COMPETITION LAW

INTRODUCTION

The Perspective :

Power corrupts and absolute power corrupts absolutely. This is often said of political institutions, but it is said to be no less true of economic activity. One such manifestation is the achievement by one or more units in an industry of such a dominant position that they are able to control the market by regulating prices or output or eliminating competition. “Another is the adoption by some producers and distributors, even though they do not enjoy such a dominant position, of practices which restraint competition and thereby deprive the community of the beneficent effects of the revelry between producers and distributors to give the best service. It is needless to say that such practices must inevitably impede the best utilization of the nations means of production. Economic power may also manifest itself in obtaining control of large areas of economic activity, by a few industrialists by diverse means. Apart from affecting the economy of the country and being detrimental to the consumers interest, this often results in the creation of industrial empires tending to cast their shadows over political democracy and social values.

Those possessing economic power flaunt their superiority in riches in palatial buildings, limousines< and a retinue of servants, and that they think themselves to be a class apart, well above the rest of their fellow countrymen. Inevitably, the position and glamour of these very rich persons has also seriously undermined social values in the country,. Culture and education, scientific pursuits and research are for may young men, at a discount compared to a carrier that is likely to help to climb the dizzy tops of business success. The big business has the power to corrupt public officials in the attempt to continue and increase their industrial domain.

Although it is true that big business has helped the economic betterment of the country, but it may not make us blind to certain evil effects of such power on the country economy. The most serious of these is the risk of emergence, of monopoly with its attendant evils – high prices for consumers, deterioration financial strength, it can afford to sell for sometime at an inremuenerative price

with definite object of eliminating competition or discounraging potential competition and because of its fighting strength by large scale efficient advertising. The elimination of small men in industries or business increases the imbalance in the distribution of national earth and income.

India being a developing country was eager to promote the industrial growth keeping in view the socio economics objectives. The damagers of excessive concentration of economic power and monopolies received special attention since our independence and particularly after we adopted the path of socialistic pattern of society. In ordinary parlance, the concentration of economic power is considered to be an evil and is not liked but even viewed with hatred, particularly in a country like ours where millions of people are below the poverty level. They are given to believe that the cause of their ill fate is primarily a few business magnets. But this belief is not wholly true, Indeed, the concentration of economic power is neither good nor bad in itself, but it is the exercise of such power which may be good or bad. If it is prejudicial to public interest, it has to be checked. The objective behind this approach is that growth as well as equality are sine quo non and have to be pursued simultaneously; Moreover, out basic objective is that the industrial growth and expansion should not go into the hands of a few persons but should be channelized for the common good and for the nation as a whole. The State had to create a legal framework to achieve the aforesaid socio economic objectives. The framework was provided by various legislations including the Monopolies and Restrictive Tradd Practices Act 1969 (hereinafter referred to as the MRTP Act) which came into force on June 1, 1970. It added a new dimension in the realm of the modern economic legislations of our country. The object of the MRTP Act as spelt out in t\its preamble is to provide that the operation of the economic system does not result in the concentration of economic power to the economic system does not result in the concentration of economic power to the common detriment for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for mattes connected therewith or incidental thereto.

The purpose of the MRTP Act was not to outlaw the concentration of economic power per se but to curb them only when they were not conductive to

the common good. The philosophy of welfare state was spelled out in more clear and definite terms in the Constriction of India. In its preamble it was resolved to secure to all citizens not only political but also social and economic justice. This philosophy was further strengthened by Articles 38 and 392 falling under Part IV- Directive Principals of State Policy of the Constitution of India.

Article 39 of the Constitution of India also does not condemn concentration of economic power as such, but only when it is to the common detriment. Thus, the basic policy of the MRTP Act was to ensure that while promoting economic concentration of economic power to the common detriment was also brought about to secure social and economic justice. The MRTP Act has repealed and replaced by ther Competition Act 2002.

Outline of Competition policy :

The focus for most competition laws today in the world is in three areas.

- Agreement among enterprises
- Abuse of dominance
- Mergers or, more generally, combinations among enterprises.

Agreement among enterprises :

Agreement between firms have the potential of restricting competition. Most laws make a distinction between horizontal and vertical agreements between firms. Horizontal agreements refer to agreements among competition and vertical agreements to an actual or potential relationship of buying or selling to each other. Both these types of agreements should be converged by the competition law, if it is established that they prejudice competition. Horizontal agreements relating to prices, quantitative, bids (collusive tendering and market sharing are particularly anti competitive. Vertical agreements like tie in arrangement, exclusive supply distribution agreements and refusal to deal are also generally anti competition.

While vertical agreements are generally treated more leniently than horizontal agreements, the following approach was recommended by the High Level Committee on Competiton Policy and Law (hereinafter referred to as the High Level Committee :

- Certain anti competition practices should be presumed to be illegal.

- Agreements that contribute to the improvement of production and distribution and promote technical and economic progress, while allowing consumers a fair share of the benefits, should be dealt with leniently;
- The relevant market should be clearly identified in the context of horizontal agreements;
- Blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to be illegal.

Article 38 of the Constitution of India provides :

(a) The State shall strive to promote the welfare of people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the Competition of the national life.

(b) The State shall, in particular, strive to minimize the inequalities in income and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst group of people residing in different areas engaged in different vocations.

2. Article 39 of the Constitution of India states:

The State shall in particular, direct its policy towards securing.

(a) that the citizens men and women equality, have the right to an adequate means of livelihood.

(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good.

(c) that the operation of the economic system does not result in the concentration of wealth and means of production of the common detriment.

(d) …........

(e) …....

Abuse of dominance :

Dominance needs to be appropriately defend in the competition law in terms of the position of strength enjoyed by an undertaking which enables it to

operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its action. The definition needs to be also in terms of substantial impact on the market including creating barriers to new entrants. The High Label Committee did not consider it desirable to prescribe any arithmetical figure like percentage of market share to define dominance, as s firm with a high market share may conduct business ethically if there is a strong and effective rival in the relevant market and likewise, a firm with a small market share may abuse its market power, if its competitions diffusely hold the remaining market share.

Abuse of dominance rather than dominance should be the key for competition policy/law. Abuse of dominance will include. He practices like restriction of quantities market and technical development. Abuse of dominance which prevents, restricts or distorts competition needs to be frowned upon by competition law. Relevant market needs to be an important factor I determining abuse or dominance.

Predatory pricing which is defined as the situation where a firm with market power prices below cost so as to drive competition out of the market is generally prejudicial to consumer interest in the long run. This is because there is the possibility that after the competitors are eliminated and the offending firm has functioning as a monopolist. The High Level Committee, however, that lower prices charged by the firm may sometimes constitute a gain in social welfare for the consumers. Instead of always taking an adverse view, it is desirable in the Committees view that predatory prancing may be treated as an abuse, only if it is indulged in by a dominant under taking. By and large, abuse of dominance and exclusionary practices will need to be dealt with by the adjudicating authority on the rule of reason basis.

Mergers or Combinations :

Mergers need to be discouraged, if they reduce or harm competition. The High Level Committee, however, cautioned against monitoring of all mergers by the adjudicating authority, for the reason that very few Indian companies are of international size and that in the light of continuing economic reforms, opening up of trade and foreign investment, a great deal of corporate restructuring is taking place in the country and that there is a need for mergers,

amalgamations. Etc., as part of the growing economic process before India can be on an equal footing to compete with global giants, as long as the mergers are not prejudicial consumer interest.

It is in this context that the High Level Committee recommended that mergers beyond a threshold limit in terms of assets should require pre-notification. The Committee felt that pre-notification of mergers above the specified threshold should be sufficient in the present economic milieu, as it would most likely reduce the social cost5s of potential post merger unscrambling. The potential efficiency losses from the merger need to be weighed against potential gains in adjudication merger. In respect of a merger re1uiring pre-notification, if within a specified time period, the adjudicating authority does not, through a reasoned order, prohibit the merger, it should be deemed to have been approved. The competition law has been designed and implemented I n terms of the contours enunciated above.

Competition policy/law needs to have necessary provisions to examine and adjudicate upon anti competition practices that may a company or follow developments arising out of the implementation of WTO agreements. In particular agreements relating to foreign investment. Intellectual property rights, subsidies, countervailing duties, anti dumping measure, sanitary and phtosanitary measures, technical barriers to trade and ? Government procurement need to be reckoned in the competition policy/law with a view to dealing with anti competition practices.

Furthermore, the High Level Committee recommended as follows regarding State monopolies, regulatory authorities, Government procurement. Foreign companies, professions and standards -

- The State monopolies, Government procurement and foreign over all consumers who purchase goods or services regardless of the purpose for which the purchase is made.
- All decisions of the regulatory authorities can be examined under the touchstone of competition law by the Competition Commission of India.
- Bodies administering the various professions should use their autonomy and privileges for regulating the standard and quality of the profession and not to limit competition. In the competitive and globalised

environment there is need to encourage size, growth and internation affiliating of professional firms. This should be encouraged and restraints should be removed.

- If quality and safely standards for goods and services are designed to prevent market access, such practices will constitute abuse of dominance/exclusionary practices.

Competition :

Rivalry in which every seller tries to get what other sellers are seeking at the same time; sales, profit, and market share by offering the best practicable combination of price, quality, and service. Where the market information flows freely, competition plays a regulatory function in balancing demand and supply.

Competition arises whenever at least two parties strive for a goal which cannot be shared or which is desired individually but not in sharing and cooperation. Competition occurs naturally between living organisms which coexist in the some environment. For example, animals compete over water supplies, food, mates, and other biological resources. Humans compete usually for food and mates, though when these needs ard met deep rivalries often arise over the pursuit of wealth, prestige, and fame. Competition is also a major tenet of market economics and business is often associated with competition as most companies are in competition with at least one other firm over the same group of customers, and also competition onside a company is usually stimulated for meeting and reaching higher quality of services or products that the company produce or develop.

Competition can have both beneficial and detrimental effects. Many evolutionary biologists view inter species and intra species competiton as the driving force of adaptation, and ultimately of evolution. However, some biologist, most famously **Richard Dawkins,** prefer to think of evolution in terms of competition between single genes, which have the welfare of the organism in mind only insofar as that welfare furthers their own selfish drives for replication. Some social Darwinists claim that competition also serves as a mechanism for termini the best suited group; politically, economically and ecologically Positively organism involved, and drain valuable recourses and energy. In the human species competition can be expensive on many leves, not only in lives

lost to war, physical injuries, and damaged psychological well beings, but also in the health effects from everyday civilian life caused by work stress, long work hours, abusive working relationship and poor working conditions, that detract from enjoyment of life even as such competition results in financial gain for the owners.

DEFINITION OF COMPETITION :

Competition in business can be defined as the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms. It was describedc by **Adam Smith** in The Wealth of Nations (1776) and later economists as allocating productive resources to their most highly valued uses and encouraging efficiency. The invisible hand that Adam Smith identified in 1776 ensures in most situations that free market economies left to their own devices will produce results more beneficial than can be realized by intervening in the markets. This conclusion has been supported by evidence put forward by economists over the last 200 years.

ADVANTAGES OF COMPETITION :

BENEFITS OF FAIR COMPETITION IN MARKETS :

Introduction :

Competition is an organized event where more than one person competes to win or be the best. Competition aims in leading the competitors. It is an attitude of being better than the other business groups. Competition in today business has developed an opportunity to benefit the public in many ways. In the fore coming chapters the meaning, the advantages to all sectors are discussed.

Meaning :

Competition leading to a healthy business environment is called as fair Competition based on the factors of price, quality, and service, it does not encourage monopoly powers, competitor bashing predatory pricing etc. Fair competition focuses on economic growth of a country.

To understand the strengths of the business, understanding completion and positioning is essential. Those who all compete for the customers time and money are competitors. Without competition the grocer may have no incentive

to lower prices. The business may have no reason to offer a range of choices and to offer.

Competition makes our economy work, by enforcing antitrust laws and suit helps to ensure that our markets are open and free, the government promotes healthy competion and anticompetitive business practices to make sure that consumers have access to quality goods and services, and those businesses can compete on the merits of their work.

KEEPING MARKETS COMPETITIVE : By challenging anticompetitive busincess practices, it helps the society to ensure that consumers have choices in price, selection, and service. To learn about competition problems, the business firms often receive information from consumers.

Free market economy, also known as capitalism. A competitive market place for the exchange of goods and service with a minimum of government regulation or interference characterizes capitalism, this type of system can provice an array of benefits to both businesses and consumers.

BENEFITS OF COMPETITION : Competition is the critical driver of performance and innovation. It benefits everyone by enabling to choose from an array of excellent products at affordable prices. Competition also encourages the adoption of innovation as companies evolve and new ideas flourish in the marketplace.

Consumers stand to gain the most from greater competition. Competitive markets encourage lower prices and greater choice.

Consumers :

Consumers stand to gain the most from greater competition. Fair and open competition means lower prices and greater choice, Consumers are considers as king of business in to days business world since they face heavy competition, that is the reason why consumers needs and desires are give importance by the companies. There are many benefits to the consumers due to competition in business as discussed below :

Lower Consumer Prices :

In competitive economic environment companies do battle with each other in an attempt to earn the consumers business. One common method companies. Lowr prices may come in the form of special sales promotions,

such as coupons or discounts, or the implementation of a pricing strategy where lower prices are an everyday occurrence.

Encouraging Innovation :

Innovation is the process of being creative in introducing new product or introducing existing product to the new market or introduction existing product or overtake the competition can result in a focus on innovation. A company that produces a unique product providing the consumer with a previously unavailiable benefit satisfying a need can gain a competitive edge. The company benefits by an increase in reveuse, and the consumer benefits by improving t\her quality of life.

Quality Service :

A competitive economic system benefits the consumer in better quality of service, Companies that may not be able to beat their impetigo's on price may instead focus on delivering superior customer service to strict and retain customers. By offering good quality of service the company can satisfy their customers and there by the company can earn the customer loyalty. The consumer benefits by being taken care of by the company.

Consumer Information :

Heightened competition means more information that is accessible to consumers to help them make informed decisions. In the age of the Internet consumers may log on to the websites of serveal competing companes to gather information that a 30 second television commercial cannot convey. By making comparisons, the consumer can feel more confident in his ultimate buying decision. Now days consumers are give chances to compare the benefirts offered by the companies, the companies even reach the door steps of the consumers at times.

Responsive to consumer wishes :

Business firms will more responsive to consumer wishes because which don't respond and react to consumers preferences will never stand in the market and that business will not be in consumers mind. The companies are more proactive in identifying the customers need and satisfying them.

Offering value added Services :

As competition is increasing the companies tries to offer value added services with the product, so that the companies are trying to differentiate themselves by their value added services.

Business :

Fair trade and open competition in the market enable vendors and manufacturers to deliver a greater variety of competitive products to their customers around the world and often results in lower prices and higher performance. When competition allows market forces to prevail, leading companies can offer the best products to a broader array of customers and c9nsumers Advantages to Business firms are as follows :

Lower Supplier Costs :

if the chain decision to pass the savings on to the consumer in the form of lower prices, the dead used also wins.

Up gradation in technology and in Innovative services :

Fair trade competition has given room for up gradation of technology, the consumers today are aware about the latest and advance technologies. They prefer companies offering latest and reliable technology. Hence the companies after in a to upgrade their technology so that the can serve better their customers.

Adopt to Glogbal consumer Tastes and Preferences :

it is clearly understood that only when a company maintains global standard in its products and services can survive in this competitive world. Moreover, when they are planning to get into global market they have to study the consumers, needs and preferences accordingly. The companies have to upgrade themselves at least for their benefits to get acceptance from their customers.

Government :

Competition pricing, product innovation and performance improvements copied with competitive practices help ensure that government authorities, get the best value for the public they serve. Furthermore, transparent and unbiased procurement practices are essential components for oepn government and a healthy free market economy.

Learn more about the benefits of vendor neutral procurement practices and download procurement guidelines.

Economies :

Regional and global economies will benefit from an environment of fair and open competition in the critical IT sector. For sample the IT sector, led by the semiconductor industry in which AMD participates, is the leading source of economic growth in the world economy, Competition and innovation in the microprocessor industry fuels growth in other industries and encourages economic development worldwide.

Conclusion :

New a day without fair competition consumer cannot get better products and service. Hence we can conclude that fairs competition is essential for the betterment of the consumers, companies and for the growth of economy.

DISADVANTAGES OF COMPETITION :

The disadvantages of competition are essentially the benefits of a monopoly, in perfect competition locative efficiency is achieved as it is a price taker to the firms are supplying to the level that normal profits can be madder. The firms in the market will only every achieve normal profits can be made. The firms in the market will only ever achieve normal profits because this is what is achieved at equilibrium level, as a perfectly competitive market is contestable and so if supernormal profits are being made in the short run more firm will enter the market as money can be made. Whereas if firms are making losses in the short run smaller or less rich firms will be forced out of the market.

Productive efficiency is not gained because price is dictated and so there is not change to gain a greater market share through dictating price and forcing other entrants out of the market.

Unfair COMPETITION :

Unjust and often illegal attempt to gain unfair competitive advantage through false, fraudulent, or in ethical commercial conduct. Examples include below cost selling, counterfeiting or limitation dumping, misleading advertising, rumor mongering, trademark of trade secret infringement.

Unfair competition in commercial law refers to a number of areas of law involving acts by one competitor of group of competitors which harm

another in the filed, and which may give rise to criminal offenses and civil causes of action. The most common actions falling unde the banner of unfair competition include.

