ANTI-MONOPOLY LAW AND FREE MARKET ECONOMY: POLICY AND BASIC ISSUES

L. X. Mbunda (Ph.D)*

Abstract The United Republic of Tanzania joined other developed and developing countries in dealing with monopoly problem by enacting the Fair Trade Practices Act of 1994. The gist of the legislation is to encourage competition in the economy by prohibiting restrictive or unfair trade practices controlling monopolies and concentrations of economic power in the newly liberalized economic environment.

Although countries may have different political and economic policies as well as different policy considerations, it is generally agreed that anti-monopoly policy in most countries is aimed at promoting competition. Competition is considered to be the form of industrial organization, which is most likely to yield certain economic benefits. As far as basic issues on this subject are concerned, the controversies anti monopoly law has caused have arisen from differences of opinion on the desired degree of governmental interference in economic life.

INTRODUCTION

The United Republic of Tanzania joined other developed and developing countries in dealing with the monopoly problem by enacting the Fair Trade Practices Act of 1994.[1] Apart from part VI which contains provisions relating to consumer protection, this legislation aims at encouraging competition in the economy by prohibiting restrictive trade practices or what may be called unfair trade practices, controlling monopolies and concentrations of economic power.[2]

The general political and economic philosophy and the general aims of economic policy, differences in business structure and other economic conditions are the variables, which greatly influence any country's anti-monopoly policy.

However, despite the different policy considerations, it is generally agreed that anti-monopoly policy in most countries aims at promoting competition. Competition is considered to be the form of industrial organization, which is most likely to yield certain economic benefits.

A general survey of anti-monopoly policies shows that these policies differ from country to country although all these countries share the common denominator of promoting and fostering competition. These differences range from strong commitment to competition where all forms of monopolistic and restrictive behaviour are outlawed, to a system that has no laws against monopolies. The United States of America for instance, is nearest to the first end of this scale, while the European Union, The United Kingdom and India occupy intermediate positions.

In the United States of America, anti-monopoly policy is directed towards two distinct but related purposes. First, is to maintain and foster competition. This entails that competition is not eliminated or reduced by whatever device or restrain of trade or monopoly. Second, is to restrict or prevent competition in some special industries in which unregulated competition is considered unworkable.[3] As a general rule the United States has maintained a general economic policy, favourable to competition throughout its history.[4]

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* Senior Lecturer, Faculty of Law, University of Dar es Salaam, Tanzania.

1 Act No. 4 of 1994

2 Preamble to the Fair Trade Prtactices. *op cit.*

3 See Richard Vaves, *American Industry, Structure and Conduct Performance*, 1967: 77-86.

4. Emanuel Celler "Corporation Mergers and Antitrust Laws *Merger Law Review* 1956, (VII): 269.

The United Kingdom on the other hand has adopted a neutral approach between competition and monopoly. Although the emphasis is on competition, that is not considered good *per se*. Anti-competitive behaviour may be allowed if economic justification can be shown for their continuation. Inspite of the enactment of the Competition Act in 1980,[5] and other developments, the neutral approach of the United Kingdom's anti-monopoly law has remained largely unchanged since the 1948 Act, that is the Monopolies and Restrictive Trade Practices (Inquiry and Control) Act.

The European Union on its part has the basic policy of achieving unification of the common market, and maintaining free competition in the operation of the market.[6] The Treaty of Rome emphasizes the necessity of establishing a system for ensuring that competition is not distorted in the European Union.

In India, one of the policy goals is to promote competition, but the overall policy thrust involves more that maintenance of competition, like consumer protection and achievement of certain economic objectives.

GENESIS OF ANTI-MONOPOLY LAWS

Fair Trade Practices is a subject which is not very familiar to the ordinary citizen or even to some of the trained lawyers, economists, industrialists in Tanzania to mention but some. There is therefore need to trace its history and identify and discuss the basic issues involved in this area of public law. There is also need of understanding anti-monopoly laws in other countries.

Although chronologically speaking Canada was the first country in the world to enact modern anti-monopoly law in 1889,[7] the United States of America is one of the pioneers in the field of modern anti-monopoly laws, popularly known as anti-trust laws. The history of the United States anti-trust laws may be traced back to the trust movement in the American industry during the later decade of the 19th century.[8] The word trust when used in the context of industrial restriction meant a combination of a number of companies through trustees to whom the shareholders in the companies transferred their shares in exchange of trust certificates.[9] These certificates entitled the shareholders to a specified share in the pooled earnings of the jointly managed companies.

The trusts were attacked from several angles for *inter alia*, seeming to absorb new enterprises even faster than the industrial expansion created them; achieving consolidation through predatory tactics; and using outrageously unfair methods to achieve unreasonable ends.

