this case, literal interpretation was applied by the court. Similarly, in Dr.Miles v. Park & Sons, Supreme Court held that resale price clause compelling retailer to sell the product not below a particular price is illegal and prohibited. In another famous case of Standard Oil Comp. v. U.S Rule of reason was developed by the court, in this case Supreme court found that Standard oil comp. guilty of monopolizing the petroleum industry, since they acquired 90% of oil capacity. The issue was whether size and market power of a company which might have been considered legal in common law becomes illegal as implies by the Act by acquiring numerous other companies. The court considered the case from the point of view of consumers and applied rule of reason and held them guilty. Same approach was followed in US. V. American Tobacco Company.

Analysis of Sherman Act 1890

After going through the criticism it can be said that Although Sherman Act was passed to tackle issue relating to Trusts formation, yet it could not efficiently deal with the same because of incompetence of its plain provisions. However, statutory laws were enacted but its interpretation depended upon common law. Sherman Act was enacted to ward off Trusts but did not deal with mergers, so firms started merging and generated new issues.

It mentions that to constitute monopoly there should be an element of anti competitive activity but what should be the standard of such conduct is left to the courts to decide, thereby giving rise to different approach. In US v. Grinnel, case court laid down two elements to determine monopoly: first is the possession of monopoly power in relevant market and other is the willful acquisition or maintenance of that power. In another case of Spectrum v. Mquillian, it was laid down that attempted monopolization requires that the defendant was engaged in some anti competitive conduct with intent to monopolize giving rise to dangerous probability of monopoly power.

Thus, we can comprehend from the cases, which have been mentioned till now that court in the beginning had a strict approach toward the provisions but eventually it started looking into the purpose and object of contracts, combinations and other conduct and their effects on trade, which is known as application of rule of reason. Court looked into the contract and differentiated between general restraint and limited restraint, developed two views that is tolerant and condemning.

Clayton Act 1914

Clayton act was passed in the year 1914 to strengthen and clarify the Sherman Act. Sherman Act prohibited Trusts but some companies found their way to control prices and production by merging instead of forming Trusts. The focus of Clayton Act is to protect consumers by prohibiting mergers or acquisition that is likely to suppress competition. Since the extent to which mergers to monopoly were covered by Sherman Act was not clear as in Knight Case where sugar trust was formed through a series of mergers. But, in Northern securities v.US, the court blocked the Combination of Northern Pacific and great Northern Railroads since according to court it would monopolies the trade. Clayton Act explicitly prohibits practices like price discrimination, exclusive dealing practices; it gives power to parties to sue for treble damages under section 4 under which the victim can ask for compensation equal to three times the damages and attorney's fees. Clayton Act specifically includes certain anti competitive activities. Clayton Act has specifically mentions certain practices illegal but not criminal:

- Price discrimination--- It is a practice where a seller sells the same product of same grade and quality at different prices to similarly situated buyers. For example a rice company sells per Kg rice at Rs 120 in area where it has monopoly whereas it sells the same amount of rice at Rs 80 where it has no monopoly until it drives the competitors out of the market, seller here makes profit in monopoly area to finance the below cost price in competition town. However, it provided, "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." For example if transportation cost is included then in areas where there is more transportation cost then same product will be of slightly higher price. Another exception is that if goods are of different grade or quality then can be sold at different price. Further, it says that the persons dealing with wares, merchandise in commerce are allowed to select their customers in bona fide transaction and not in restraint of trade. Further, it provides that price can be changed

from time to time in response to changing conditions.
However, the provision is qualified by the phrase that “They were only illegal where the effect "may be substantially to lessen competition" or "tend to create a monopoly." This provision again leaves the scope for interpretation by courts which are difficult decision to make.