- Matters pertaining to antitrust law, known in the European Union as competition law. Antitrust violations constituting unfair competition occur when one competitor attempts to force others out of the market (or prevent others from entering the market) through tactics such as predatory pricing or obtaining exclusive purchase rights to raw materials needed to make a competing product.
- Trademark infringement and passing off, which occur when the maker of a product uses a name, logo or other identifying characteristics to deceive consumers into thinking that they are buying the product of a competitor. In the United Sttes, this form of unfairs competition is prohibited under the common law and by state statutes and governed at the federal level by the Lanham Act.
- Misappropriation of trade secrets, which occurs when one competition uses espionage, bribery, or outright theft to obtain economically advantageous information in the possession of another. In the United States, this type of activity is forbidden by the Uniform Trade Secrets Act and the Economic Act of 1996.
- Trae libel, the spreading of false information about the quality or characteristics of a competitors products, is prohibited at common
- Tortious interference, which occurs when one competitor convinces a party having a relationship with another competitor to breach a contract with, or duty to, the other competitor is also prohibited at common law.

Various unfair business practices such as fraud, misrepresentation, and unconscionable contracts may be considered unfair competition, if they give one competitor an advantage over others. In the European Union, each member state must regulate unfair business practices in accordance with the principles laid down in the Unfair Commercial Practiced Directive, subject to transitional periods.

Development of competiton law :

Socialism and Competition :

For a long time, there remained a controversy with regard to compatibility of socialism with any form of competition between Kari Marx and Proudhon. Proudhon saw socialism essentially as a free association of small property owners of independent producers owing their means of production. He argued that necessary evil of capitalism is that it gives monopoly on the means of production to bankers and industrialist and thus, small business enterprises were ousted from the market. This in trun degraded the small artisan and peasants into wage slaves. In such a competiton, a genuine competition, with presupposed equality and freedom was impossible. He further argued that socialism would break the capitalist monopoly on the means of production; it would restore to the individual the tools monopoly on the mean of production; it would restore to the individual the tools of his labour; and thereby it would also restore competiton to its proper role. As per him, competition is inherent in human nature and therefore there can be no question of destroying competition. Therefore, socialism would represent the final synthesis between association and competiton. Marx on the other hand, replied to Proudhon's argument by relying on hypothesis that competition is emulation for proft. He argued historically, that very capitalism was not always competitive and in the beginning it was monopolistic. Only with its growth and consolidation, and with the development of modern industry, did monopoly find place to free trade and competition. But then free competition itself, progressively concentrating wealth in the hands of the few, tended towards monopoly. Competitive economic activity was thus characteristic only for a relatively short period in men's history' and from that period Proudhon mistakenly projected it into the past and future.

Issac Deutscher, Socilist Competition (1951) With this, almost a century ago, Karl Marx theorized that capitalism amidst its competitive splendor and glory capitalism has a natural tendency to become a global monoply. Describing capital accumulation as the basic tenet of capitalsim, Marx stated that competition contains the seed of future centralization, or rather, competition the demise of many small firms, the cannibalism of other competitors, and the ultimate evolution of monopoly power, Lenin, adopting a

more pragmatic approach, advocated that socialism is not against competition in fact socialism is the first system to create an opportunity for competition within the masses; to include the majority of workers into a task within which they shall be able to prove their best qabilities, Lenin considered the growing monopolization and cartelization in capitalist countries, and the ensuring artificial blocking of technical progress, as one of the important justification for a socialist revolution. This shows that social scientist like Marx and Lenin, were never against the competitive market, but they were considering the ruthless competition of big firm as a procuess for conglomeration of economic power.

Journey of Competition Law :

According to Raybould, the concept of monopoly is quite ancient and can be traced back to the civilizations of India and the Roman Empire B.C. The modern statutes controlling cartels and monopolies, however, first apeared in the United States in 1890. The development of competition law started with grant of individual freedom against existing guilds in the Europe in early 18th century. This shown that the roots of competition law are very deeply rooted.

The first traceable even of origin of competition law can be regarded as the book of Wallth of Nations of Smith, where he give the metaphor of the invisible hands. Smith argued that those who seek wealth by following their individual self interest, inadvertently stimulate the economy and assist society as a whole. According to him, the person intends only his own gain, and he is in this, led by an invisible hand to promote an end which was no part of his intention. Competition, which Smith conceptualized as a striving of all to maximize wealth, performed three functions. First, competition explained how prices, wages, and rents would be set provided all were free to enter any occupation Competition ensured that wages and prices of goods would be naturally set. Second the idea of competition explained how economic relations would function without State interference. The invisible hand of competition enssured that social welfare would be maximized. And third, competition provided a theory that justified whatever prices, wages, and rents were received, Smiths idea was that competition legitimated the distribution of wealth and income that resulted from market exchange. However, this was vehemently criticized by Kenneth Arrow and Gerard Debru, who received the Nobel Prize in

economics for their development of general equilibrium theory, which is another landmark in development of modern competition law. In general equilibrium theory, they claimed that any socially desirable outcome can be achieved by a competitive market.

Middle period of competition law began with the Standard Oil opinion's

The legality of an agreement or regulation cannot be determined by so simple a rest as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very ensure. The true test of legality is whether the restraint imposed is such as merely regulate and perhaps thereby promotes competiton or whether it is such as may of even destroy competition To determine that question the court must onbinarly consider the facts peculiar to the business to which the restraint is applied its conditions before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil beloved to exist, the reason for adopting the particular remedy, the purpose or end sought to the attained are all relevant facts.

However, the Sherman Act 1890 is considered as the rist attempt in the drafting or modern competiton law, which was an attempt to promote and preserve competion. The Act was enacted in response to the rising number of large scale bsuiness enterprise in the post civil war period and the growing number of trusts, which uses their power to oppress individuals and injure the public. The Act contained the well established principals of common law contracts or conspiracy in restraint of trade is void. Moreover, it has been suggested unconvincingly, that the Act is based in part on the Constitution of Zeno, Emperor of the East from 471 to 491, promulgated in 483. Roman legislation dealing with some aspects of competition predates to Constitution by over 500 years. An early example of competition law is the lex Juila de Annona enacted during the Roman Republic around 50 BC. Enforcement of the Sherman Act 1890 was not so strict unless 1897. When the Supreme Court decision on a trust of 18 railways, which fixed the price of transport of goods came up whereby the Court declared the price fixation anticompetitive volatile of Sherman Act. In the decision even the Court rejected the argument that price fixed was reasonable and it was done to unhealthy competiton between the

entities. The Court held that with the passage of the Sherman Act all price fixing agreements are void and it is not left on the Courts to decide which agreements are reasonable and which are not.

Classical and neo-classical competiton :

Classical and neo-classical competition differed in their taxonomy and its functioining. For classicists competiton meant both rivalry and freedom from constraints such as the exclusive privileges so common in the Mercantilist period, whereas in neoclassicism perfect competition is a state of affairs in which price is driven to marginal cost and firms are forfed to minimize their costs through innovation and growth to the optimal size, No-classicists described competition more ass a mean to exercise free choice between buyer and seller rather than an solely, by himself. Under this definition buyers and sellers were in competiton with each other, just as sellers competed among themselves. Further, anti-competitive conduct was identified as a restraint on inviduals freedom, rather than manipulation of the price/cost relationship.

Later on, the concept of competition was further changed and it was noted that competition is something which existed only among the buyers within a single market, or only among the sellers. The law kept close step with these about the restraints on indiviual freedom that contracts in restraint of trade entailed. At the same time, the law increasingly became concerned about arrangement such as price fixing, that were anti competitive in the neo classical sense.

According to classical political economy, competition itself was a form of liberty. People should be unrestrained in their decision about what calling to pursue what price to charge, or with whom to deal. But just as one could give up some liberty by entering into a contract, so also one could bargain sw2ay the right to compete. As Holmmes argued in his Northern Securities dissent, a voluntary merger should not be illegal merely because it eliminated competition between the parties. No one who was not a party to the bargain was forced to do something against her will.

Classical political economists were concerned expressly with public policy much more than their neoclassical followers. Moreover, classical theory

of theorizing competition as liberty of free selling and buying is based on the common law principles, which is discussed in later part of this chapter.

Competition Law and Common Law :

Common law is one of the main bases of emergence and crystallization of competition law. However, there is no as such common law of competition but there are areas in which the operating of common law impacts upon issues that are classily related to the public regulation of competition. Common law basically deals with fair competition which is primarily comprised of torts that cause are economic injury to a business, through a deceptive or wrongful business practice. Unfair competition is sometimes used to refer only to those torts that are meant to confuse consumers as to the source of the product, for example, tradesmen infringement litigation. In this context, it is quite different from competition law which involves monopolies and anti competitive activities of the market forces.

Earlier, Courts used common law to protect competition in the market while adjudicating upon the validity of any anti competitive agreement, the court had to satisfy itself that the person who had promised not to compete would not scholar Charles F. Beach identified why such contracts were void, he cited not a cause, but rather the general principle that it is the duty of the law making power to secure to every citizen the right to pursue his ordinary avocation and no dispose of his labor, or of the product thereof, without restraint, and to protect the public from the evil consequences of an agreement under which it would be deprived of the benefits of competition in skilled labor. The law of contracts and combinations in restraint of trade was one of the few areas of the common law where the courts expressly accommodated the nineteenth century states economic policy.

As stated earlier, Part I of the Sherman Act (sections 1 & 2) is primarily based on common law and the Sherman Act has been largely regarded as a codification of exiting common law principles in this regard. Even during the debate on the Sherman Bill, many a times, its backers assured the floor that their objective is federal enforcement of common law prohibitions on combination contracts, contracts in restraint of trade etc. After the codification, common law sphere in competition law has remained in residual notion but it

had strong force in development of competition la, Justice Oliver Wendell Holmes has also construed the Shereman Act as the embodiment of English common law against restraint of trade. The English common law sought to protect the liberty of people to practice their craft or trade. It did not prevent cooperation among competition as long as that cooperation did not exclude others from plying their trade.

Competition law rests on the basic set premises of doctrine of restraint of trade. Generally contract in restraint of trade are void because they are contrary to public policy interest. Primarily, restraint of trade relates to a situation in which a party agrees with any other party to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses. From the times of development of this doctrine, its judicial enforcement has been done on the basis of public interest or public policy. The law with respect to contracts in restraint of trade, had more than any other class of contracts, been molded by changing ideas of public policy.

The interpretation and enforcement of doctrine was inextricably linked with resistance to monopolize the market. Therefore, every contract of such a nature was struck down in the initial phase. It was early seventeenth century, wherein the concept of reasonableness started coming into picture while enforcing the doctrine. The test of reasonableness became a primary consideration in eighteenth and nineteenth centuries because of changing pattern of business, trade and commerce. The court, then, declined to adopt a strict definition of the doctoring stating that not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive, and if oppressive, it is in the eyes of the law, unreasonable. Whatever is injurious to the interest of the public is void on the grounds of public policy.

With further developments in the doctrine, the test of reasonableness became the overriding consideration of determining the validity of contract. In Eldridge et at v. Johns ton.

A contract imposing a restraint on competiton must be reasonable with regard to area and time if it is to be given effect? A promise is to be considered reasonable if it is not wider than is necessary for the protection of the parties

and is not injurious to public. If the restraint imposed is greater than is necessary for the protection of promises, it is invalid.

Presently, the application of doctrine of restraint of trade has been limited by the test of reasonability. However, whether a restraint is reasonable or not is to be considered in light of circumstances at the time when the restraint was imposed. At the same time, onus to prove the reasonability of the restrictions lies on the party claiming the benefit of restriction. In such a case, it is difficult to balance the interest of private parties on the one hand and public interest on the other. Lord Pearce held that:

“There is not, as some cases seem to suggest, a separation between what is reasonable on ground of public policy and what is reasonable between the parties. There is one broad question is it in the interest of community that this restraint should, as between the parties, be held to be reasonable and enforceable?

This was further crystallized on Texaco Ltd v Mulberry Filling Station Ltd wherein court held that:

Restraint of trade is part of the doctrine of common law and not of economics...... if it refers to the public at large, it might.......involve balancing a mass of conflicting economic, social and other interests which a court of law might be ill adapted to achieve, but more important, interest of the public at large would lack sufficiently specific formulation to be capable of judicial as contrasted with unregulated personal decision and application.... a decision varying, as Lord Eldon, LC, put it, like the length of the Chancellor's foot.)Texaco Ltd v Mulberry Filling Station Ltd. (1972) All Er 513).

Such an opinion by the court had the effect of limiting the scope of doctrine. Other limitation to the doctrine was provided by the doctrine of privities, which means only parties to the contract can invoke the doctrine. In this way, the.

During the nineteenth centruy, both law and economics began to develop therapies of competition as well as ideological defenses of competition as a social good. A though classicists, were concerned to preserve competiton, they did not understand that term as we understand it today. In both classical law and classical economics, competition carried a very different meaning.

Competition was not a theory about price/cost relationships, as it came to be in neo-classical economies. Nor was it a theory about the struggle for survival, as it was for some Social Darwinists during the Gilded Age. Rather competition was a belief about the role of individual self determination in directing the allocation of resources, it was a theory about the limits of state power to give privileges to one person or class as the expense of others.

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- Enhancement of efficiency in the market.
- Promoting consumer welfare.
- Avoidance of conglomeration of economic power, and
- Protection of smaller firms from anti competitive agreements

Specific goals :

The specific goal of competition law is the creation of a single market, which helps in bringing out lower price, better consumer welfare and libety to sellers and buyers. The single market relies chiefly on competition of goods and services.

The Celler Kefauver Amendment to the Claytons Act 1914 considered competition law as curbing the social evil of concentration. The amendment was introduced more on the ground of danger of increasing economic concentration rather than on the virtues of efficiency. However, apart from any classification, efficiency and consumer welfare are the primary goals of competition law, which are discussed herein.

Competition for efficiency :

In recent years, efficiency advocates have gained ascendancy, powerfully assisted by the perception that efficiency analysis is scientific and rigorous, as contrasted with the softer values of more inclusive approach that would encompass non-economic values. Efficiency is all about maximum utilization and best possible management of scarce resources in the society. Efficient resource allocation is the entrap idea of any economic market. There are three types of efficiency.

- Locative efficiency.
- Productive efficiency
- Dynamic efficiency.

Locative and productive efficiency are together known as static efficiency. Locative efficiency deals with optimal allocation of resources and productive efficiency deals with optimal production of resources. Thus, static efficiency aims at a better output with same input. State efficiency can be achieved in the market by enforcement of a competition policy that seeks to promote competitive pricing and present abuse of market power. This is based on the premise that monopoly or any other form of imperfect market structure leads to static inefficiency as the pricing of product is above the marginal cost resulting in monopoly profits.

Market prices are the signals from marginal consumers of the value they affication means this price reflects the cost of producing the goods. Allocative efficiency in a free enterprise economy can be achieved only if all firms are of efficient size to realize all significant economics of scale, and all markets are either competively structured (that is they comprise a significant number of producers with so one or few having market dominance) or entry barriers are low. In such come all producers are price takers, the market, not the producers, sets the price. The market focuses cause resources to move to the production of goods that consumer want, given the distribution of wealth. Prices move down to marginal cost, and output is optimal to serve consuer wants at that cost. Productive efficiency means optimal production of gods with available input i.e. use of the cost effective combination of productive resources available under present technology. This emphasize on making best possible use of input resources and emerging no wastage.

Dynamic efficiency refers to development ofnew products. This can be done gby ensuring proper reward to the inventor in lieu of developing and disclosing the invention to public. Out of these efficiencies, productive efficiency can be best measured because productive gains produce directly observable indicia. Such a removed manufacturing costs, that are capable of being assessed with precision. At the same time, dynamic efficiency is very difficult to measure. Static efficiency is achieved by strong price competiton. Locative efficiency is attained when prices are equated to marginal cost, which is a condition for perfect competition. This reveals an inherent tension between

static and dynamic efficiency. AS stated earlier, for static efficienc, the price should be equal to marginal cost. But in such a situatin. Dynamic efficient can never be achieved because the cost of producing a goods that has already been discoed is very low, the price charged would also be very low or virtually zero. Such market structure based purely on the competiton price mechanisms does not provide an incentive to innovate and to put in huge quantum of investments in research and development. A pricing policy based purely on competitive practices would thus make a socially desirable innovation non-excludable resulting in loss of potential incentives to innovate. This will discourage the inventor to develop the innovation into socially desirable product and diclose it to public. To put it in economics terms, the price of a product is based on its Total Fixed cost (TFC) and Total Variable Cost (TVC). Total Fixed Cost is the cost incurred in developing that product like cost of research and development. Total Variable Cost is the cost incurred in actual production of unit of that product like cost of raw material etc. In case of products which require a huge research and development expenditure. TFC is high and TVC will be very low, if price is kept equal to marginal cost, i.e. TVC the TFC put in by the inventor will not be compensated to him no one will put his resources into developing socially.

Competition should aim at achieving static as well as dynamic efficiency. The incentives provided to boost dynamic efficiency should be kept less than this overall social benefit arising from the incentive it provides to innovative activity. At the same time, Posner has argued that, since, in an economic analysis, we value competition because it promotes efficiency ··· i.e., as means rather than as a end --- it would seem that whenever monopoly would increase efficiency it should be tolerated, indeed encouraged. In short, the traditional view of competition as an important end in itself is turned on tis head. Competition is valued only when it serves wealth maximization. That is, competition is valued only as a means to increase the cumulative market value of private property. Posner's justification for competition, probably, rests on the lines of modern utilitarianism, which states, rule is good when by its effects society is better well off. However, ealth maximization might be one important.