The above stated objections were among other things that eventually led to the enactment of the United States anti-trust laws. The central core of the Federal anti-trust laws were to be found in three statutes: (i) The Sherman Act, 1890; (ii) The Federal Trade Commission Act, 1914 and (iii) The Clayton Act, 1914.

POLICY CONSIDERATIONS

The basic philosophy behind anti-trust laws is better explained in the following observation of the United States Supreme Court in *Northern Pacific Railway v. US*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality

5 Chapter 21 of the Laws of England.

6 Susanne Brun "Antitrust Policy in Europe: The Emergence of Strict Enforcement" *Journal of World Trade Law*, 1974 (8): 475.

7 See Canadian Criminal Code, 1989.

8 For American Anti-Trust laws see generally A.D. Neale and D. Goyder, *The Antitrust Laws of the United States of America* 3rd Ed. 1980. Philip Areeda and D.F. Turner, *Antitrust Law. An Analysis of Antitrust Principles and Their Application* (1978).

9 Lord Wilberforce, Alan Campbell and Neil Elles, *The Law of Restrictive Trade Practices and Monopolies*, 164 (1966)

> and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institution. [10]

The main purpose of anti-trust laws is thus, to maintain, and foster competition, and to ensure that it is not excessive or cut throat. The purpose of suppressing competition is generally to build up a position of power in a market, that is, to achieve monopoly or market power, power over prices, output and entry into the market. Firms having monopoly power can make the terms of bargain more favourable to themselves and less favourable to others than they would otherwise be.

There are two obvious ways by which firms may achieve monopoly power. One way is for them to join together and exert joint power to prevent competition. The other way is for a single firm to achieve a dominant position in the market by eliminating the existing competition. Firms already having monopoly power may strive to retain it by adopting behaviour patterns that are predatory or unfair. The anti-trust laws were therefore designed to deal with specific actions such as agreements, combinations and conspiracies restraining competition, predatory and unfair trade practices and undue monopoly power.

ANTI-MONOPOLY LAW CONTROVERSIES

Anti-monopoly law is one of the most controversial pieces of legislation. These controversies stem from differences of opinion on the desirable degree of governmental interference in economic life.

The extreme view on one side represented by Marxists and other socialist ideals believe in complete nationalization and governmental control, while the extreme opinion on the other side favours free play of market forces and complete non-interference by the government.[11]

Between these extremes there are various views which uphold the general framework of the free enterprise system, but which differ on the extent to which the government should interfere in economic matters. There is no unanimity among these views as to whether control of monopoly is desirable and possible. One school of thought finds anti-monopoly law a proper response to a variety of political and social concerns including the viability of small business, the political power of large business and the distribution of income, as well as the needs of an efficient economy. A statement of this position is to be found in the following quotation:

> Concentration of economic power is always open to abuse leading to the common detriment and therefore it should be prevented to the extent possible.[12]

A similar position is to be found in the dissenting opinion of Justice Douglas in *United States v. Columbia Steel Co:*

> We have here the problem of bigness. The curse of bigness shows how size can become a menace both industrial and social. It can be an industrial menace because it creates gross inequalities against existing putative competitors. It can be a social menace because of its control of prices. In the final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. For all power tends to develop into a government in itself. Power that controls the economy should be scattered into many hands so that the fortune of the people will not be dependent on the whim, caprice, prejudices, and the emotional stability of a few self appointed men.[13]

On the other hand some commentaries argue that anti-monopoly law is largely useless as a

10 356 U.S.I. (1958) at pp.4-5.

11 See for example F.A. Hoyek, *The Road to Serfdom* 1944 where it is argued that even mild state interference with a spontaneously evolving market economy is likely to set in motion processes that eventually lead to destruction of liberty.

12 Quoted in F.L. Berawalia, *Industrial Licensing, Monopolies and Restrictive Trade Practices, Law and Practice*, 1972: 1 13.

13 334 U.S. 495 at p. 585-6 (1946). Majority in *Brown Shoe Co. v. United States*, U.S. 294, expressed similar views (1962); *United States v. Aluminium Company of America*, 148 F: 2 d 416 at p.427-28.

positive restructuring device and therefore it should be partially or completely dropped as an expensive or indeed counter-productive folly. An extreme example of this approach is to be found in the following passage in relation to a similar statute in India:

> The impression is unmistakable that the Act would inhibit industrial advance. Already industry has to contend with a variety of controls, such as industrial licensing, import control, clearance for capital issues and so on. To embellish this paraphernalia further by placing restrictions on expansion and diversification from the angle of this Act is bound to retard rather than accelerate industrialization.[14]

Professor Galbraith, an American economist found anti-monopoly law nothing more than a historical aberration "sadly at odds with reality."

