Law & Economics of Competition Law
Part 2 – US Antitrust Law

Avinash S. Ganu

Advocate

B.Sc. LL.M. (Pune), LL.M. In International Economic Law (Warwick, U.K.)

US Antitrust Law

- Competition laws = Antitrust
- After 1880 – large industries combining as trust to control ‘pricing’ & ‘output’
- Legislation provide solution to trust problem, therefore “Antitrust”
- 1890 → The Sherman Act
- 1914 → The Clayton Act

  → The Federal Trade Commission Act
- USA adopted ‘Crime Tort’ model, which prescribed anticompetitive ‘concerted & unilateral conduct’

US Antitrust Law – Nature

- US law provided a ‘broad structure’ or ‘standards’
- Did not specify ‘detailed rules’
- Entire ‘substantive content’ of law is developed by the judiciary
- US ‘Antitrust Law’ is developed as a common law
- Need to study judgments of mainly the US Supreme Court & Circuit Courts

US Antitrust Law – Prosecuting Agencies

- Authority to prosecute/ take action
  - Department of Justice
  - Federal Trade Commission
  - State Governments
  - Private Individuals
- In India, single prosecutorial gatekeeper - i.e. Competition Commission of India (CCI) can take action

Schools of Antitrust

- Different schools of thought had impact on US antitrust policy and development
- Various schools
  - Harvard School
  - Chicago school
  - Post - Chicago school
  - Neo – Chicago school
  - Behavioural school

Harvard School

- Its structural approach was influential in the US since 1930 t0 1960 and also shape EU policy
- SCP model - Argues relationship between – **S**tructure, **C**onduct & **P**erformance
- Market structure influences firm's conduct, which in turn influences performance
- Structure –seller concentration, entry barriers, product differentiation
- Conduct – pricing, advertising, research & development
- Performance – efficiency, technological progress

Harvard School contd.

- This school asserts that high concentration and high entry barriers directly affect conduct of the firm
- For this school, antitrust has many goals
  - Distribution of equity
  - Economic stability
  - Decentralization of economic power
  - Optimal factor allocation
  - Consumer sovereignty

Harvard School contd.

- Wide range of conduct considered as anticompetitive including
  - Vertical restraints – tying, bundling
  - Exclusive dealings, territorial restraints resale price maintenance
  - Expanded rights of perceived victims

Chicago School

- At centerstage since 1970
- Based on neoclassical economics and price theory
- Different than Harvard School
  - Sceptical of SCP paradigm
  - Single goal of ‘economic efficiency
- Consumer welfare → improving allocative efficiency without impairing the productive efficiency
- Consumer welfare = total surplus / total welfare ≠ consumer surplus

Chicago School contd.

- In Economies of Scale, high level concentration is natural
- Predatory pricing – cannot be successful if no recoupment possible
- Exceptional intervention prescribed
- 1970 onwards US Supreme Court decisions influenced by this philosophy
- 1990 influence was almost complete
- Reversed old precedents, liberal policies

Chicago School contd.

- Supreme Court's change of approach in following areas
  - Per Se Rule to Rule of reason
  - Tying arrangement
  - Maximum retail price maintenance
  - Predatory pricing

Post Chicago School

- Deviates and improve Chicago approach
- Considers that certain conduct may have harmful effect
- Support Rule of Reason

Neo Chicago School

- Combine Price Theory with Game Theory
- Make error analysis weighing relative harm
- False positive – finding violative when not harmful
- False negative – finding no violation when behaviour is injurious

Behavioural School

- Reject unrealistic assumptions of neoclassical economics
- Adopt inductive approach
- Look to congnitive psychology to understand people's choices
- Considers cognitive biases, endowment effect
- Still underdeveloped

The Sherman Act

- Section 1

  Restrictive Agreements

- Contracts, combination or conspiracy, in restraint of trade or commerce
- Is declared illegal
- Punishable with fine &/ or imprisonment

The Sherman Act contd.

- Section 2
  - Every person who shall monopolize
  - Or attempt to monopolize
  - Or combine or conspire to monopolize
  - Is guilty of felony and punishable with fine &/ or imprisonment

Early Interpretation Per se Rule

- Illegal per se means that act is illegal

  without extrinsic proof of intention or effect

- Earlier domain of per se rule was broad
- Now it extends to - Naked ‘price fixing’

  - Market division agreements

  - Certain boycotts

  - Concerted ‘refusal to deal’

  - Some tying agreements

Early interpretation - Rule of Reason

- It is evaluating
- Pro competitive conduct
- Against anticompetitive conduct
- To decide whether practice should be prohibited or not

Early interpretation

- In Alcoa case (1932 -1945)
- 3 element of monopolization provided
  - Relevant market
  - Monopoly power
  - Illegal use
- In Grinnell case (1966)

  growth by superior product, business acumen it was lawful
- Harm by monopolist's conduct
- Exclusionary abuse – against competitor
- Exploitative abuse – against customer

Exclusionary conduct

Categories

- Exclusionary pricing
  - predatory pricing
  - predatory buying
  - Loyalty discount
- Refusing to deal
  - Essential Facility Doctrine

Exclusionary conduct contd.

- Exclusionary distribution

  - Exclusive contract – with supplier, with customer ;

  - Tying or bundling

- Exclusionary misuse of institution - Frivolous suits; Manipulating rules

- Exclusionary innovation – Technology; New product; IPRs

Predatory Pricing

- Monopolist
  - reduces price for longer period,
  - competitor leaves market,
  - other entrants deterred
  - later – increase price to higher level
- Predator and victim
  - – incur losses
  - - loss is investment for future profit

Predatory Pricing contd.

- Areeda Turner test
  - price below Average Variable Cost (AVC) – Per se violation
- Intent test
  - now not valid
- Now in Matsushita v/s Zenith, & in Brook Group v/s Brown
- Recoupment test developed
  - To prove predator's ability to recoup

Essential Facility Doctrine & Refusal to deal

- Elements
  - Monopolist controls essential facility
  - Competitor cannot duplicate but needs it
  - Monopolist denies
  - Monopolist can provide/ feasibility
- 1912 – SC – USA v/s Terminal Rail Road Association
- 1973 – Otter Tail Power v/s USA

  electric high voltage transmission lines

  denial to competitors

Essential Facility Doctrine & Refusal to deal

- 1985 – Aspen Skiing Co. – Harvard school influence

  downhill skiing, other 3 resorts, stopped collaboration

- 1992 Eastman Kodac

  service & parts - separate market, Kodac Monopoly

  exception ‘valid business reason’ for non cooperation not accepted

- 2004 Verizon Communications v/s Trinko

  Verizon denied interconnection services to rival in order to limit entry

  SC distinguished Aspen skiing saying that it was limited exception

Questions?