There are three different approaches to analyze efficiency for the purpose of competition. Under the first approach, the nature of challenged activity and it impact on output is determined. Then the social wwlfare is measured, which is considered as dependent on producer and consumer welare. The proponent of this approach advocates that competition should reach only acts that artificially lower and thereby impair social welfare. Second approach relies on business autonomy, limited only by the clearest evidence that private actions waste resources. With increasing frequency, efficiency is defined in terms of business freedom maximizing, with only limited constraints, the freedom of autonomy of firms to engage in transactions of their choice. This conception assumes that business firm are profit maximizing and business behavior is efficient. Private decision making tends to maximize productive efficiency, because the firm itself knows how best to reduce costs and satisfy consumer. Competition among productively efficiency firms tends to maximize a locative efficiency, because the competitive measures exerted by such firms are the best spur to improve performance and to investment decisions that are responsive to consumer wants. By this approach, competition would have a yet narrower role. The third concept is preservation of competition as a process. This conception focuses upon rivalries interaction among numerous firms in free and open markets and products access and opportunity of firms without market power. This approach assumes that the process protected is likely to produce best result for consumers. It does not focus on consumer surplus marginal cost, or welfare loss. It centers, rather, on an environment that is conducive to vigorous rivalry and in turn, to efficiency and progressiveness.

Competition and consumer welfare :

The previous section conceptualized with competiton as a tool for promoting efficiency in the market. Many a times, competition has been used to of economics consumer welfare has been defined as consumer surplus, which is that part of total surplus that accrues to consumers. In other words, competition law is not concerned with maximizing of firms, rather it is concerned with market competition in order to increase welfare, not defending competition.

The previous section concludes that competiton aims at achiving efficiency in the society through promotion of inter firm rivalry. However, competition aims at achieving the result and a preferred means to achieve that. But can efficiency be considered as the only economic goal of competition or it is just a means to an end ? Prof. Joseph Brodley argues that the end result of competition in the enhancement of aggregate social wealth (economic efficiency) subject to the courted that consumers shall receive an appropriate share of such wealth consumer welfare). Thus competition policy enunciates a distinct economic objective, a blending of efficiency and consumer welfare to be achieved by a particular social instrumentality – inter firm rivalry. Because the economic retainable of competiton is neither economic efficency nor consumer welfare standing alone, is best described by a distinctive term competition welfare.

However, there may be situation where consumer welfare and incentive no innovate comes in contrast with reach other, Suppose for example, firm X is selling a new technology and has gained monopoly in the market. Firm Y steals the technology, et it registed as patent and ousts the firm X from the market. In the market, it doesnt mater to the consumers whether they are paying to X or Y. Even, they will prefere to pay Y if he charges a lower price. Competiton enforcement agencies that view the objective of competion as consumer welfare might not find any ground for intervention when one monopolist dislodges other by predatory tactics. In such cases if competition remedies are withhold, on the reason of consumer welfare, it will affect incentive for production and innovation badly. Furthermore, this will make investment in innovation risky. It also strengthens the incentive to monopolize by socially unproductive means such as theft of technologyl. Thus, the compettion policy and enforcement agencies should also ensure that consumer welfare by unfair competition shojld not be taken as a defence for not striking down an activity of a firm, which otherwise would have been.

Promotion of small business enterprises :

This is considered more of a non-economic and equity based goal of competition law. However, economics still argue that wholesale dissolution of firms that dominate their business would reduce concentration and work to

achieve the small business equity objective and this will lead to major efficiency.

Therefore, the question arises as to promotion of efficiency and balancing the efforts to promote efficiency against other goals of competition. This leads to the competition policy debate between Chicago and Harvard School which is discussed in the later part of this chapter.

Competition and Darwinism :

British economist, Herbert Spencer trie3d to introduce the phrase survival of fittest in 1851 through his much celebrated work Social Statics. It was not until his book titled Principles of Biology (1864) that Spencer coined the phrase Survival of the fittest that he would later apply to economics as well as biology. This was a key tenet of so-called social Darwinism, which refers to the idea that biological theories can be extended and applied to social realm. Just as competition between individual organisms drives biological evolutionary changes through survival of fittest, competition between individuals, groups, or nations driver social evolution in human societies. When extended to economics, Darwinism was subjected to criticism by communists and widely supported by capitalists. Communists argued that Darwinism results in ruthless competition and it completely, oust the small firms from the market Carnegies while applying the theory in competition noted that.

The law of competition be it benign or not, is here, we cannot evadance it, no substitutes for it have been found, and while the law may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department.

John D,. Rockefeller also noted that the growth of a large business is merely a survival of the fittest....the working out of a law of nature..... Robert Black in his book Corporate Darwinism successfully attempted to apply Darwinism to corporate world. He concluded that business also evolves like human evolution in predicted stages and this is natural. This swallows the competiton.

In an industry where there are a number of firms, both efficient and inefficient the competition between them will force the efficient firms to exit. Thus there will be only efficient firms which will be produce at a lower cost and

thus static efficiency of the market increases. However, in a market, when competition doesn't exist, al the firms will remain in the market increasing the cost of production because both efficient and inefficient firms exist in the market. Olley and Pakes carried out a study on productivity of telecommunication industry of usA in the period of 1963-87. They focused on estimating parameters of production function for the equipment industry and then use those estimates to analyze the evolution of plant level productivity. During a major part of twentieth century AT&T was given exclusive monopoly in the provision of telecommunication equipment to the network were allowed. After the divestiture of AT&T in 1982, seven regional Bell operating Companies were created and they were made free ao buy their equipments from any supplier, and which could not produce equipment themselves, effictively, completed the de-regulation process. Thus, there was a considerable entry and exit in 1967-1987 due to both domestic and foreign producers.

Econometric techniques used by Olley and Pakes revealed that it is the larger share in output of the more productive firms, which explains the rise in productivity in the industry the productivity growth that followed regulatory change seemed to result form the downsizing (frequently the shutdown) of (often order) unproductive plants, and the disproportionate growth of productive establishments (often new entrants).

Baily, Hulten and Camphell also found that more than entry and exit, productivity growth is mainly due to increasing output shares in high productively plants and decreasing output shares in low productivity ones. Similarly Barnes nad Haskel also noted that productivity increases due to entry or growth of more efficient plants and exit of less efficient plants are found to account for roughly 30-60% of productivity increase. The remaining increase is internal growth i.e. by improved productivity at the plant level.

It seems that an important role is played by competition in selecting the most efficient firms and exit of inefficient firms, thereby, raising productivity.

Policy debate – Harvard versus Chicago School :

The economies analysis of competition has been attempted by Chicago as well as Harvard School differently. Harvard is the first school of thought which emerged on this issue and it primarily advocates Structure Conduct

Performance Puradigm (S-C_P Paradigm). The S-C-P Paradigm was developed by Edward S. Mason (1949) at Harvard University in late 1939s and early 1949s. The S-C-P hypothesis primarily states that the succes of any industry (efficicency, consumer welfare, price etc.) is dependent upon the conduct of its market players il.e. Sellers and buyers. Conduct is based on the market structure, which is again dependent upon basic conditions such as government policy, taxation, technology and preference structure. This paradigm is based on study of specific industries. The proponents of this model argued that the limitation of market power should be reduced wherever this could be done without a correspondiing cost in the performance of the industry. They also argued that strong barriers to entry in an industry will lead to price increase and therefore should be avoided.

In contrast to Harvard School, Chicagoans were primarily reluctant to examine the welfare implications of structure of an industry and of barriers to entry paradigm argued by Harvard School was replaced by the Chicagoans with the argument that the monopolistic industry is the result of efficient production, superior performance and other factors which lead the firm to oust other firms from the market. In such a situation, the existence of monopolistic firm should not be attacked. Thus Bork argued that the real question for competition policy is whether artificial barriers, not being the result of more efficient production or economics of scale, prevent the effective operation of the market./

The debate between Harvard and Chicago School lies in the policy implications of barriers to entry. However, it is generally accepted that higher the barriers to entry that exist, the greater is the ability of the incumbent to ignore the potential competition. One of the most important attacks on the S-C-P doctrine of conducting antitrust policies was given again by stigler while investigating the role of barriers to entry. Often the Harvard tradition argued that fixedf costs were seen to lead scale economies on the one hand, but also to barriers to entry on the other. Stigler defines a barrier to entry as a cost of producing (at some or every rate of output) that must be borne by a firm which seeks to enter the industry but is not borne by firms already in the industry.

However, the thoughts of new industrial economic which is based on the Game Theory and Transaction Cost Analysis is not in the line with the Chicago School because they consider them empirically incorrect, New industrial economics states that in a monopolistic market, where the expected benefits otuweigh the likely costs, a profit maximizing firm will engage in strategic behaviour. For adherents to the new industrial economics one of the roles of competiton policy is to make the expected cost of such strategic behaviour sufficiently great to outweigh the expected benefits, thereby deterring such conduct.

MRTP – Its Feature

The MRTP Act 1969 :

The MRTP act 1969, aims at preventing the concentration of economic power in order to avoid damage. The act allows for the probation of monopolistic unfair and restrictive trade practices. This results in the control of monopolies and the consumer interest is thus protected, Monopolistc Trade Practice.

Practics such as monoplistc trade reflects misuse of one's power to abuse the term of production the sales of goods and services in the market. Emanating competiton from the market is the main objective of firms involved in monopolistic trade practice. They take advantage of their monopoly and charge reasonably high prices. They also deteriorate the product quality, limit technical development, prevent competition and adopt unfair trade practices. Unfair Trade Practice Unfair practices are cause due to :

- False representation and misleading advertisement of goods and services.
- Falsely reprise nting second hand goods as new.
- Unreliable representation regarding usefulness, need, quality, standard, style etc of goods and services.
- False claims or representation regarding price of goods and services.
- Giving false fcts regarding sponsorship, affiliation etc. of goods and service. Giving false or warrant on.

In order to maximize profits and to gain power in the market, traders often indulge in activities that have a tendency to block the flow of capital into production. These traders manipulate the conditions of delivdry to affect the flow of supplies leding to unfair costs.

FEATURES OF THE MRTP ACT, 1969

1. The name of the Act is Monopolies and Restrictive Trade Practices Act (MRTP Act) 1969.

   MRTP Act 1969 came into forice rom 01th June 1970 and has been amended in 1974, 1980, 1984 and 1991.

It extends to the whole of India except the State of Jammu and Kashmir.

Objectives :

- To control monopolies and monopolistic trade practices.
- Prevention of concentration of economic power in the few hands only.
- To regulate trade practices.

After the amendment of the act in 1984 another objective was introduced.

Regulation of Unfair Trade Practices

RTP Act dealt with following areas :

1. Monopolies V/s Concentration of economic power :
   a) the expansion establishment of new undertakings, diversifications Mergers and Amalgamations, of such units are subject to approval by Central Government.
   b) In exceptional cases the government can force an Industrial Undertaking to divide into number of smaller divisions.

Restrictive Trade Practices Act : The term Restrictive Trade Practice is used for any strategy used by the producers to restrict competition within a given market.

a) The Setting of minimum prices.
b) The refusal to supply retailers that stock the products of other competitors.
c) Setting different prices for different buyers (discriminatory pricing)

Unfair Trade Practices : Unfair Trade Practices means any trade practice which adopts one or more of the following practices :

a) **Making misleading advertisements**.

b) **Hoarding in order to push up the price leve**.

False representations.

The industrial policy statement of 1991 : bring drastic changes in the MRTP Act. These provisions were criticized very much because of their negative imput on growth and competition. So the following is an important issues regarding the new policy.

Prior approval of Central Government for establishment of new Undertakings, expansion of existing new undertakings, mergers, amalgamation, take over, and appointment of new Directors will no longer be required.

Relief Available under this Act :

a) This practice should ot be repeated.

b) The agreement relating thereto shall be void.

Any information relating to such unfair trade practice shall be disclosed.

This Act is ot applicable to :

a) Any undertaking owned or controlled by Central or State Government.

b) Any undertaking the management of which has been taken over by the government.

c) Any undertaking owned by the co-operative society.

Any financial institution.

MRTP Commission : The powers of the commission include the powers vested in the civil court. Powers of MRTP Commission also include :

- To direct an undertaking to discontinue a trade practice and not to repeat the same.

To grant temporary injunction restraining and undertaking from discontinuinan alleged trade practice.

Remedies Available Under MRTP Act :

a) To award compensation for loss suffered or injury sustained on account of Restrictive Trade Practices, Unfair Trade Practices or Monopolistc Trade Practices.

b) To direct the parties to issue corrective advertisements.

c) To recommend Central Government, division, undertakings if their working is pre-judicial to public interest.

Compensation.

Investigation & Enquiries Under MRTP Act 1969 : The MRTP Commission can be approached with a complaint/reference on Restrictive or Monopolistic or Unfair Trade Practices by :

a) An individual consumers.

b) A registered association of consumers.

A trade association.

REASONS FOR FAILURE OF MRTP

During the administration of the MRTP Act over three decades since its beginning in 1969, many difficulties were encountered, particularly in regard to interpretation of expressions and provisions therein. There has been a large number of binding rulings of the Supreme Court of India and Bench decision of the MRTP Commission. These decisions have interpreted the various provisions of the MRTP Act from time to time and have constituted precedents for the future. Thus, where the wording of the existing law has been considered inadequate by judicial pronouncements, it became necessary to redraft the law to explain the spirit of the law and the intention of the lawmakers.

A perusal of the MRTP Act will show that there is neiether definition nor even a mention of certain offending trade practices which are restrictive in character. Some illustrations of these are :

- Abuse of Dominance.
- Cartels, Collusion and Price Fixing.
- Bid Rigging
- Boycotts and Refusal to Deal.
- Predatory pricing.

Often an argument has been advanced that one particular generall provision (Section 2(o) of the MRTP Act may cover all anti-competition practices, as it defines an RTP as a trade practice which prevents, distorts or restricts competition and that therefore there is no need for a

new law. While complaints relating to anti competition practices could be tried under the generic definition of restrictive trade practice (which prevents, distorts or restricts competition), the absence of specification of identifiable anti competition practices gave room to different interpretations by different Courts of Law, with the result that the spirit of the law often escaped being captured and enforced. While a generic definition might to necessary and might form the substantive foundation of the law, it was considered necessary to indentify specific anti competition practices and define them so that ……. Would not obtain. Hence, the need for a new and better law was which gave birth to the competition Act, 2002.

The experience in administering the MRTP Act, for about three decades some 1969, the deficiencies noted in the said Act, the difficulties that arose out of different interpretations and judgments of the MRTP Commission and the Supreme Courts of Law and the new and changing economic milleu spurred by the UPG paradigm and the economic reforms of 1991 (and thereafter) impelled the need for a new competition law.

The need for a new law has its origin in Finance Ministers budget speech in February, 1999.

The MRTP Act has become obsoletes in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions.

HISTORY OF COMPETITION LAW

The history of competition law refers to attempts by government to repudiate competitive markets for goods and services, leading up to the modern competiton or antitrust laws around the world today. The earliest records traces buck to the efforts of Roman legislators to control price fluctuations and unfair trade practices. Through the Middle Ages in Europe Kings and Queens repeatedly down on monopolies, including

those created through state legislation. The English common law doctrine of restraint of trade became the precursor to modern Community competition laws after the Second World war. Increasingly the focus has moved to international competition enforcement in a globalised economy.

Laws governing competition law are found in over two millennia of history. Roman Emperors and Mediaeval monarchs alike used tariffs to stabilize prices or support local production. The formal study of competition began in earnest during the 18th century with such worlds as Adma Smith's. the Wealth of Nations. Different terms were used to describe this area of the law, including restrictive practices, the law of monopolies combination acts and the restraint of trade.

Modern competition law begins with the United States legislation of the Sherman Act of 1890 and Clayton Act of 1914. While other, particularly European, countries also had some form of regulation on monopolies and cartels, the U.S. codification on subsequent competition law development. Both after World War II and after the faill of the Berlin wall, competiton law has gone through phases of renewed attention and legislative updats around the world.

In 1957 six Western European countries signed the Treaty of the European Community (EC Treaty or Treaty of Rome), which over the last fifty years has grown into a European Union of nearly half a billion citizens. The European Community is the name for the economic and social pillar of EU law, under which competition law falls. Healthy competition is seen as an essential element in the creation of a common market free from restraints on trade. The first provision is Articule 81 EC, which deals with cartels and restrictive vertical agreements. Prohibited are :

(1)…all agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

The History of Competition Law can be studies under the following heads in details:

1. Earthy history
   a. Roman legislation
   b. Middle ages
   c. Renaissance developments
   d. Restraint of trade
2. Modern age
   a. United States antitrust
   International Enforcement

Competition law are found in ovr two millennia of history. Roman Mediaeval monarchs alike used tariffs to stabilize prices or support….. The formal study of competition began in earnest during the ….. with such works as Adman Smith's. The Wealth of Nations. Different …… to described this area of the law, including, restrictive practices. The law of monopolies, combination acts and the restraint of trade.

Roman legislation :

The ….. surviving example of modern competition law's ancestors…… in the Les Julia de Annona, enacted during the Roan Republic around …. The producer the corn trade, heavy fines were imposed on anyone directly, ….. and insidiously stopping supply ships (2) Under Diocletian, in 301 AD on Edict on maximum prices established a death penalty for anyone violating a tariff system for example by buying up, concealing or contriving the scarcity of everyday gounds. The most legislation came under the Constitution of Zeno of 483 AD which can be traced into Florentine Municipal laws, if 1322 and 1325. It provided for purports confiscation and banishment for any trade combinations or joint action of monopolies private or granted by the Emperor. Zeno rescinded all previously ground …. Rights. Justinian 1 also Europe slipped into the Dark Ages, so did the of law making until the Meddle Ages brought greater expansion of trade in the time of lex mercatoria.

Middle ages :

Edward III during the Black Death enacted the Statute of Laborers' to cap … and provide double damages against infringers Legislation of England to cannot monopolies and restrictive practices were in force well before the Norman Conquest . The Doomsday Book recorded that fore steel (i.e. forestalling, the practice of buying up goods before they reached market and then inflating the prices) was one of three forfeitures that King Edward the Confessor could regulate the market. Under Henry III, an Act was passed in 1266 to fix bread and ale prices in conceportence with corn prices laid down by the assizes. Penalties for breach included amercements, pillory and tumbrel. A fourteenth century statute enemies of the whole country-l Under King Edward III, the Statute of Laborers' of 1349 found wages of artificers and workmen and decreed that food stuffs should be sold … On ton of existing penalties, the statute stated that an idea that has been replicated in punitive treble damages under US antitrust law. Also under Edward III, the following statutory provision in the poetic language of the time outlawed trade combinations.