- Payment or acceptance of commission etc.— Act also makes it unlawful to pay or accept any brokerage fee, commission, discount except in course of trade in connection with sale or purchase of goods, wares, merchandise etc.
- Tying and exclusive- Tying in arrangement is a practice where a consumer is compelled to but a product only when he buys another product, the sellers exploit market power of one product to make profit out of selling another product together with the former product. Exclusive dealings are those contracts, understanding etc which provide that buyer shall stop dealing with the products of other seller competitors. The effect of such contracts, dealing or understanding is to substantially lessen competition or tend to create a monopoly in any line of commerce.
- Corporate mergers—In such activity corporations engaged in commerce acquire directly or indirectly stocks or other capital of another corporation engaged in commerce. Such activity is prohibited under the Act However, it is qualified by the phrase “They were only illegal where the effect "may be substantially to lessen competition" or "tend to create a monopoly." Which is again a question of interpretation.
- Interlocking directorates--- It is a situation where members of Board of Directors of one company also serves as Board of Director of another company. It expands power of the members, they can also be used to form cartel, and results in restriction of output and increase in price. For example Computer field appointment of wife of Bill gates Melenda Gates to Board of Directors of Washington post as co director.

These were the main issues addressed by the Clayton Act However; Clayton Act was also amended in the following Acts, which dealt with loopholes existing in the Clayton act.

Robinson Patman Act 1936

Section 2 of the Clayton Act dealing with price discrimination was amended by the Robinson Patman Act 1936. This Act prohibited certain specific types of price discrimination which were not adequately addressed by the Clayton Act. Robinson Patman act lay down that it is unlawful to practice price discrimination if the effect is to substantially lessen competitions or tend to create monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination or with customers of either of them. There are three lines of commerce

1. Primary line (Injury to competition between sellers)
2. Secondary line (Injury to competition between purchasers)
3. Tertiary line (injury to competition between customer and purchaser)

The event which leads to the enactment of this Act was the practice in which chain stores were able to purchase goods at a lower price than other retailers from the suppliers because of their buying power and the influence they are able to exert for example Reliance occupies an influential position and it has several stores all over country so if it buy goods(say soft drinks) in large quantities from the supplier at a lesser rate on discount etc, as compared to any other small shop then reliance will sell it on a lower price than other small shop who has bought the same soft drink from the supplier at higher price. This will drive other competitors out of the market and will lead to monopoly and causes exploitation of consumers. The target of the Act is on the sellers who sell their goods at price discounts not based on true cost differentials. It also prohibits sellers and buyers indulging in activities like paying or accepting brokerage fees or services.

In case of FTC v. Anjeuser Busch the issue was regarding the nationally sold beer and regionally or locally sold beer. There are few national sellers of beer and many regional sellers of beer. A premium beer is one which is nationally sold whereas a local or regional beer is one which is sold in local region. Premium beer is expensive than local beer. The market structure is such that the same beer is sold at different area at different prices. The premium beer seller Anjeuser lowered their prices in an area called St. Louis market because of which three local competitors suffered losses. FTC issued complaint that it violates section 2 having adverse effect on sellers company, Commission also held it to be violation of Act. However, the seventh Circuit held that there is no violation of Act since there should exist some kind of relationship between purchasers which entitles them to comparable treatment before price discrimination may be found. However, the Seventh Circuit did not consider the fact that the lowering of price by the premium beer seller affects the primary line of

commerce that is it injures the competition between sellers.

Further in another case of Atlas Building Product v. Diamond Block & Gravel Co., Diamond sued Atlas on the ground that Atlas has lowered its price in certain area where there are many competitors whereas it has not lowered its price in area where it has monopoly, the court held it to be Price discrimination. The supreme Court expressly cleared the doubt created by the Seventh circuit in former case that whether section 2 applies to primary line competition or not, the court held that where there is price discrimination it will cause injury to primary line commerce even though secondary and tertiary line remain unaffected.

Celler Kefauver Act 1950

The said Act was also passed to revise the loopholes regarding asset acquisitions and acquisitions involving firms which were not in direct competition. Clayton Act prohibits stock mergers only and did not deal with asset mergers. Persons who could not acquire stocks of another started accomplishing their acquisition by liquidation and purchase of assets. Section 7 of Clayton Act was amended by the Said Act and provides that no corporation engaged in commerce shall acquire directly or indirectly stock or other share capital and no corporation subject to jurisdiction of Federal Trade Corporation shall acquire the whole or any part of the assets of another corporation, whose effect is to substantially lessen the competition or tends to create a monopoly. There the amendment foreclosed this method by providing assets also.