> In seeking to pressurize the market the anti-trust laws are an anachronism in the larger world of industrial planning. They do not preserve the market they preserve rather the illusion of the market. In the past the man who argued against the antitrust laws was often suspected sometimes rightly, of ulterior interests. He wished to violate laws or was the paid or unpaid theorist for those who did. Now it is the friend of the antitrust laws who serves, almost unwittingly, ulterior purposes. He defends and gives legitimacy to a charade an act that helps to conceal the reality of industrial planning and associated price control by the great corporation.[15]

However, even liberals who believe in minimal government interference in economic matters recognize the legitimacy of intervention in this area:

> To create an environment in which private enterprise will be truly competitive and responsive to consumer desires clearly requires considerable government activity.[16]

The United States Supreme Court as the economic counterpart of the Bill of Rights in fact considered anti-trust law. For example in *the United States v. Topco,* it observed:

> Antitrust laws are the *Magna Carta* of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business no matter how small, is the freedom to compete.[17]

PROBLEMS OF APPROACH

A theoretical hypothesis of industrial Organisation first proposed by an American economist E.S. Mason [18] and adopted by most leading economists [19] emphasizes the causal link between market structure, conduct and performance. Various hypotheses presented by economists predict in general that the market structure of an industry determines or strongly influence the essential aspects of its market conduct and thus indirectly determines certain strategic dimensions of its market performance.

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14 V.P. Juneja "Rationale of the Monopolies and Restrictive Trade Practices Act" in Vindo K. Agarwal (ed.) *Some Problems of Monopoly and Company Law* (1972) pg. 90. See also Berarwalla op.cit. pg. 258 where it is said that "The Act (of India) could have been more appropriately entitled "The Prevention of Economic Growth Act."

15 J.K. Galbraith, *The Industrial State* (1972) pp. 187-97. See also Galbraith, *Economics and the Public Purpose* (1977): 234; Robert Bork, *The Antitrust Paradox* (1977): 418-25; E Lilienthal, *Big Business: A New Era* (1953) where it is argued that the anti-trust philosophy is no longer applicable and that the anti-trust laws are in fact crippling America.

16 S. Brittan, *Government and the Market Economy* (1971): 23.

17 405 U.S. 596 (1972) at pg. 610. For similar observation see also *Northern Pacific Railway vs. US* 356 U.S. 1 (1953).

18 E.S. Mason, "Price and Production Policies of Large Scale Enterprise" (1939) 29 *American Economic Review.* (Supp.): 61-74.

19 See J.S. Bain, *Industrial Organisation*; John Blair, *Economic Concentration Structure Behaviour and Public Policy* (1972); Richard Caves, *American Industrial, Structure, Conduct and Performance* (1967).

The relationship between business structure and its conduct and performance suggests that the optimum policy for taking action against economic power and restrictive trade practices is three-fold. One is structural approach, another is the conduct approach and the third is the performance approach.

The Structural Approach

The structural approach makes sure that the structure of business is one which does not have unwarranted concentration of economic power and from which competition will supposedly and inherently flow. This approach pre-supposes that certain type of structures typically produce undesirable conduct and performance and therefore such structures should be amenable to anti-monopoly action.

In this approach the fact that a firm has substantial economic power would make it subject to the anti-monopoly law even if its conduct were impermeable and even if its efficiency, progressiveness, and other performance attributes were wholly satisfactory. One reason for this approach may be the opinion that the adverse effects of economic power cannot be effectively controlled as long as the position of power itself continues to exist.

The Performance Approach

This approach is directed against the specific conduct or practices of a firm. Whenever the conduct of a firm or firms is having detrimental effect on the freedom of market action of other firms or where other firms or consumers are being adversely effected by the restrictive trade practices, the government can intervene to control such conduct. Under this approach the formation or existence of economic power is left unaffected in the sense that they are not directed controlled. However, it can be a useful indirect device for discouraging the emergence of industrial structures.

The Conduct Approach

Under this approach performance itself is examined to decide whether or not governmental intervention is needed. Large firms, monopoly power and firm's conduct are not viewed as bad in themselves but are subject to intervention only when they have had effects on performance of the firms or market in question.

It may be important to note that any one of these approaches is not sufficient to cope with all aspects of the monopoly problem. A combination of elements of structural, conduct and performance approach seems generally to be the appropriate solution. The Fair Trade Practices Act therefore adopts a combination of these three approaches. Under the structural approach it seeks to control unwarranted concentration of economic power and monopolies; under the conduct approach, restrictive trade practices and under the performance approach prices and other matters.