…we have ordined and established, that no merchant or other shall makes Confederacy, Conspiracy, Coin, Imagination or Murmur, of Evil Devices in any points that may turn to the Impeachment, Disturbance, Defeating or Decay of the said Staples, or of anything that to them pertains, or may pertain.

Exampls of legislation in Euope include the constitutions Juris metallictd by Wenceslas II of Bohemia between 1283 and 1305, condemning combination of ore traders increasing prices; the Municipal Statutes of Florence in 1322 and 1325 followed Zeno's legislation aginst stte monopolies, and under Emperor Charles V in the Holy Roman Empire a law was passed to prevent losses resulting from monopolis and improper contracts which many merchants and artisans made in the Netherlands. In 1553 King Henry VIII reintroduced tariffs for foodstuffs designed to stabilize prices in the face of fluctuations of supply from overseas. The legislation read here that whereas.

It is very hard and difficult to put certain prices to any such things… (if is necessary because) prices of such victuals be many times enhanced and raised by the Greedy Covetousness and Appetites of the Owners of such Victuals, by occasion of engrossing and rerating the same, more than upon any reasonable or just ground or cause, to the great damange and impoverishing of the King's subjects.

Around this time, organization representing various tradesmen and handcrafts people, known as guilds had been established and enjoyed many concessions and exemptions from the laws against monopolies. The privileges conferred were not abolished until the Municipal Corporations Act 1835.

Renaissance Developments :

Elizabeth I assured monopolies would not be abused in the early era of globalization.

Europe around the 15th century was changing quickly. The new world had just been opened up, overseas trade and plunder was pouring wealth through the international economy and attitudes among businessmen were shifting. In 1561 a system of Industrial Monopoly Licences, similar to modern patents had been introduced into England. But by the reign of Queen Elizabeth 1, the system was reputedly much abused and used merely to preserve priviletges, encouraging nothing new in the way of innovation or manufacture. When a protest was made in the House of Commons and a Bill was introduced, the Queen convinced the protesters to challenge the case in the courts. This was the catalyst for the Case of Monopolies or Darcy v Allin. Te plaintiff, an officer of the Queens household had been …. Infringement of this right. The court found the grant void and that three …. Of monopoly were:

1. price increases
2. quality decrease

   the tendency to reduce artificers to idleness and beggary.

This put a temporary end to complaints about monopoly, until King James ….. to grant them again. In 1623 Parliament passed the Statute

of Monopolies which for the most part excluded patent rights from tis prohibitions, as well as the guils. From King Charles 1. Through the civil war and to King Charles II, … continued, and were considered especially ueful for rasing revenue from to 1684. In East India Company Vs Sandys it was decided that exclusive ….. trade only outside the realm were legitimate on the grounds that only large …. Powerful concenrns could trade in the conditions prevailing overseas. In 1710, … eal with high coal prices caused by a Newcastle Coal Monopoly, the New Law was passed. Its provisions whether the same be in writing or not in writing (between) persons whatsoever concerned the said Coal trade, for grossing Coals, or for restraining or hindering any Person or Persons whomsoever from freely…. Disposing of Coals…. Re hereby declared to be illegal. When Adam Smith wrote the Wealth of Nations in 1776 he was somewhat cynical of the possibility for change.

To expect indeed that freedom of trade should ever be entirely restored in Great Britain is as absurd as to expect that Oceana or Utopia should evr be established in it. Not only the prejudices of the public, but what is more crumble, the private interests of many individuals irresistibly oppose it. The Member of Parliament who supports any proposal for strengthening this Monopoly is seen to acquire not only the reputation for understanding trade, but great popularity and influence with an order of men whose members and wealth render them of great importance.

Restraint of trade :

Judge Coke in the 17th century thought that genial restraints on trade were ….

The English law of restraint of trade is the direct predecessor to modern competition law. Its current use is small, given modern and economically oriented sources in most common law countries. Its approach was based on the two accepts of prohibiting agreements that ran counter to public policy, unless the blenches of an agreement could be shown. A restraint of trade is simply some kind of agreed provision that is designed to restrain another's trade. For example, Gun Co a

Swedish arms inventor promised or ammunition anywhere in the world, and would not compete with Maxim in an way.

To consider whether or not there is a restraint of trade in the first place both parties must have provided valuable consideration for their agreement. It Dyer's case a dyer had given a bond not to exercise his trade in the same tower as the plaintiff for six months but he plaintiff had promised nothing in return, On hearing the plaintiff's attempt to enforce this restraint, Hull J exclaimed.

Per Dieu, if the plaintiff were here, he should go to prison until he had paid a fine to the King.

The common law has evolved to reflevct changing business conditions. So in the 1613 case of Rogers v Parry a court held that a joiner who promised not to trade from his house for 21 years could have this bond enforced against him since the time and place was certain. It was also held that a man cannot bind himself to not use his trade generally by Chief Justice Coke. This was followed in Broad Jolyffe and Mitchell v Renolds where Lord Macclesifield asked, What does it signify to a tradesman in London what another does in Newcastle? In times of such slow communications, commerce around the country it seemed axiomatic that a general restraint served no legitimate purpose for one's business and ought to be void. But already in 1880 in Roussillon v Roussillon Lord Justice Fry stated that a restraint unlimited in space need not be void, since the real question was whether it went further than necessary for the promisee's protection. So in the Nordenfell case case Lord McNaughton rule that while one could validly promises to not make guns or ammunition anywhere in the world it was and unreasonable restraint to not compete with Maxim in any way. This approach in England was confirmed by the House of Lords in Mason Vs The Provident Supply and Clothing Co.

Modern age :

Modern competition law begins with the United States legislation of the Sherman Act of 1890 and the Clayton Act of 1914. While other, particularly European, countries also had some form of regulation on

monopolies and cartels the U.S. codification of the common law position on restrain of trade had at widespread effect on subsequent competiton law development. Both after World War Ii and after the fall of the Berlin wall, competition law has gone through phases of renewed attention and legislative updates around the world.

United States antitrust :

Standard Oil was one of the greatest companies to be broken up under United States antitrust laws. The American term anti-trust arose not because the U.S. statutes had anything to do with ordinary trust law, but because the large …. To democracy and the free market these represented led passage of … Shreman and Clayton Acts. These laws, in part, codified past American and…… common law of restraints of trade. Senator Hoar, an author of the Sherman ….. in debuted. We have affirmed the old doctrine of the common law in ….. to all interstate and international commercial transactions and have clothed .. United States cours with authority to enforce tht doctrine by injunction….. of the common law basis of the Sherman and Clayton Acts is found in … Oil of New Jersey Vs United States, where Chief Justice White explicitly…. The Sherman Act with the common law and sixteenth century English statutes….. The Act's wording also reelects common law. The first two sections as follows :

Sections 1. Every contract, combination in the form of trust or otherwise, …out …. In restraint of trade or commerce among the several Staes, or with …. Is declared to be illegal. Every person who shall make any contract for engage in any combination or conspiracy hereby to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine…

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by …

The Sherman Act did not have the immediate effects its authors intended, althroungh Republican President Theodore Roosevelt's federal government sued 45 companies and William Taft used it against 75 companies. The Clayton Act of 1914 was passed to supplement the Sherman Act, Specific categories of abusive conduct wre listed. Including price discrimination (secont 2) exclusive dealings (section 3) and mergers which substantially lessened competition (section 7). Section 6 ember… trae unions from the law's operation. Both the Sherman and Clayton Acts are now codified under title 15 of the United States Code.

- United States v Workingmen's Amalgamated Council 54 Fed 994 (CCA 5th 1893)
- United states v E.C. Knoght Company 156 I (1895)
- United States v Trans Missouri Freight Association 166 U.S. 290 (1897).
- Northern Securities Co. v United States, 193 U.S. 197 (1904)
- Loewe v Lawlar, 208 U.S. 274 (1908)

Duplex Printing Press Col v deering 254 U.S. 443 (1921)

Post War Consensus :

It was after the First World War that countries began to follow the United States lead in competition policy. In 1923, Canada introduced the Combination Investigation Act and in 1926 France reinformed its basic competiton provisions from the 1810 Code Napoleon. After World War II, the allies, led by the United States, introduced tight regulation of cartels and monopolies in occupied Germany and Japan. In Germany, despite the existence of laws against unfair competition passed in 1909 (Geselz gegen den unlauteren Wettbewerb or UWG) it was widely believed that the predominanace of large cartels of German industry had made it easier for the Nazis to assume total economic control simply by bribing on blackmailing the heads of a small number of industrial magates. Similarly in Japan where business was organized along family and nepotistic ties, the zaibatsu were easy for the government to manipulate into the war effort. Following World War II and the unconditional surrender of Japan and Germany, tighter controls replicating the existint American polices and regulations were introduced.

However, further developments were considerable overshadowed by the move towards nationalsation and industry wide planning in many countries. Making the economy and industry democratically accountable through direct government action became a priority. Coal industry, railroads, steel, electricity, water, health care and many other sectors were targeted for their special qualities of being natural monopolies. Commonwealth Kingdom introduced the (considerably less stringent) Restrictive Practices Act in 1956. Australia introduced its current Trade Practices Act in 1974, Recently however there has been a wave of updates, especially in Europe to harmonise legislation with contemporary competition law things.

European Union Law :

In 1957 six Western European countries signed the Treaty of the European Community (EC Traty or Treaty of Rome), which over the last fifty years has grown into a European Union of nearly half a billion citizens. The European Community is the name for the economic and social pillar of EU la, under which competition law falls. Healthy competition is sen as an essential element in the creation of a common market free from restraints on trae. The first provision is Article 81 EC, which deals with cartels and restrictive vertical agreements. Prohibited are …..

(1)…. All agreements between undertakings, decisions by association of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competiton within the common market….. are ….. void. However, just like the Statue of Monopolies 1623. Article 83(3) EC creates exemptions, if the collusion is for distributional or technological immolation , gives consumers a fair share of the benefit and does not include….. restraints (or disproportionate, in ECJ terminology) that risk…… competition anywhere. Article 82 eC deals with monopolies, or mre …. Firms who have a dominant market share and abuse that position. Unlike U.S. Antitrust, EC law has never been used to punish the existence of dominant firms but merely imposes a special responsibility to conduct oneself appropriately,…. Categories of abuse listed in Article 82 EC include price discrimination and …. Dealing, much the

same as sections 2 and 3 of the U.S. Clyton Act. Also under Article 82 EC, the Council of the Euuropean Union was empowered to …. A regulation to control mergers between firms, currently the latest known by the abbreviation of ECMR Reg. 139/2004. The general test is whether a economy….. (i..e. merger of acquisition) with a community dimension (i.e. affect a number of EU member states) might significantly impede effective competition. Again, Articles 86 and 87 EC regulate the state's role in the market. Article 86(2) EC states clearly that nothing in the rules can be used to obstruct a member state's right to deliver pubic services, but that otherwise public ent… prices must play by the same rules on collusion and abuse of dominance as everyone else. Article 87 EC, similar to Article 81 EC, lays down a general rule that eh state may not aid or subsidies private parties in distortion of free competiton, but then grants….. for things like charities, natural disasters or regional development.

International Enforcement :

Competition law has already been substantially international along the lines of the US model by nation states themselves, however the involvement of imm…. Organizations has been growin. Increasingly active at all International cpmferemces are the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Co-operation and Development (OECD), which is prone to making neo-libeal recommendations about the total application of competition law for public and private industries. Chapter 5 of the point war Havana Chrter contained an Anitrust code but this was never incorporated into the WTO's forerunner, the General Agreement on Tariffs and Trade 1947. Office of Fair Trading Director and Professor Richard Whish wrote … that it seems unlikely at the current stage of its development that the WTO will metamorphose into a global competiton authority. Despite that, at the emoting Doha round of trade talks for the World Trade Organization, discussion includes the prospect of competition law enforcement moving up to a global level. While it is incapable of enforcement itself, the newly established International.

Evolution of Competition Law in India

India after independence chose a centrally planned economic structure also referred to as the Nehruvian15 Socialism Model. The Nehrusian Model was a mixed economy model – a model that was nether a market economy like the United State of America nor a socialist economy one like the UsSR. Under the mixed modern both the private and public sector co-existed. The approach behind the mixed economy model was to ensure that the Government played a significant role in capital formation in the country in order to promote an inclusive economic growth and social justice. To promote economic objective, the Governement reserved for itself strategic industries

such as mining, electricity and heavy industries, service public interest. The functiona of the private sectors wre made subject to Industrial (Department and Regulation) Act of 1951 (IDRA). The IDRA empowered the Government to regulate almost evry aspect of the functioning of private sector viz, size of plant and production size, price of goods produced and its distribution foreign trade and exchange control, labor issues etc. Despite the laudable oals or the Nehruvian model, the result was unsatisfactory. While the objective of the industrial licensing system was to direct resources in socially desired directions it however resulted in giving discretionary power to government authorities to control investment decisions of private industries, resulting in trade barriers on competition and reduction in efficiency and consequently, the growth of the economy. This compelled the Government to initiate reformation of India economy, the reform wave began in mid-1980s, co-incidentally during the regiment of Mr. Nehru's grandson Rajiv Gandhi. The limited reforms of 1980s were followed by wholesale reforms in the year 199l. In the wake of 1991 balance of payment crisis another round of wide ranging economic reforms were initiated under the guidance of the the finance minister and present Prime Minister of India Mr. Manmodan Singh. The reforms beginning 1991 were not a one off event and every since 1991 many more rounds of reforms have been rolled out year after year the usher India into a market based economy. These reforms have to a varying extend influenced every aspect of economic policy inducing reforms of economic legislation.

As discussed, the Nehruvian model was a mixed economy model, but was tilting more towards socialistic pattern of economic growth with the objective being economic growth with social justice. Despite more than a decade a independence, it was apparent to every one including Mr. Nehru that the the professed model was not yelding desired results. Economy was growing at the rate of less than 3% per annum and income growth was around 1.75%. The growth rate, often disparagingly referred to as the Hindu rate of growth was not enound… big business hourses were emerging because of the planned economy…. Practiced by the Government and recommended looking at Industrial …. Subsequently on account of such recommendations made by the ….. Committee, the Government constituted the Monopolies Inquiry Commission (MIC) in 1964 to enquire into the extent of qnd effect of connectration of power in the private sector and the prevalence of monopolistic practices in India. The MIC found a high level of concentration of economic power in ovr 85 percent of industrial items in India. The MiC also found that the then licensing policy in due country had enabled big business houses to secure a disproportionately bigger… of passed to enable the Government to control concentration of economic power in Indian industry. The MRTP

Act was notified in the year 1970 and in August 1930, the MRTP Commission was set up.

The MRTP Act : Predecessor of the Competition Act, 2002

The MRTP Act was the operative competition law of India until it was repealed in the year, 2009. It is important understand the MRTP Act 1969 to (a) determine the context in which Indian legislature enacted new competition legislation (b) the kind of cases that were brought under MRTP Act and finally, (c) to understand the competition law jurisprudence developed over the last four deedless by the Supreme Court and the MRTP.

The preamble provided that the MRTP Act is an Act to provide that the operation of the economic system does not result in the concertration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The MRTP Act aimed at preventing (a) economic power concentration in a few hands and curbing monopolistic behavior and (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect economizers as well as to avoid concentration of wealth.

The MRTP Act was a precursor to the Cmpetitionn Act and sought to legislate over issues relatintg to restrictive and monopolistic trade practices. There are areas of similarities between the MRTP Act and the competiton Act. The primary distinction between the enactments stems from the legislative objective. While the thrust of the Competition Act is to promote competition the objective of the MRTP Act was to prevent economic concentration and restrictive trade practices.

Even in respect of merger control provisions currently found in the ……. Undertakings were typically called MRTP companies, MRTP companies were under obligation to seek prior approval of the Government before expanding the operations in any manner including through merger and acquisitions. This, in addition to acting as check on abuse of dominance also acted as a merger contract provision, Howevr, the emphasis on economic concentration got removed in 1991 when all such provisions were omitted.

Chapter IV of the MRTP Act dealt with Monopolistic Trade Practice (MTP). The MRTP Commission was empowered to inquire into the workings of a undertaking and they were of the opinion that there should be such an act liberty Competition Law in India.

FEATURES AND OBJECTIVES OF COMPETITION LAW

In 1969 Govt. has passed an act and it had given the name monopoly and restrictive trade practices (MRTP). It became popular with the name of MRTP 1969. This act has many provisions to control the monopoly and to promote the competition. It has defined MRTP and also explained the powers of MRTP commission. But its scope was very narrow and Govt. of India has made new act called competition act 2002. On the place of MRTP ACT 1969 after this MRTP act 1969 was fully repealed.

Explannation of Competition Act 2002 : Competition Act 2992 states than Indian traders must not do any activity for promoting monopoly. If they will do any activity in the form of production, distribution, price fixation for increasing monopoly and this will be against this act and will be void. This act is very helpful for increasing good competiton in Indian economy. Under this act following are restricted practice and these practices are stopped by this act.

1. **Prie Fixing :** If two or more supplier fixes the same price for supply the goods then it will be restricted practice.
2. Bid ragging : **If two or more supplier exchange sensitive information of bid, then it will also be restricted practice and against competition.**
3. Re-sale price fixation : **If a producer sells the goods to the distributors on the condition that he will not sell any other price which is not fixed by producer.**
4. Exclusive dealing : **This is also restricted practice. If a distributor purchases the goods on the condition that supplier will not supply the goods any other distributor.**

Above all activities promote monopoly so under competition act these and void and action of competition will not entertain by civil court.