However, it is also subject to criticism, since it provides for acquisition of assets or stocks of one corporation by another but it does not cover other business entities like partnership, sole partnership, giving other entities an opportunity to escape because they can safely acquire. Further Corporation acquiring assets of a partnership firm also does not fall within the provisions so they can also acquire. But court again interpreted and justified extension of jurisdiction of FTC to other mergers by stating that purpose of 1950 was to cover all mergers. Hence this loophole is covered by Federal Trade Commission, since provision under FTC Act provides that unfair methods of competition are unlawful; and can be prevented by Commission. This can be best analyzed by judicial interpretation in Beartri Foods Co. v. FTC where an acquisition by an association was barred as it amounted to unfair method of competition.

The mergers are to be tested whether they substantially lessen competition or tend to monopolize, that is to state violation only reasonable probability will be enough. However, the degree of probability depends upon the type of merger. In horizontal merger which is a merger between firms who compete within same market, so the degree of substantial lessening of competition depends upon increase in market power of merged firm. Another type of merger is vertical merger where there is a merger of a firm with its suppliers and here the standard of criterion is the degree of foreclosure to competition of market of acquired firm. As a result the word substantially has been variously interpreted by judiciary as in US v. Pabst Brewing Co court held merger of two brewing company supplying 4.49% of national beer as substantially lessening the competition. The Celler Kefauver Act deals with merger within the same industry but it gave rise to another issue of conglomerate mergers where merger takes place between firms dealing with unrelated products. Since it is believed that such conglomerate mergers does not significantly decrease competition, the Act does not deal with this new problem, which emerged after the enforcement of the Act.

Hart Scott Radino Act 1976

The said Act amends merger provisions of Clayton Act and gives DOJ and FTC the power to review all mergers of firm above a certain size of threshold. It provides procedure for filling of detailed information regarding mergers, thereby requiring premerger notification which allows anti trust agencies to examine the likely effect of merger on the competition before they take place and operate in the market. The filling is required to describe the the proposed transaction and parties to it. It requires disclosure of the parties' financial information and various planning and evaluation documents prepared by the parties concerning the transaction and other recent transactions followed by a waiting period of 30 days. It imposes penalty of $16,000 per day if parties do not file the information regarding merger and the agencies may obtain an order requiring an acquiror to divest assets or securities acquired in violation of the Act. It also provides the conditions when filling of notification is required.

Enforcement of Anti Trusts Laws

The two important agencies responsible for enforcement of anti trust laws are Department of Justice Antitrust Division and the Federal Trade Commission (FTC). At State level Attorney General can act on behalf of those injured by anti trust activities. Federal Trust Commission was created by congress under Federal Trade Commission Act 1914 (FTCA) to keep an eye on unfair trade business practices and authority to investigate and restrain such unfair and deceptive

practices. FTCA is administered by FTC, without attaching criminal liability FTC prevents unfair methods of competition affecting commerce. Further DOJ seeks criminal sanction and civil injunctions against conduct violating any of the trust laws, to sue for treble damages on behalf of the United States; to reviews mergers and acquisitions and other functions.

Section 4c deals with the Actions brought by States Attorney States AGs may also sue under a provision in the federal antitrust laws that allow them to bring suits *parens patriae* on behalf of residents of the relevant state to secure monetary relief. Section 4 of Clayton Act deals with Suit by injured person where any person injured by any activity which is prohibited by the Act may sue in of the district court of US. The victim can ask for threefold of damages sustained by him without respect to the amount in controversy. If party succeeds then damage is equal to 3 times their losses and attorney's fees. Parties can also get injunctive relief but they must be threatened with an anti trust injury

Conclusion

It can be concluded that Anti trust law is a complex and intricate area, which cannot be written at once, as analyzed in this paper. Beginning with Sherman Act, which was the first law dealing with competition but was subsequently revised many times to tackle the emerging problems in market competition. The focus of the anti-trusts laws are to promote competition and prevent competitors from indulging into anti-competitive activities, which exploits consumers and kills the market competition. Anti Trust laws encompasses within its ambit contracts, combinations, monopoly etc that have an adverse effect on the competition. US Supreme Court has also played an important role in supplementing the laws by interpreting general provisions of law and laying down uniform principles.

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