OVERVIEW OF THE FAIR TRADE PRACTICES ACT

The Fair Trade Practices Act has its purpose stated in its preamble as "to encourage competition in the economy by prohibiting restrictive trade practices, regulating monopolies, concentration of economic power and prices, and to protect the consumer."

The main actors in implementing the Act are The Trade Practices Commissioner [20] (hereinafter called the Commissioner), The Minister for Finance, and The Trade Practices Tribunal[21] The Commissioner and the Minister hold wide, discretionary powers, which have little checks, and balances and in most cases cannot be challenged in any court of law. No clear guidelines are given as to how some of these powers are to be exercised by these two administrative functionaries.

The Act provides for procedures for inquiries and investigations into restrictive Trade Practices, which are not only cumbersome but also, time wasting.[22] Commercial dispute

20 Appointed by s.3 of the Fair Trade Practice Act *op. cit.*

21 See s.3 *ibid.*

22 See Part II of the Fair Trade Practices Act, *op.cit.*

settlement procedures should be simple, fast and efficient if business acumen is to be maintained and if business chores are to continue without inhibitions.

The Commissioner on a complaint can investigate restrictive trade practices by the aggrieved party or an information from other sources. The Commissioner may ask the party involved in alleged practice to discontinue the practice and compensate the person who is injured because of the alleged practice, and can obtain a consent agreement. On failure to comply with the consent agreement or in the absence of any response, the Commissioner may propose to the Finance Minister to make an order. Any contravention of the order is an offence. An appeal lies to the Tribunal from the Order of the Minister. [23]

The Act also intends to control concentration of economic power in cases where there is a control over a chain of distributing units whose sales exceed one-third of value of a relevant market or control over two or more physically distinct manufacturing units supplying more than one-third of value of a given commodity for domestic market. The Act also controls concentration of shareholding exceeding twenty percent in a wholesale enterprise at the same time having a beneficial interest in a retail enterprise. [24] These cases of concentrations may also, in appropriate cases be subject to the control provisions of the Fair Trade Practices Act.

The task of investigations into the concentration of economic power is given to the Commissioner and the Minister. The Minister is empowered to make an order, directing a person to dispose such portion of his interest as the Minister may think fit. From the order of the Minister, an appeal lies to the tribunal.

Horizontal mergers and takeovers are subject to control and it is an offence to consummate such a merger or take-over without an authority order from the Minister. The Commissioner is empowered to investigate the proposed merge or take-over and to make a final order. In this case also, an appeal lies with the Tribunal.

CONCLUSION

This paper has revisited the basic issues and policy relating to anti-monopoly law. It has revealed some of the anti-monopoly law controversies. Those controversies not withstanding, one thing has come out quite clearly, that is, anti-monopoly laws are actually the *Magna Carta* of free enterprise aimed at preserving free and unfettered competition as the rule of trade.

An attempt has also been made to review the Fair Trade Practices Act. This has been achieved by exposing the fact that every large firm having economic power has the ability to adopt trade practices which may damage or destroy their competitors or may put restrains on competition or may be unfair to the ultimate consumers. Sometimes firms without economic power may strive to achieve it by means of collusion or agreement among themselves to adopt trade practices which may restrain competition.

We have seen how the Fair Trade Practices Act thrives to regulate such restrictive trade practices. Part III of this Act contains comprehensive provisions relating to restrictive trade practices. The Act covers all types of trade practices, to wit, Horizontal agreements, vertical agreements and unilateral practices.

Part IV of the Act as we have seen is concerned with the concentration of economic power. The provisions contained in this part seek to make direct attack on the size of a firm. A firm may be large in various ways. It may be a large firm in absolute terms, i.e. large in absolute size, or it may be a relatively large firm with a large share of the market, i.e. a dominant firm, or it may simply be large, consisting of a number of sub-firms, each producing different

23 See Part III *ibid.*

24 See Part IV *ibid.*

products, i.e. a multi-plant, multi-product firm.

Finally, an evaluation of the provisions relating to restrictive trade practices shows that these provisions are very comprehensive and cover most kinds of restrictive practices. However, the definition of "restrictive trade practices" given by the Act in S. 15 is clumsy and complicated. It introduces certain new concepts of elimination of opportunities in place of the acceptable standard concept of competition.

The same can be said about the provisions relating to concentration of economic power, which on their part are very stringent, wide and vague. It is unfortunate that we have an anti-monopoly piece of legislation, which is highly pregnant with serious weaknesses. Perhaps this is the result of wholesale reproduction of an anti-monopoly piece of legislation from a neighbouring country without due regard to the economic socio-political local environment prevailing in Tanzania.