Establishment of Competition Commission Under this law

Govt. of India appoints the chairman and other member of competition commission. Competition act 2002 gives the rules and regulation regarding establishment and functions of this commission.

Qualification of chairperson of Competition Commission

He or she should be judge of high court + 15 years or more experience

1. To stop activity and practice which are promoting monopoly.
2. To promote the competition.

3. To protect the interest of consumers.

India is doing all work, for safeguarding the interest of consumer and this how is one of the important pillar in this way.

NEW SHAPE OF THE OLD LAW

After the Act was placed on the web-site and came into the public domain, ….. often asked is whether it is not still the old law in substance although not in form. A clear answer to this question is in the title of this section. The Act … new wime in a new bottle. The differences between the old law (namely the MRTP Act 1969) and the new law (the Competition Act, 2002) may perhaps be …… in the form of a table displayed below :

MRTP Act 1969	Competition Act 2002
1. Based on the pre-reforms scenario. 2.Based on size as a factor. 3. Competition offences implicit or not defined. 4. Complex in arrangement and language. 5. 14 per se offences negating the principles of natural justice. 6. Frowns upon dominance. 7. Registration of agreements. 8. No combinations regulation. 9.Competition Commission appointed by the Government. 10. Vry little administrative and financial autonomy for 11. No competition advocacy role for the Competition Commission. 12. No penalties for offences. 13. Reasctive and rigid. 14. Unfairm trade practices covered	Based on the post reforms. Scenario. Based on structure as a factor. Competition offences explicity and defined. Simple in arrangement and language easily comprehensible. 4 per se offences and all the rest subjected to rule of reason. Frowns upon abuse of dominance No requirement of registration of agreements. Combinations regulated beyond a high threshold limit. Competition Commission selected by a Collegium (search committee) Relatively more autonomy for the Competition Commission. Competition Commission has Competition advocacy role. Penalties for offences Proactive qand flexible Unfair trade practices omitted.

The Act is therefore a new wine in a new bottle. Wine gets better as it ages. The extant MRTP Act 1969 has aged for more than three decades and has given birth to the new law (the Act) in line with the changed and changing economic scenario in

India and rest of the world and in line with the current economic thinking comprising liberalization, privatization and globalization.

Rubric of the new law, Competition Act, 2002 (Act)

There are three areas of enformcement that provide the focus for most competition laws in the world today :

- Agreements among enterprises.
- Abuse of dominance.
- Mergers or, more generally, combinations among enterprises.

There are, however, differences in emphasis and interpretations across countries and over time within countries. The above mentioned three areas are not mutually exclusive and there is considerable overlap between them. A number of actions that constitute abuse of dominance could infringe the law regarding agreements among enterprises. The actions are similar though the causes might be different. In one case, it maybe the joint action of one or more undertakings that is in question, whereas in another, it may be the action of one dominant undertaking that is the driving force. The concern with mergers is ultimately a concern with market power and the possible abuse of that market power by the merged entity. In spite of this, most laws deal with this separately. One reason for this is that it might be difficult to deal with the situation after the fact. In spite of the inevitable duplication that follows from this classification, it provides a useful taxonomy for organizing the thinking about competition law.

The rubic of the new law, Competition Act,. 2002 (Act, for brief) has essentially four compartments :

- Anti Competition Agreements
- Abuse of Dominance
- Combinations Regulation
- Competition Advocacy

These four compartments are described in the narrative that follows:

Anti – Competition Agreements

Firms enter into agreements, which may have the potential of restricting competition. A scqan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms.

The of ….. agreements is the cartel. Vertical agreements are pernicious, if they one …... firms in a position of dominance. Most competition laws view vertical agreements generally more leniently that horizontal agreements, as, prima facie, ….. agreements are more likely to reduce competition than agreements business firms in a purchaser – seller relationship.

Types of Agreements

Horizontal Agreements :

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal dealing in the same product or products. But the market for the product (s) is critical to the question, of the agree,ment trenches the law. The Act has taken care to define relevant market. To attract the provison of law, the products must be subcri.... if parties to the agreement are both producers or retailers (or ul...) they will be deemed to be at the same stage of the production chain.

A specific goal of competition policy/law is and needs to be the prevention of economic agents from distorting the competitive process eitherf through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It needs to control agreements among competing ….. (horizontal agreements) on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes (vertical agreements, for example between a manufacturer and wholesaler) which are likely to harm competition (…..less harmful than horizontal agreements) need to be addressed in the competition policy/law. The foremost constituent of any competition policy/law is ….. the objective to foster competition and its obverse is the need to deal effictively agaisnt practices and conduct that subvert competiton. The Act reckons these propositions.

In general the rule of reason test is required for establishing that an agreement is illegal. However, for certain kinds of agreements, the presumption is generally that they cannot serve any useful or pro-competitive purpose. Becauseof this presumptin, the law makers do not subject such agreements to the rule of reason test. They place such agreements in the per se illegal

category (please see need section). The Act presumes that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services have an apreciable adverse effect on competition :

2. Agreements regarding prices. These include all agreements that directly or indirectly fix the purchase or sale price.
3. Agreements regarding bids (collusive bidding or bid rigging). Then include tenders submitted as a result of any joint activity or agreement.
4. Agreements regarding market sharing. These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way.

Per Se Illegality :

Such horizontal agreements, which include membership of cartels, and presumed to lead to unreasonable restrictions of competition and aere therefore presumed to have an appreciable adverse effect on competition. In other words they are per se illegal. This provision of per se illegality is rooted in the provision of the US law and has a parallel in most legislations on the subject. The Australian law prohibits price flexing arrangements, boycotts and some forms of exclusive dealing. The new UK competition law, namely, Competiton Act, 2000, endorses certain agreements to have an appreciable effect on competition (presumption is however rebuttable). A per se illegality would mean that there would be very limited scope for discretion and interpretation on the part of the prosecuting and adjudicating authorities. The underlying principal in such presumption of illegality is that the agreements in question have an appreciable anti competitive effect Barring the aforesaid four types of agreements, all the other will be subject to the rule of reason test in the Act.

Vertical Agreements :

By and large, as noted earlier, vertical agreements will not be subjected to the rigours of competition law. However, where a vertical agreeemnt has

then character of distorting or preventing competiton, it will be placed under the surveillance of the law.

For instance, the following types of agreements, inter alia, will be subjected to the rule of reason test.

- Tie – in arrangements
- Exclusive supply agreements
- Exclusinve distribution agreements
- Refusal to deal;
- Resale price maintenance.

The act the following factors to be taken into account for adjudicatory purposes to determine whether an agreement or a practice has an appreciable

- driving excising competitors out of the market.
- Foreclosure of competition by hindering enter into the market.
- Accrual of benefits to consumers.
- Improvements in production or distribution of goods or provision of services and
- promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Exceptions

The provisions relating to anti-competition agreements will not restrict the sight of any person to restrain any infringement of intellectual property rights or to impose such reasonable conditions as may be necessary for the purposes of ··· any of his rights which have been or may be conferred upon him under the following intellectual property right statutes :

- the copyright Act 1957
- the Patents Act, 1970
- the trade and Merchandise marks Act 1958 or the Trade Marks Act 1999.
- the Geographical indications of goods (Registration and Protection) Act, 1999.
- the Designs Act, 2000;

the Semi conductor Integrated Circuits Layout Design Act, 2000.

The rationale for this exception is that the bundle of rights that are unconsumed in intellectual property rights should not be disturbed in the interest of conafivity and intellectual/innovative power of the human mind. No doubt, this handle of rights essays an anti-competition character, ever bordering on monopoly power. But without protecting such rights, there will be no incentive for innovation, area technology and enhancement in the quality of products and services. However, a maybe noted, that the Act does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or ….. of goods and services will fall within the contours of competition law as long as they are not in reasonable juxta position with the bundle of rights that to with intellectual property rights.

Yes another exception to the applicability of the provision relating to anti competition agreements is the right of any person to export goods from India, to most jurisdictions, export cartels are exempted from the application of competition law. A justification for this exemption is that most countries do not desire any shackles on their export effort in the interest of balance of trade and/or balance of payments. Holistically, however, exemption of export cartels is against the concept of free competition.

The Central Government has power under the Act to exempt from the application of the Act, or any provision thereof, a class of enterprises, a practice an agreement etc. This has been given a treatment later in this paper (seel section titled Exemptions).

Abuse of Dominance :

Dominant Position has been appropriately defined in the Act in terms of the position of strength, enjoyed, by an enterprise, in the relevant market, in India which enables it to (I) operate independently of competition forces prevailing in the relevant market; or (ii) affect its competition or consumers or the relevant market, in its favour. This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20% with the remaining

80% diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key revelry in the market, Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape (like in the first example above) or result in unnecessary litigation (like in the second examples above). Hence, in a dynamic changing economic environment, a static arithmetical figure to define dominance may, perhaps, be an aberration. With this suggested broad definition, the Regulatory Authority will have the freedom to fix errant undertakings and encourage competitive market practices, even if there is a large player around. Abuse of dominance is key for the Act, in so far as dominantenter prises are concerned.

It is important to note that the Act has been designed in such a way that its provisions on this count take effect, if dominance is clearly established. As already stated, there is no single objective market share criterion that can been blindly used as a test of dominance. The Act seeks to ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on the count could endanger large efficient firms.

Product Market And Geographical Market :

Before assessing whether an undertaking is dominant, it is important, as ……… side the relevant product market includes all such substitutes that ……. Would switch to, if the price of the product relevant to the….. were to increase. From the supply side, this would include all … who could, with their facilities, switch to the production of such…. Goods. The geopgraphical bounderies of the relevant market can be …. Deflued. Geographic dimension involves identification of the geographical ….within which competition takes place. Relevant geographic markets could be …. International or occasionally even global, depending upon the facts …. Came. Some factors relevant to geographic dimension are consumption and….. transportation costs, perish ability and existence of barriers to …. Of products between adjoining geographic areas. For example, in view off the high transportation costs in cement, the relevant geographical market market may his the …. Close to the manufacturing facility.

The Act posits the factors that would have to be considered by the….. Authority in determining the Relevant Product Market and the …. Geographic market, reproduced herein below :

Relevant Product Market :

- **physical characteristics or end-use of goods,**
- **price of goods or service.**
- **Consumer preferences**
- **Exclusion of in-house production.**
- **Existence of specialized producers.**
- **Classification of industrial products.**

Relevant Geographic Market :

- Regulatory trade barriers
- Local specification requirements
- National procurement policies.
- Adequate distribution facilities.
- Transport costs
- Language
- Consumer preference
- Need for secure or regular supplies or rapid after sales services.

The determination of relevant market by the adjudicating Authority has to be done, haing due regard to the relevant product markt and the relevant geographic market.

Predatory Pricing :

One of the most pernicious forms of abuse of dominance is the practices of predatory pricing. Predatory pricing occurs, whre a dominant enterprices charges low prices over a long enough period of time so as to drive a competition from the market or deter others from entering the market and then raises prices to recoup its losses. The greater the diversification of the activities of the enterprices in terms of products and markets and the greater its financial resources, the greater is its ability to engage in predatory behavior.

Predatory price is defined in the Act to mean sale of goods of provison of services, at a price which is below the cost, as may be determined by

regulations, of production of the goods or provision of services, with a view to reduce competiton or eliminate the competitors (the expression regulations mean the regulations made by the commission under the Act), Predatory pricing therefore is a situation where a firm with market power prices below cost so as to drive competitors out of the market and, in this way, acquire or maintains position of dominance. In reality, predation is only established after the fact i.e. once the rival has left the markt and the predator has acquired a monopoly position in the market. However, any law to prevent is meaningful, only if it takes effect before the fact ile. Before the competitor has left the market.

Predatory pricing is s kind of Antitrust violation The Monopolies and Restrictive Trade Practices Commission in India in the Modern Food Industries Ltd. (MRTP) Commission 1996) case observed that the essence of predatory pricing is pricing below cost with a view to eliminating a rival. Further, the Commission made it clear that the mere offer of a pric lower than the cowt of production cannot automatically lead to an indictment of predatory pricing and that evidence of malaise intent to drive competitors out of business or to eliminate competition is required. The logic underlying the caution of the Commission is that price cutting may be for genuine reasons, for example in the case of inventory surplus. Price cutting has therefore to be coupled with the meens rea of eliminating a competitor or competiton to become an offence under competition law (Act).

The Act outlaws predatory pricing as an abuse of dominance :

Distingushing predatory behavior from legitimate competition is difficult. The distinction between low prices, which result from predatory behavior and low prices, which result from legitimate competitive behavior is often very thing and not easily ascertainable.

When does abuse of dominance attract the law ?

The key issue is the extent to which these arrangements foreclose the to manufacturers (inter brand rivalry) or retailers (intra brand rivalry) and …. No which these raise rivals costs and/or dampen existing competition. Of with arrangements need to be weighed against the benefits. For come of

these restraints help to overcome the free rider problem and allow …. Of scale economics in retailing.

Further proceedings to the next compartment, a listing of factory. From the ……… dominance and constituting abuse of dmoninace has been herein below:

Dominance is determined by taking into account one or more of the following :

- market share of the enterprise.
- Since and resources of the enterprise.
- Sine and importance of the competitors.
- Economic power of the enterprise including commercial advantages over competitors.
- Vertical integration of the enterprise, or sale of service network of such enterprise.
- Dependence of consumers on the enterrise.
- Monopoly or dominant positon whether acquired as a result of any statue or by virtue of being a Government company or a public sector undertaking or otherwise.
- Costry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economics of scale, high cost of substitutable goods or service for consumers.
- Countervailing buying power.
- Market structure and size of market.
- Social obligations and social costs.
- Relative advantage, by wa of the contributions to the economics development, by the enterise enjoying a dominant position having or likely to have an appreciable adverse effect on competition.
- Any other factor which the Commission may consider relevant for the inquiry.

Abuse of dominance having an appreciable advrse effect on competiton incurs of an enterprise.

- Directly or indirectly, imposes unfair or discriminatory :

1. Condition I purchase or sale of goods or service, or
2. Pric4e in purchase or sale (including predatory price) of good of service.

- Limits or restricts :

1. Productin of goods or provison of services or markt thereof or
2. Technical or scientific development relating to goods or service to the prejudice of consumers of

- Indulges in practice or practices resulting in denial of markt access or
- Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- Uses its dominant positing in one relevant market to enter into, on protect, other relevant market.

It may therefore be seen that the Act does not frown upon dominance as such but frowns upon abuse of dominance.

MERGER AND COMPETITON LAW

Iderger is a restructuring tool available to Indian conglomerates aiming to…. Unt diversify their businesses for various reasons whether it is to gain ….. advantage, reduce cost or unlock values. In commercial parlance, …. Essentially means an arrangement whereby one or more existing companies … their identity into another existing company or form a distinct new entity.

Mergers is the aspects of corporate strategy, corporate finance and ….. decaling with the buying, selling, dividing and combining of different…. And similar entities that can help an enterprise grow rapidly in its sector … business of orgin, or a new field or new location, without reacting a subsidiary, .. … or using a joint venture. Mergers and acquisitions activity can… as a type of restructuring in that they result in some entity reorganization with the aim to provide growth or positive value. Consolidation of an industry or …. Occurs when widespread M&A activity concentrates the resources of many …. Companies into a few larger ones.

Merger and Competition Law :

The raison d'etre of having in place legal framework on completion is to … deal with the aspect of mergers and therir effect on completion. Corporate reorganizations in the form of mergers may be in line with the …. Of dynamic competition and are capable of increasing the ….. of the industry. However, mergers can have an appalling effect it can raise competition concerns and the same shall be seen in this chapter. In India, the legislative provisions governing mergers of companies are contained in section 190 through to 396A of the Companies Act 1956. Section 5 of the Competatries Act deals with the aspect of combinations and merger is included within with… of combination. Particularly, section 5© of the Competition Act describes the mode in which a combination may be brought through a merger.

Types of mergers :

In this section an apercu would be shown as to the types of mergers the manner in which that they could effect competition.

Horizontal mergers :

A horizontal merger is one between parties that are competiton at the say level of production and/or distribution of a goods or service, i.e. in the same relevant market. The focus of analysis is on evaluating how the competition incentives of the merging parties and their rivals might change as a result of the meager. The merging parties may realize efficiency gains and in some circumstance this mayintensify rivalry and be beneficial for consumers. It is the competiton authorities task to ensure that the merger is not likely to enable firms to has consumers or customers (where products or services are nto sold directly to consumers), ieg., by profitable raising prices, reducing quality or restriction innovation. There are two mainstreams theories that are prevalent as regards to competitive harm of the horizontal mergers viz.

1. **Unilateral effects/non co-ordinate effects :** It arises where, as result of the merger, competiton between the products of the margin firms eliminated, allowing the merged entity to unilaterally exersice markt power, instance by profitably raising the price of one or both merging

parties, products thus harming consumers. In theory, all horizontal mergers involve firms active the same relevant market and therefore remove some competitive constraint: critical issue is how to distinguish economically important competitive constraint from unimportant ones.

On-ordinate Effects : It arises where under certain market condition the merger increases the probability that, post merger, merging parties and the competitors will successfully be able to coordinate their behavior in an and competitive way, for example, by raising prices. The main issue, here, is not and competitive way, for examples, by raising prices. The main issue, here, is not to market power of the merging parties resulting from the merger, but, instead whether the merger will create or strengthen certain market conditions which allow firms in the market (not only the merged entity) to successfully co-ordinate the actions to the disadvantage of consumers.

Non-horizontal mergers :

There are two forms of non-horizontal mergers viz vertical and conglomerate.

Vertical mergers :

They are those between firms that operate at different but complementation levels in the chain of production and/or distribution of the same final product. ….. in vertical integration and a single firm now performs both stages….. mergers can potentially generate substantial efficiencies and …. A cause for concern. In some cases, however, vertical mergers no competition issues. The vertically integrated merged entity may …. The ability of rival to compete by excluding them from a market….. costs, when such actions harm consumer welfare, they are anti-competition… Furthermore, as a result of the vertical merger, the potential for price….. may increase. Since a vertical merger is between parties….. compete in the same relevant market, it does not have the ….. effect of reducing the number of horizontal competition. ….. mergers have significant potential to create efficiencies and are …. Internalizing those activities as technology changes over … minimize transactions costs associated with performing …. Activities. A vertical merger can result in an increase in market….. because of either a unilateral or a co-

ordinated effect. A unilateral effect… in a non horizontal merger if products of other producers post merger are….. as attractive substitutes as they were pre-merger, thereby creating market….. for the merging firm. This might result because the products of competitors ….. have lower quality or higher prices, or because competitors are …. Or prevented from entry. The realization of the efficiencies from vertical … may be expected over time to reduce productin and internal organizational … thereby allow more and higher quality products to be produced at lower …. A vertical merger can have anti-competitive effects if it enables…. Integrated merged entity to constrain a rival's ability to compete either ….. is from an upstream or downstream market or by raising its costs … a very thus permits the merged entity to exercise market power. The anti-competitive belivor of the megerd entity can increase rivals, costs and eventually….will lead the rival to raise their prices to consumers, thereby enabling the …. Responsible for the rivals cost increase to raise its prices as well. …. Merger can increase the likelihood of successful price or output co-…. By altering incentives and abilities to collude within either the relevant … market or the relevant downstream market or both. Such concerns may …. Example. Vertical integration increases market transparency, cross… or multi-market contacts between firms in one or more key dimensions…. (e.g. price, output, capacity, or quality) or decreases the likelihood of market entry. A co-ordinate effect occurs if, post-merger, it is easier for the … frims, or some subset, to enhance co-ordinatin and the collective… of market power. For example, if vertical integration affords the merged…. Knowledge of selling prices in another market together with other…….

1. **FEAR OF FORECLOSURE :** There can be a case of caption distribution channels. This will foreclose the rival.
2. **ENTEY BLOCKING : Monopolies have the ability to create barriers to centry into the market. There can be a case of collective foreclosure where the stop a potential entrant from entering into the market and hence, the potentrants capital requirement would be high.**

   PRICE SQUEEZES : Vertical mergers and integration internalize of process of productin and enable a firm to reduce costs. This would

result in the reduction of the output prices, which is interpreted as a price squeeze.

Conglomerate Mergers :

It involves firms that operate in different product markets, without vertical relationship. They may be product extension mergers, i.e., mergers between firms that produce different but related products or pure conglomerate merger Le. Mergers between firms operating in entirely different markets. Conglomerate mergers are neither horizontal nor vertical. It is usefl to adopt a three was classification for conglomerate mergers based on the relationship of the product involved. These are meregers between complementary products, neighboriers products, and unrelated products.

A conglomerate merger may lead to economies in production, distribution research, management, selling, or capital costs that might, among other think enable the merged firm and similarly structured firms to drive less efficient competitors out of the market. The aras of conglomerate merger can be defined as an area which involves all acquisitions other than.

1, Acquisition by a producer of the stock or assets of a firm products an identical product or close substitute and selling it in the same geographical market – the simple horizontal merger; and

2. acquisition of the stock or assets of a firm that buys the product social by the acquirer of sells a product bought by the acquirer – the simple vertical merger.

The area range from the pure conglomerate, in which there are discernible economic relationships between the businesses of the acquiring and acquired firm, through a variety of mixed conglomerate, involving horizontal vertical economic relationships other than those characteristic of the simple merger just described. Mixed conglomerates include acquisition of a firm producing same product as the acquirer but selling it in a different geographic market, acquisition of a company manufacturing a different product which is never held.

In a merger involving complementary products, customers assemble…. Into systems that are ultimately consumed. A second type of ….. involving related products occurs when the products of the firms are complements, but

are in neighboring markets. In some cases there may be …. Associated with providing consumers with a range of products. While the products in a range are substitutes or independent, demand at the level of the … depend on the extent of its product range. Where the locus of competition….. firms involves consumers considering the range of products produced by firm, then from the perspective of the firm the products will be complements. A conglomerate merger involves the acquisition of products that are not … on the demand or supply side it is a merger in which there is not a horizontal, complementary or neighborhood relationship between the products. In the focus is on mergers between companies that are active in related or ….. markets, e.g., meregers involving suppliers of complementary products on of products belonging to a range of products that is generally sold to the same of customers.

The objections which are raised in relation to conglomerate mereger are…. The phenomenon of theory of deep pockets wherein it is said that the firms … in multifarious fields can devastate their rivals due to their capital at their and thus they can participate in predatory pricing and raising barriers to entry wherein due to indefinite capital in their hand and they can indulge in various …. Like illegal typing and bundling and such kind of mergers can lead to the …. Of entry barriers. The other competition concerns are that the acquired firm may be operated at lowr cost as part of a large enterprise… the merger may achiever economic of scale in production, distribution, research, selling, management, or capital costs that will enable it to drive less efficient smaller competitions out of business; a diversified firm may charge abnormally low prices for its newly acquired product line, either with the conscious purpose of driving smaller competing firms out of business or for other less predatory reasons; the substantiation of a large firm as the owner of one of many competing small enterprises … competition because of adverse effects (a) on the competitive behavior of the other small firms – they may compete less vigorously that before, not wishing to provoke massive and deadly retaliation; and (b) on entry of new competitors who, other things being equal, may be less enthusiastic if they must … on a giant; The acquisition may lessen potential competition either (a) because the acquiring firm would have entered the industry in any event by internal …. Of its own facilities, so that acquisition

reduces the number of competitors by one; or (b) because the acquiring firm, although it might not have … was a sufficient threat to existing firms to exert a competitive influence products because of reciprocity effects – companies that would like to seal Product A to the conglomerate may unilaterally decide to reciprocate by purchasing the requirements of Product B from it. The same would be an ideal case of typing, which is aginst the spirit of competition.

Pre-notification :

Parties to the proposed merger, acquisition or combination, as the case may be must determine as to whether the proposed transaction triggers the applicable threshold limits as prescribed under the laws of the countries depending upon the size of the parties or the turnover. In case wherein the:

No person shall acquire, directly or indicrectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under sub-sectio n (d)(1) of this section and the waiting period described in sub-section (6X1) of this section has expired, if –

The acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affection commerce; and

As a result of such acquisition, the acquiring person would hold as aggregate total amount of the voting securities and assets of the acquired person –

(A) In excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19(a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross nationa product for the year ending September 30, 2003); or

(B) Ii) in excess of $50,000,000 (as so sadjusted and published) but not in excess of $200,000,000 (as so adjusted and published) and (ii) Ii) any voting securities or assets of a person engages in manufacturing which has annual has annual net sales or total assets on $10,000,000 (as so adjusted and published) or more are being

acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; (II) any voting securities or assets of a person not engaged if manufacturing which has total sadists of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more or (III) any voting securities outght to be filed before the applicable competition authorities the scheme of the proposed combination before the competiton commission which would look into the aspect of competitive concerns of the proposed merger taking into account the merger specific efficiencies and once the applicable authorities give the permission, the scheme of the merger/combination is to be carried on. The applicable threshold limits applicable in India are given under section 5(c) of the Competitin Act, which reads as any merger or amalgamation in which -

The enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have –

(A) Either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees, three thousand crores; or

(B) In India or outside India, in aggregate, the assets of the value of more than five hundred million US dammars or turnover more than fifteen hundred million US dollars; or

The group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger of the amalgamation, as the case may be, have or would have –

Either in India, the assets of the value of more than rupees four – thousand crores or turnover more than rupees twelve thousand crores; or

In India or outside India, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars.

Under the aegis of the Competition Act, it was an option left with the Indian Comapnaies to notify to the CCI if the merger triggers the applicable threshold limits work for approval Section 6(2) of the unlamented Competition Act used the work … instead of shall. However, there have been necessary changes been carried out under the Competition Act by the Competition (Amendment) Bill 2007 which … passed by both the Huses of Parliament which is followed… Assent. Under the Act, it has been made mandatory for trhe companies on … before the Competiton Commission of India their scheme of merger. Section 6(2) as amended by the Competition (Amendment) Act 2007 reads as;

Subject to the provision contained in sub-section (1), and person or shall give notice determined, by regulations, disclosing the details of the proposed combination within thirty days of –

- Approval of the proposal relating to merger or amalgamation, reference to in clause (c) of
- Execution of any agreement or other document for acquisition reference to in clause (a) of section 5 or acquiring of control referred to in clause (6) that section:

(2A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31 whichever is earlier.

The changes that have been brought vide the amendment is that –

- Prior intimating to the Commission, of any combination amongst companies, groups or persons, has been made mandatory. However, such a intimating of such a combination has to be done if the same triggers the threshold limit as provided under section 5 of the Competition Act.
- Once the intimation is received by the Commission, it will do all that is necessary and give its ruling within a maximum period of 210 dyas. In fact the time required would be much less since the limit of 210 days would also take into account a situation where the Commission orders

an enquiry. Where no enquiry is found to be necessary, the time taken would be less than half of this limit.

CCI has also promulgated a draft of the Competition Commission (Combinations) Regulations (Regulations) which seeks to govern combinations. Under the Competiton (Amendment) Act 2007 (Amendment Act) which received. Presidential assent towards the end of 2007 brought significant changes to the Competition Law regime in India. Most noteworthy of the changes proposed by the Amendment Act was the introduction of a mandatory notification process for persons undertaking combinations above prescribed threshold limits. As mentioned above, under the Competition (Amendment) Act 2007 introduced a waiting period of 210 days within which the CCI is required to pass its order with respect to the notice received, failing which, the proposed combination is deemed to been approved. The Regulations provides for certain kinds of combination that are excluded from the ambit of combination that are likely to have an appreciable impact on competition in India. Further the regulations also provides for the modus operandi for the reporting to the CCI for a proposed combination.

Exempted transactions :

The Regulations provides for certain transactions from the purview of combination and from the regulatory ambit of the CCI. Some of the key …. That have been exempted include :

- An acquisition of shares or voting rights as investment or in the ordinary course of business, of not more than twenty six percent of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordinance with the execution of any document including a share holders agreement or articles of associations.
- An acquisition of assets, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent the entire business operations in a

particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

Further, it is to be noted that acquisitions as listed under (i) and (ii) above, should be acquisitions which are made solely as an investment or in the ordinary course of business and which do not lead to control of the company by such acquirer.

- An acquisition of or acquiring of control or merger or amalgamation where the minimum assets or turnover, in India, of rupees five hundred crores or rupees fifteen hundred crores respectively, but does not include assets of rupees two hundred cores of turnover of rupees six hundred cores, respectively, of each of at least two of the parties to the combination; or
- An acquisition of shares or wonting rights where, prior to such acquisition the acquirer holds more than 50% of the shares or voting rights in the enterprise of which further shares or voting rights are being acquired; or
- An acquisition of control or shares or voting rightx or assets resulting form gift or intestate or testamentary succession or transfer by a settler to an irrevocable trust.
- An acquisition of current assets in the ordinary course of business;
- An acquisition of shares or voting rights by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting.
- An acquisition of shares or voting rights pursuant to a bonus or rights issue or sub-division of shares;
- An acquisition in pursuant to an order of Competition Commission of India.
- As acquisition by the Central Government or a State Government;
- Any acquisition, acquiring of control, merger or amalgamation, which is specifically exempt under any othe statute made by the Parliament.

The filing requirement :

The Competition Act makes it mandatory to notify the CCI in the events of any combination but it does specify any mannerism of such notification. These Regulations seeks to provide for a mannerism of notifying the CCI.

The proposes notice should be either in Form 1 or Form 1 and the said notice for the combination shold be filed with CCI within 30 days of the date of execution of any agreement or other document for acquisition of voting rights or acquisition of control.

It is provided that in case of an acquisition or acquiring of control, the acquirer shall file the notice with the CCI. However, in the event that the enterprise being acquired is being acquired without its consent, the acquire shall furnish information, relating to the enterprise being acquired, available with the acquirer.

In case of a merger or an amalgamation, all persons, or enterprises to the combination, who or which propose such merger or amalgamation, as the case may be, shall jointly file the notice.

The manner in which the analysis of merger and whether the same is anti-competitive is contemplated in India is shown :

Does the combination trigger the limits set in the Act?

The combination does not need any scrutiny or investigation,

Merger qualifies for investigation.

Procedure prescribed under section 29 would apply.

Suo moto enquiry by the Competition Commission.

3 Analyzing mergers and competition law.

Competition authorities generally have the responsibility to intervence when …. A merger to have an anticompetitive outcome. It is implicit in the …. Above that basic merger analysis relies on understanding the effects that …may have on the expected state of competiton in a market. Although … agreements such as horizontal price fixing and market allocation, are …. Anti-competitive that each is illegal per se without inquiry into …it has actually caused, other combinations, such as mergers, joint ventures … vertical agreements hold the promise of increasing a firm's efficiency…. It to compete more effectively and thus, are judged under a rule of … i.e. an inquiry into market power and market

structure designed to assess … combination's actual effect. The key to the offence is the determination of whether a combination has caused or is likely to cause an appreciable adverse effect … competition within India. The factors that the competition authorities must take … whilst determining whether a combination would have an appreciable … effects on competition are specified in section 20(4) of the Competition Act.

Sections 20(4) of the Competition Act reads as :

For the purpose of determining whether a combination would have the efficient of or is likely to have an appreciable adverse effect on competition in the … market, the Commission shall have due reard to all or any of the following namely :

- Actual and potential level of competition through imports in the market.
- Extent of barriers to entry into the market.
- Level of combination in the market.
- Degree of countervailing power in the market;
- Likelihood that he combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- Extent of effective competition likely to sustain in a market;
- Extent to which substitutes are available or are likely to be available in the market.

- Likelihood that the combination would result in the removal of an vigorous and effective competitor or competition in the market.
- Nature and extent of vertical integration in the market;
- Possibility of a failing business.
- Nature and extent of innovation;
- Relative advantage, by wa of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The Competition laws of various countries use the words combination on concentration, which includes the aspect of merger, amalgamation or joint ventures (Section 5 of the competition Act, 2002 (India). Section 7 of the clayton Act (USA)]. The competitive effect of the merger rests on the understanding of the competitive constraints under which the firm operates and one has to analyze by using various mechanisms whether the merger would result in competitive harm. The ultimate purpose is to determine shether the merger is likely to create on enhance market power or to facilitate its exercise. It is to be noted that while undergoing an appraisal of the merger, only merger sector efficiencies should be considered, i.e. only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anti-competitive effects. Hence, as a humbly rule, thee should be laid down certain parameters for the Competition Commission to decIde as to whether the merger is against competition.

Definitions

Market Definition :

The starting position for identifying the scope of competition involves identifying products, which are substitutable from the point of view of customers. This is the purpose of market definition. A market geneally includes a group of products, which compete with one another within a geographic ares. When conducting market definition analysis, it is generally practical to describe the relevant product market and relevant geographic market. The analysis of the market definition is important for two reasons.

1. **Defining Market :** The exercise of defining markets provides a useful analytical framework in which to organize the analysis of the effects of the merger on competition. Firms in the relevant market offer the most immediate and direct competition to the merged entity. Products may be differentiated within a relevant …. Will raise prices significantly. In this sense, market definition sets…. On which competition takes place.

   Market shares : The most widely used proxy for the determination…. Or possible existence of market power can be calculated only after …. Of

the market has been defined. As an initial indicator, when the combined … market share of the merged entity is expected to be high, competition… might arise. According to established judicial pronouncements, very large …. 50% or more may in themselves be evidence of existence of dominant. Conversely, when market shares are low (especially if they are low under… alternative definitions of the relevant market), then as mentioned. Possible to dismiss any concerns or the need for substantial further . Under the EC Merger Regulation, the substantive appraisal test ….is used is that whether the concentration would significantly impede … competition in the common market or in a substantial part of it, in … as a result of creating or strengthening dominant position and one of the … measure dominant position is to measure the aspect of market shares. …. Been pointed out that even a merger can raise competiton concerns … of the post merger share would be less than 50% in vie of factors like strength … member of competition, the presence of capacity constraints or the extent to … the products are substitutes. It has been observed that while determining … of the product market, demand side and supply side substitutability… taken into account.

Demand Side Substitutability :

Demand side substitutability assesses the extent to which customes could… switch among substitute products in response to a change in relative…. Quality or availability or other features. The approach that is taken into in by applying the hypothetical monopolist test, wherein it is considered.. … firm is the only supplier of the product or group of products. The question to be answered is whether a monopoly supplier (the hypothetical) of these products would maximize its profits by consistently charging prices. The aspect of hypothetical monopolist was laid down in the case … decision wherein it was observed. No matter how the boundaries… drawn in terms of products or areas, there is a single tes: If, within the … market, prices were appreciably raised or volume curtailed, would supply.. in such amounts as to restore approximately the old price and output? If … is yes, then there is not market, and the definition must be expanded. … is no the market is at least not wider. If

it would be no even…. Definition, then the narrower definition must be used. Any other… of definition, is not so much wrong as meaningless **United States v** it does have monopoly power ovr that market. Monopoly power is the power to control prices or exclude completion. It seems apparent that the Font's power to set the price of cellophane has been limited only by the competition afforded by other flexible packaging materials… The trial counter consequently had to determine whether competiton from other flexible wrapping materials preented du pont from possessing monopoly power ….)-I.

Market definition is not a jurisdictional prerequisite, or an issue having own significance under the statute; it is merely an aid for determining whether power exists. To define a market in product and geographic tems is to say the if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources, count not be expected to enter promptly enough and in large enough amounts to the old price or volume. If sufficient supply would promptly enter from other geographic area, then the defined market is not wide enogh in geographic terms if sufficient supply would promptly enter in the form of products made by other producers which had not been included in the product market as defined, then the market would not be wide enough in defined product terms. A relevant market then, is the narrowest markt, which is wide enough so that products from adjaceed area or from other producers in the same area cannot compete on substantial parties with those included in the market.

The hypothetical monopolist paradigm began to crystallize in anti trust scholarship with the publication of the Sullivan treatise in 1977 wherein it was observed: Market definition is not a jurisdictional prerequisite, or an issue having its own signifience under the statute; it is merely as aid for determining whether power exists. To define a market in product and geographic tems is to say that if prics were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources court not be expected to enter promptly enough and in large enough amounts to resto the old price or volue. If sufficient supply would promptly enter from other geographic areas, then the defined market is not wide enough in geographic terms if sufficient supply would promptly enter in the form of

products made by other producers which had not been included in the product market as defined, then the market would not be wide enough in defined product terms. A relevant market then, is the narrowest market which is wide enough so that products from adjaced area or from other producers in the same area cannot compete on substantial parity with those include in the market. This test is also commonly referred to as the SSPIP test where SSNIP stands for small, but significant non transitory increase in price. The next closest product should be added to the scope of the market and the test should be applied again. By repeating the process, own eventually be reached where a hypothetical monopolist supplying the or services in question would achieve market power, i.e., the hypothetical would maximize profits by maintaining prices above prevailing levels.

Supply Side Substitutability :

In examines the extent to which supplies of alternative products could and… their existing production facilities to make altenative products in to a change in relative prices, demand or other market conditions.

The next factor that needs consideration is the aspect of geographical. The geographic market is an area within which reasonable substitution for parties products can occur, i.e. to which customers can look for. One approach of definition geographic market is to conceptually consider… area where a hypothetical monopolist would maximize its profits by at least a small but significant and non transitory increase in price. The … market may be local or reginal, national, continent wide or worldwide …. Wheter the geographic market should be defined more widely … data on imports may be informative. Imports can exercise a … constraint such that the market may be defined wider than national.

Critical Loss Analysis :

Critical loss analysis is used in the definition of the relevant market. Critical… analysis as introduced by **Harris and Sions** who define the critical loss.

Fine any given price increase as the percentage los in sales necessary to the specified price increase unprofitable. It has gained increasing importance competition law mainly cause market definition plays a crucial role in assessing

anti-competitive practices of firms. The accuracy and outcome of the market process can substantially alter the assessment by the competition of competitive harm since the evaluation of the degree of competiton law is market crucially depends on how the boundaries of the market, in product geographic terms, determine the presence and effect of competitive .

Critical loss analysis makes the SSNIP test operationa. Critical loss anaylsis much the hypothetical omopolist's sales would have to fall in order the hypothetical price increase unprofitable. Some consumer's substitute to rival firms products in response to the increase in price. However, there is an offsetting positive effect on profits as the hypothetical monopolist now earns higher margins on all of the remaining sales. If the negative effect on profits is greater than the positive effect, then the price increase will be unprofitable for the hypothetical monopolist, and the relevant market is wider. The critical loss is the percentage reduction in quantity such that these two effects just balance. If the reduction in unit sales is greater than the critical loss, then the price increase will reduce profits. If the reduction in unit sales is less then the critical loss, the price increase will increase profits for the hypothetical monopolist, and the relevant market must not be expanded. Critical loss analysis estimates the necessary percentage price increase of a product, for the resulting percentage loss in unit sales to make the price increase unprofitable. According to critical loss analysis, the larger the profit margins are the greater is the reduction in profits from sales lost after a price increase. Thus, it takes a smaller critical loss to make given price increase by hypothetical monopolist unprofitable. Fro any given price increase, the critical loss is smaller the higher the gross profit margin. This is because when the gross margin is higher, there is a larger negative effect on profit arising fro the fall in sales (caused by the increase in price). Thus, profit margin determine the amount of substitution needed to expand a provisional relevant market definition. The computational method used to calculate the critical loss is given be the following formula :

Critical Loss : Y

Y + PCM

Where Y is the hypothesized percentage price increase and PCM is the price cost margin, i.e. percentage incremental profit margin, which is equal to initial price minus the average cost and this outcome divided by the initial price. The two merger cases are illustrative of the prominent role critical elasticity and critical loss analysis now plays. In FTC Vs Swedish Match. The opposing economic expert both relied on critical elasticity analysis, and while the court ultimately found nether expert's evidence persuasive, it did discuss this evidence in some detail, and the court relied on its own simple critical loss analysis, concluding that it cannot be unprofitable for the hypothetical monopolist to raise price… because the hypothetical monopolist would lose only a small amount of buinsess. I United Sttes Vs Sungard Data Systems, Inc., the court referred to the defendant contention that the critical loss was very low and rejected the government proposed market because it had not been shown tha the customers who would not switch in the face of a price increase wre substantial enough that a hypothetical monopolist would find it profitable to impose such an increase is price.

Market structure and concentration:

One of the key india of analyzing whether merger is against competition … of market structure and concentration which can be analyzed from… mentioned three perspectives.

1. Market **Sharer :** An important indicator is the combined share of the… i.e. the sum of their pre-merger shares. The combined share of… parties and the increment in market share resulting from the merger … considered as useful screens for possible unilateral effects scenarios. To compare the combined market share with those of other market … creating a high market share for the merging firms are those that … th riase competition issues. It is generally the case that merger … combined market share may be cleared fairly quickly.
2. **Concentration Ratios :** Concentration ratios measure the aggregate share of a small number of the leading firms in a market. Concentration of the first three (CR3) or four (CR4) or five (CR5) firms are usually. They

are absolute measures of concentration and take no account of.. in the relative size of the firms that make up the leading group.

3. **Herfindahl-hirschman Index (HHH) :** The HHI is calculated by the squares of the market shares of all the firms active in the market reflects both the number of firms in the market and their relative the absolute level of HHI and the change in HHI as a result of the merger … an indication of whether a merger is likely to raise competition. The increase in HHI (or delta) can be calculated by subtracting the pre-transaction HHI from the post transaction HHI. For example: In a thee are six firms. Firm A (with 20 per cent market share) merges (with 5 per cent share). Three of the other four firms each have 20 shares and one has 15 per cent. The post-mereer HHI is : 25/2 + 20/2 + 20/2 -15/2 = 2.050. The pre-merger HHI is 20 + 20+20+20+15 = 2.050. The increase in HHI (or delta) = 200. It has been stated by the commission that there are normally o competition concerns in a market the post merger HHI is less than 1000 and there exists normally no concerns in amarket where the post merger is between 1000 and 2000 below 250 or a merger with a post merger HHI above 2000 and delta 1.50. In accordance with the US Merger Guidelines, any market with an HII tham 1000 is deemed unconcentrated: one between 1000 and 2000 is concentrated and any market with an HHI of above 1800 is highly. Need to figure out their own concentration thresholds, if any, India for example traditionally has a very concentrated market in many industries.

Non coordinated effects :

Unilateal effects, also known as non coordinated effects, refer to situatin where the anti competitive effects of the merger flow from coordinated action by market participantsl In particular unilateral effects where as a result of the merger, the merging firms are above to exercise merger powr, of example, by profitably raising price, or reducing output or quality variety (or changing any other competitive parameter) as a result of the eliminate of competiton between the merging parties themselves. Generally, merger gives rise to such non coordinated effects would impede effective competitive creating or strengthening the dominant position of the enterprise, which typie would have

an appreciable market share. Furthermore, it has been seen that degree of substitutability between the merging firm products, the more likely that the merged firm would increase the price. It has been observed that unilast effects can occur in at least two different market settings.

- Where the combining firms products, while competitive with a other, are not perfect substitutes.
- Where the products of the combining firms are very similar and two firms are distinguished primarily by their capacities, giving the merged the ability to suppress output and raise prices.

However there are broad competitive constraints on the effective a coordinated manner of the merged firm activities.

- **Low Barriers To Entry or Expansion :** Entry by new competition (expansion by existing competitors may be sufficient in time, scope and likely to deter or defeat any attempt by the merging parties to exploit the reduction rivalry following the merger.
- **Buyer Power :** The competitive pressure on a supplier is not exercised by competitors but can also come from its customers. Even firms very high market shares may not be in a position, post merger, to exercise may power if customers possess countervailing buyer power. In the come countervailing buyer power means the bargaining strength that the buyer has a-vis the seeler in commercial negotiations due to its size, its comment significance to the seller and its ability to switch to alternative supplier. Countervailing powr may also exist where a buyer is capable of producing supplied product itself (through vertically integrating) or alternatively, direct importing the product. The factors to consider in making an assessment of but larger is able to refuse to buy products produced by the supplier or (in of durable goods) delay purchases. It is more likely that large and… will possess this type of countervailing buyer power than… in a fragmented market. Furthermore, buyer power cannot sufficiently adheres effects of a merger if its only applies in relation to certain. Finally, it is not sufficient that buyer power exists prior. Is must also exist and remain effective following the merger.

1. Repositining of Competition : In some cases, competitors can …. Increasing output (if spare capacity is a available) or repositioning in … a constraint on the parties ost merger.
2. Alternative Suppliers Exist To Whom Customers Are Willing to : is a number of alternative to whom a significant number are willing to turn, the threat of losing these customers may be enough … on th merging parties.
3. **Potential competitor/new Entrant** : Some firms … of an influence on the competitive process than their market shares or ….. would suggest. A merger involving such a firm may change the …. Dynamics in a significant, anti competitive way, in particular when the is already concentrated. For instance, a firm may be recent entrant that to exert significant competitive pressure in the future on the other firms. In markets where innovation is an important competitive force, a relatively small market share may nevertheless be an important force if it has promissin pipeling products.
4. **Merged Entity Able To Hinder Expansion By Competitors** : Post the merged entity may be in a position where it would have the ability and to make the expansion of smaller firms and potential competitors more . For instance, the merged entity may have such a degree of control, or over, the supply of inputs or distribution possibilities so that expansion by rival firms may be more costly. Similarly, the merged entity's control or other types of intellectual property (e.g., brands) may make .. or entry by rivals more difficult. In markets where interoperability infrastructures or platforms is important, a merger may give the … ability and incentive to raise the costs or decrease the quality of its rivals.

Co-ordinate effects :

Co-ordinate effects ,au arise where a merger reduces competitive in a market, thus creating or strengthening the conditions that facilitate of coonpetitors to co-ordinate their competitive in analyzing decrease in the number of players in the relevant market, it would increase possibility of collusion, or co-ordination, between the enterprises. This would also have the effect of enabling the remaining enterprises to ensure adherence to written or

unwritten understanding between them as it would now be a small group, as well as lead to a decrease in the sources and kinds of evidence that authorities could look for while investigation suspected co-ordination.

The main question in analyzing co-ordinate effects should be whther merger materially increases the likelihood that firms in the markt will successful co-ordinate their behavior or strengthen existing co-ordination. [Airtours Commision (2002) ECR II 2585]. In assessing the lkeihood of co-ordinate effects, it has to be take into account all available relevant information on characteristics of the markets concerned, including the structural and the behavioral patterns of the firms. In order for co-ordination to be successful, the conditions must be met in the market or be created by a merger :

1. **First, the articipants in the market must be able to identify term of co-ordination :** In order to co-ordinate, firms need to achieve some kinds understanding as to how to co-ordinate. [Gencor v Commision (1999) ECR 753]. This need not involve an explicity agreement on what price to charge, share quotas or the quality of products to be attained. Nor is it necessary for firms concerned to coordinate prices around the monopoly price, or for the ordination to invlve every single firm in the market. However, it is sometime possible for firms to find a focal point around which to co ordinate behavior. Market transparency, product homogeneity and stability of the relevant firms key elements in giving the firms the ability to align on terms of coordinating. The relevant factors are highly dependent on market facts, how competition in the market and how co-ordination would work. Furthermore, if one or more firms in the market is a maverick firm, co-ordination may be difficult to substance. A maverick firm is a firm whose strategy is different from the majority of find because of lower costs or other differences, but nevertheless is rational for its. Alternately, if the maverick firm is one of the merging parties, then the likelihood of co-ordinated behaviors may rise because the merger eliminates the different the led to maverick behavior. In general, the more symmetrical are the structures of the firms in the market, the easier it may be for them to coordinate behavior.

2. **Second, it must be costly for firms to deviate from coordinate :** So costly that it will be in each coordinating firm's interest to go along with coordinated behavior rather than cheat, e.g., through its own alternative price strategy. For these incentives to hold, participants may need to be able to delay and possible unish cheation.

Third, the surrounding competitive constraints must be weak. For ex.. the threat from playes outside the common strategy, including possible marger must be too weak to destabilize any coordinatd behavior.

Market entry :

A merger that materially increases market concentration would not give rise to… anti competitive effects if new firms would enter the market (or existing) and deter the merging parties (and others) from exploiting their position the market. Entry into the market by new firms may prevent or counteract any by the merging parties or their competitors to profit from the potential reduction is competition brought about by the merger. New entry or expansion by competition.. can effectively discipline the behavior of the current market participation. Although competition authorities may adopt different approaches to determine .. of new entry, there is broad agreement that a reviewing authority should.. that entry/expansion is a real competitive constraint on the merging where following three conditions are met :

The Entry or Expansion is likely to Occur : Herein one needs to. The aspect of barriers to entry. Barrier to entry can be described as an … enjoyed by an incumbent firm over potential entrants, which prevent new from entering the market and the same can take various forms. The various of barriers are :

(a) Absolute barriers, : such as where government regulating, e.g., and intellectual property rights, limit the market participating or impose regulatory approval costs (e.g., environmental restrictions). Regulations also make it more difficult for consumers to switch supplier.

(b) Structural barriers, arising from basic market condition such as cost, and technology. Examples include situations where the existing incumbents assets necessary for the production or supply of the

relevant product (e.g., recourses); where existing firms have access to a superior technology; networks effects are strong; and where economies of scale and sunk costs important. A merger not attract entry if the anticipated reward wre not … with the risk from being unable to recover sunk cost (e.g., not recoverable upon exit, associated with acquiring or constructing facilities, recruiting, training, product development and other for successful entry)

(c) **Strategic advantages,** where the existing established positon of the gives it an advantage over new entrants (also known as first mover or where the incumbent responds to new entry with aggrestive tactics as by significantly lowering prices or by investing in excess capacity to deter buyer this can favour current suppliers. Other factors might include product differentiation, tying and bundling, and exclusive dealer agreements.

Theanticipated entry or expansion is of a nature, scale and scope prevent or reverse theanti competitive effects the merger otherwise would have done. This condition generally requires that entry by new firms successful prevents incumbents from raising price post merger or makes them prompt reverse price increases, by capturing a sufficient amount of their sales. The following issues will have to be addressed in this case :

(a) Is the new entry likely to be so small or isolated that incumbents can nevertheless still raise prices to a significant section of the market ? It may be that the new entry is of insufficient scope to compete effectively with the merging parties. Will be the combined new entrants timely achieve a significant market impact?

(b) Is the new entry able to counteract the specific anti competitive concern brought about by the merger? Will the committed new entry be profitable at prices at or below pre merger prices ? Will timely and likely entry be sufficient to return market prices to their pre merger level.

(c) Is the new entry able to counteract any localized anti competitive effects ? In some cases, the anticompetitive effect (s) of the merger

might only access in a distinct location and any new entrants would have to target their business the adversely affected area in order to prevent such effects.

The entry or expansion is likely to occur within a reasonable period of time Profitable entry wil only be considered to act as a competitive constraint if it sufficiently timely and sustainable.

Failing firm :

In order to satisfy the conditions of the failing firm defence against the findings that the merger would be anti competitive, the following conditions should be met;

First, in order to rely o a failing firm defense, it must be clear that the firm in in such a deteriorated financial situation that the without the merger if and assets would exit the market and this would occur in th near future.

Second, there must be no serious prospect of reorganizing the business. This could include reorganizing the underlying business or the financial structur. Indentifying the appropriate counterfactual in these types of situations is often vry difficuit. Even companies in servere financial difficulties often survive and recowe and as explained, the test is whether in the absence of a merger, the assets to the failing firm would inevitable exit the market.

1. Where substantial economies are potentially available to a firm, the can normally be realized through internal expansion.

There usually are severe difficulties in accurately establishing the existence and magnitude of economies claims for a merger.

The first case wherein the efficiency test was used was the General Dynamics decision. It was the first time wherein the parties to a merger successfully rebutted the governments prima facts market share case by showing that other factors affecting the industry established that the merger would not substantially lessen competiton [U.S. V General Dynamics Co. 415 US (1974). The contours of the efficiency test that was liad down in General Dynamics was further elaborated in the case of anti trust cases in GTE. Sylvanies [Continental T.V. V GTE sylvania 433 US 35 (1977)] wherein the Court helf that non price vertical

restraints should be evaluated under the rule of reason precisely for the reason that they promote inter brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. Following the line of decision, BMI, the Court held that even a horizontal agreement among competitors should not be characterizsed as per se unlawful unless the practice facilely appears to be one that would always or almost always tend restrict competition and decrease output and is not designed to increase economic efficiency and render markets more rather than less competitive.

There were further revised guideline that were issued by the 1984 guidelines wherein four prerequisites were laid to establish efficiency, viz:

1. The Department required clear and convincing evidence.
2. The efficiencies had to be in the form of substantial cost saving resulting from the realization of scale economies, integration production facilities, or multi plant operations.
3. The efficiencies had to be ones that are already enjoyed by one on more firms in the industry.

The parties had to show that equivalent result could not be achieved within a comparable period oftime through internal expansion or merger that threatened less competitive harm.

The second change was to add an introductory paragraph that explicity acknowledged that the primary benefit of meergers to the economy is them efficiency enhancing potential, which can increase the competitivness of firms and result in lower prices to consumers. This paragraph went on the recite, however, just as the earlier guidelines had, that because the Guidelines prescribed only mergers that present a significant danger to competition, they would in the majority... allow fimrs to achieve available efficiencies through mergers without … from the Department.

In 1992, the Department undertook an extensive revision of the merger … be principal change in the guidelines was to shift decision making away from structural presumptions based on market shares and .. and to place greater emphasis on qualitative competitive effect... the merger sector efficiencies

would be taken into account i.e. … likely to be accomplished with the proposed merger and unlikely to be in the absence of either theproposed merger or another means having... competitive effects. The 1997 revision retained the introductory firm the 1984 and 1992 guidelines declaring that the primary benefit of … the economy is their potential to generate.... efficiencies. The revision … in greater detail than the earlier guidelines had that the mechanism by … could increase the competitiveness of firms was by increasing their including and ability to compete. It alse expanded the first of benefits to include signitatice quality, enhanced service, or new products in addition to lower prices. The ensued guidelines defined merger specific efficiencies as efficiencies likely the accomplished with the proposed merger and unlikely to be accomplished in …. of either the proposed merger or another means having comarable … effects. The revision requires that efficiencies be verified to be … it explained this requirement on the grounds that efficiencies are... to verity and quantify, in part because much of the information relating... is uniquely in the possession of the merging firms. Consequently, … provide, the merging firms must substantiate efficiency claim will not be.. if they are vague or speculative or otherwise cannot be verified by …. menas. Significantly, this language does not necessarily require that the efficiencies by quantified in every case. Just as the market power effects of a merger action cannot be measured precisely, so, too, some imprtant efficiency,.. those relating to locative, dynamic, and transactional efficiencies, does always lend themselves to pricese estimation.

Having defined cognizable efficiencies, the revisions next addressed the ofhow these cognizable efficiencies will be taken into account in the competitive effects analysis. They state that the agencies will not challenge a … if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anti competitive in any relevant market. They go on to enquire that the agencies will consider whether cognizable efficiencies likely would be sufficient to reverse the mergers potential to harm consumers in the relevant market, e.g. by preventing price increase in that market. As in the 1984 and 1992 guidelines, the 1997 revisions provide that a sliding scale will be used for this purpose.

The greater the potential adverse competitive effect of a merger... the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not hagve an anti competitive effect in the relevant market. When the potential adverse competitive effects of a merger is likely to be particularly large, extraordinarily great cognizable eficiencies would be necessary to prevent the merger from being anti competitive. Most commendation he interpreted the 1997 revisions as adopting instead what they call a consumer welfare approach to efficiencies, which counts efficiences only to the extent they are likely to be passed on to consumers in the form of lower prices and expanded output. Contrary to this view, a close reading of the 1997 revisions shows that the agencies preserved the possibility of weighing positively efficiences that would not immediately be passed on to consumers. Significantlyk, the fevision did not include a pas-on requirement in dening cognizable efficiencies. To the contrary, in note 37, the revisions state explicity that. The Agency will also consider the effects of cogniable efficiencies with no short term, direct on prices in the relevant market. It would probably be better, therefore, to call the approach taken by the 1997 revisions more of a hybrid consumer welfare/total welfare model. Efficiencies that benefit consumers immediately through lowr prices and increased output will receive the most weight, but other efficiencies will also be considered, to the extent they can be proved and can to be shown ultimately to benefit consumers.

General Electric Honeywell merger: difference in view point of EU and USA approach for testing mergers.

On 14th December 2005, the Eurpean Court of First Instance (CFI) denied the application of General Electric company (GE) and Honewell International (Honeywell) for annulment of the merger prohibition issued by the Europena Commssion (Commssion) of 3rd July 2001. There, the Commissin declared that the acquisition of the assets of Honewell by GE would be a concentration incompatible with the common maarket. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market, or a substantial part theeof, is declared incompatible with the common market.

` The CFI held that the Commission must quantify those effects and show that they will result from the merger rather than from pre-existing market conditions. The CFI further stated:

That requirement is particularly important in cases such as the present, in which the merger is conglomerate, since it is accepted that such mergers rarely have anticompetitive effects.

On 22nd October 2000, GE and Honewell announced their plans to merge. After the United States Department of Justice informally indicated that it would notification with the Commission. Tjhe Commission, however, found the remedies commitments insufficient, and blocked the merger. As the parties were prohibited to put the merger into effect in the Eurppean Community (EC), it qwas abandoned. The parties thereafter filed an application for annulment of the Commission's decision.

The CFI held that in the context of the proceedings before the Commission it validly found the merger would have created or strengthened dominant positions, as a result of, which effective competiton would have been significantly impeded in thre markets. The CFI held that the horizontal effects of the proposed merger were sufficient to establish that the Commission's merger prohibition decision was well founded. The CFI upheld the Commission's finding that the merger would have significantly impeded competition in:

1. the market for jet engines for large regional aircraft;
2. The market for engines for corporate jet aircraft; and

   the market for small marine gas turbines.

The CFI concluded that in the first market, GE had a preexisting dominant position. In the other two markts, the merger would have strengthened the preexisting dominant position and further, would have created dominant positions for the merged entiry in the market for engines for corporate jet aircraft, and for small marine gas turbines. Each of these markets would have created or strengthered a dominant position, which would have resulted in effective competition being significantly impeded customers, increase prices and decrease output.

The theory dates back to the traditional leverage theory of bundling. In the United States, conglomerable analysis has evolved to a much narrower scale. This was discussed extensively in a report where it was posited that the EU approach to the treatment of conglomerate merger was synonymous to the US approach during the 1960s. In the 1960s mergers were considered bad if big and more so if they strengthened an already dominant firm. This wave receded during the 1980s and anti trust agencies revised their opinions where authorities would not interferes with any conglomerate mergers for three reasons :

- It is difficult to ascertain conditions where a cognomens merger would allow the merged firm the incentive to raise prices or restrict output.
- Bundling services may actually benefit customers.
- Significant efficiencies may be spawned, theregby satisfying the US objective of efficiency.

Consequently, the US abandoned conglomerate effects as source for testing mergers in the 1982. US Merger Guidelines'. Hence, the merger beetween GE and Honewell was met with little scepticiism by the anti trust Authorities. The only horizontal overlap that the authorities could find was in the production of US military helicopter engines. GE and Honeywell were the two premier manufactorers of US helicopter engines.

The law of the European Community prohibits any concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it. Merger Regulation is administered and enforced by the Competitive Directorate of the European Commission. It is amendatory requirement for companies to prenotify competition authorities for the agreement to merge. As a result, GE and Honeywell notified their merger agreement for regulatory clearance in Europe.

In assessing the proposed merger, the Commission discovered significant horizontal, vertical and conglomerate effects that might have resulted from combining the assets of the two parties. On definiing the market, a very wide. Approach was taken including aircraft engines, starters, avionics and non

avionics systems. In contract, the US approach to market definition was much narrower. Pursuant to the aforementioned standard procedure, the Commission concluded that GE's existing position of dominance would be significantly strengthened if the merger were approved. The Commission further mentioned that no other competitor in the jet engine industry would be able to compete with the merged group in the long run and the level of dominance in the jet engine market would grow significantly stronger in the future.

Whilst US competiton authorities have abandoned concerns for conglomerate mergers, the Commission believes that the portfolio power of mergers may be detrimental to competition. According to Mario Month:

….whilst conglomerate mergers are nromally not anticompetitive, under some circumstances they can lead to exclusionary effects and a worsening of competition conditions = they will raise concerns when they make possible that the merged entity leverages market power with the effect; (to) foreclose market one or several markets from effective competition.

In the US the market was defined according to the US military helicopter engines and maintenance, whereas in the EU, the Commission examined the markets on a broader level by including markets for aerospace and power systems, large commercial aircraft engines and avionics/non-avionics products.

Merger analysis in India :

The provisions relating to analysis of merger contained in the MRTP Act were deleted from the Act vide the MRTP (Amendment) Act 1991 and hence there is noting in the Act which gave the powers to the MRTP commission to view a merger and analyze whether the same can be anti competitive before the companies are actually merged. Therefore, it is not a surprise fact that the MRTP gave a green signal to the proposed Jet Sahara deal where the merged entity would have had a share of about 47% which would he been dominant positon in the market. On the other hand, under the Competition Act, the aspect of pre notification has been mandatory vide the Competitions (Amendment) Act 2007 and Competition Commission is fully empowered to view a proposed merge and block the same if the proposed effect is viewed to be anti competitive.

Under the Companies Act 1956 a scheme of merger, or amalgamation as it is referred to in the Act, is an arrangement between a company and, usually, as its members by which the assets and liabilities of one company are transferred to the other company and if the scheme is approved by the prescribed majority of the members of both companies, the court may sanction the scheme of merger. So far, the Courts in India have restrained themselves from using the so called Blue pencil while adjudging the scheme of merger under section 394 of the Companies Act 1956. Courts have emphasized their role only as supervisory rather than regulatory institution. However, the Companies Act as it stands does not deal with issues of the effect merger on the competiton. However, the MRTP Act, while evaluating the proposed scheme of merger was not likely to lead to the connect ration of economic power, which was highly inadequate and a big fallacy of the Act Section 394(1) of the Companies Act provided that any merger taking place, should not be detrimental to public interest, but again the term remains undefined. This issue was raised in Hindustan Lever Employees Union v Hindustan Lever Ltd. Wherein scheme of merger between Tata Oil Mills Co. Ltd and Hindustan Lever Ltd. Was attacked on the ground of public interest. The Supreme Court of India while deciding the issue held that it is not the interest of the shareholders or the employees only but the interest of the society which may have to be examined. The Court also stated that if after the merger, the merged company, viz HILL, was shown as engaging in any activty falling under the definition of a monopolist trade practive of restrictive trade practice, the issue could be taken up before the MRTP Commission and if necessary a divisions of that undertaking could also be applied for under the MRTP Act.

Definition of Merger :

The combining of two or more companies, generally by offering the stockholders of one company securities in the acquiring company in exchange for thesurrender of their stock.

Provisons for Merger :

Company law in India is undergoing a complete overhaul and a new law was finally passed in 2013. However, only 98 sections of the new Companies

Act. 2013 (2013 Act) have been brought into force and the provision relating to mergers covered in Section 230 to 240 are yet to be notified. Until then, this court driven process will continoue to be governed by Section 391-396A of the Companies Act, 1956 and the Companies (Court Rules, 1959 (collectively referred to as 1956 Act).

Chapter XV of the 2013 Act deal with Compromises, Arrangements and amalgamations. In tis chapter, the Act consolidates the applicable provisions and related issues of compromises, arrangements and amalgamations; however, other provision are also attracted at different stages of the process. Amalgamation means an amalgamation pursuant to the provisions of the Act. In an amalgamation the undertaking comprising of property, assets and liabiolities of one (or more) company are absorbed by and transferred either to an exist company or a new company. Simply put, the transferor intetrates with the transferee and the former loses its entity and dissolves without winding-up. The 2013 Act creates a new regulator, the National Law Company Tribunal (Tribunal) who, upon its constitution, will assume jurisdiction (the High Courts will no longer have any jurisdiction) of the court for sanctioning merger. Once the Tribunal is constituted, expected to be formed, sometimes this yeear, and related rules finalized, the provision under the 2013 Act would be implemented.

Before detailing the key changes under the new law, a brief overview of the existing porocess will be useful. Under the 1956 Act. Companies which have reached a consensus to merge must prepare a scheme of amalgamation/merger (Scheme). The lenders (Financial institution or banks) of the transferor and the Transforce must approve the Scheme in-principle, following by the subsequent approval of the respective Board of Directors of the mergin entities. If the merging entities are listed companies, then the listing agreements executed with the stock exchanges require the company to communicate price sensitive information to the stock exchange immediately, to seek an approval from the capital market regulator. Securities and Exchange Board of India (SEBI) simultaneous with the public notification. This essentially happens after the approval of the Board to the Scheme. The next step is to apply to the High Court having jurisdiction over the registed office of the company seeking an order to convene shareholders and creditors meeting.

Without getting into further details of the process, the key point is that any objector amongst the stakeholders can object to the Scheme in the Court proceedings.

The element of preparing the Scheme has been retained under the 2013 Act. Unlike the 1956 Act, the new regime.

1. recognizes cross border mergers
2. sets out separate procdure for merger of small companies and those of holding with wholly owned.
3. Prescribes thresholds for objections; and

descriges mandatory filings to ensure legal compliance.

The Changes to the process :

a. **Regulatory/Third party approvals :** As shareholders and creditors consents are essential, the 1956 Act, therefore, contemplates issue of a notice to them. The 2013 Act requires service of the notice of the merger along with documents (such as copy of the Scheme and valuation report) not only upon the shareholders and creditors but also on various regulators including the Ministry of Corporate Affairs (through Regional Director, Registrar of Compaines and Official Liquidator), Reserve Bank of India (RBI) (where non resident investors are involved), SEBI (only for listed companies) Competiton Commission of India (where the prescribed fiscal thresholds are crossed and the proposed merger could have an adverse effect on competiton). Stopck Exchanges (only for listed comanpies), Income Tax authorities and other sector regulators or authorirties which are likely to be affected by the merger. This ensures compliance of the Scheme with other regulatory requirements imposed on the merging entities. The 2013 Act prescribes a 30 day time frame for the regulators to make representations, failing which the right would cease to exist.

b. **Approval of the Scheme through postal ballot :** In the 2013 Act, the shareholders and creditors should have the option to cast vote through postal ballot while considering a Scheme.

c. **Valuation Report :** Though the 1956 Act is silent on disclosing the valuation report to the stateholders. The 2013 Act now mandates

annexing of the valuation report to the notices for the meetings to enable ready access to the shareholders and creditors.

d. **Objections** : A bane under the 1956 Act was that it permitted the individual shareholders and creditors to raise objections. Objections can be raised by shareholders holding 10% or more equity and creditors whose debt represent 5% or more of the total debt as per the last audited financial statements.

e. **Accounting Standards :** In case of listed companies, the listing agreement should provide that an auditors certificate stating that the accounting treatment is in accordance with the accounting standards was required to be filed for seeking approval of the stock exchanges. The 2013 Act makes such prior certification from an auditor mandatory for both listed and unlisted companies.

The New Kinds of Mergers :

Apart from the aforesaid changes, the 2013 Act provides for separate provisons for cross border mergers, merger of two small companies and that of holding with wholly-owned subsidiaries. These are described briefly below :

a. **Cross-border mergers :** The 1956 Act permits cross border mergers only where the transferor is a foreign company. In contrast, the 2013 Act permits in-principle mergers between an Indian and a foreign company located in a jurisdiction notified by the central government in periodic consultation with RBI. Such a merger would be subject to RBI approval and Scheme may provide payment in cash or depository receipts or both. The payment in cash or depository receipts would facilitate exit to the shareholders of the merging entity. These changes reflect the legislatures intent to facilitate cross border business. The Income Tax Act presently grants tax examptions on mergers if the transferee is an Indian company and does not recognize a situation where the transferee will be a foreign company, as contemplated under the 2013 Act. The introduction of cross border mergers the 2012 Act may, therefore, require corresponding changes in other laws, including foreign exchange and tax.

b. **Merger of small companies and holding with wholly-owned subsidiaries :** Unlike the 1956 Act under which merger of all companies, irrespective of nature and size requires court approva, the 2013 Act carves out a separate procedure for small companies and the holding and wholly-owned subsidiaries. Section 233 of the 2013 Act prescribes a simplified fast track procedure for their merger which requires consent of shareholders holding 90% in value and creditors representing 9.10th of debt in value as well as approval of the Scheme by the Regional Director, Ministry of Corporate Affairs in case no objectinos are received from the Official Liquidator and Registrar of Companies. Approval of the Tribunal is not required for such mergers.

This could be good news for the merging entities who may not be required to (1) file documents required to be filed under the listing agreement, in the case of listed companies (ii) give notice to various authorities, (iii) provide auditors certifcate of compliance with applicable accounting standards. However, if the Regional Director is of the opinion that the Scheme is not in the interest of the stakeholders he may approach the Tribunal who could folow the merger prodecure prescribed under the 2013 Act. This ability to trander to the Tribunal has the potential to change fast-track to a normal merger and make such mergers less appealing.

Penalties :

The penalties for contravention of the provisions the 1956 Act were a maximum of INR 50,000)approximately USS 806) which apply to the companuy as well as officer-in-default. However under the 2013 Act, separate penalties have been levied on the company and its defaulting officer. To bring in more accountability, quantum for companies has been increased from the aforesaid sum to a minimum of INR 100,000 (approximately US$ 1,612) and maximum of INR 2,500,000 (approximately US$ 40,322). Defaulting officer (s) will also be punishable with imprisonment up to one year or with a minimum fine of INR 100,000)approximately US$ 1,612) and maximum INR 300,000 (Approximately US$ 4,838) or both., Such stringent penal provison will not apply to mergers of small companies and that of a holding company with its

wholly-owned subsidiaries unless their merger is transferred to the Tribunal and approved by it.

INELLECTUAL PROPERTY AND INTERNATIONAL TRADE IN CONTEXT OF COMPETITION LAW

INTELLECTURAL PROPERTY GITHS

GENERAL ASPECTS OF INTELLECTURAL PROPERTY RIGHRTS – (IPRs) NATURE, MEANING AND SCOPE OF IPRs

A. Introduction :

Creation, enjoyment and accumulatino of property has been a central activity of human life. Out of four objects of human life, i.e. (Artha) (Kama), (Dharma) and (Moksha) the first object is i.e. money. It is a fundamental requirement os sustaining material life.

According to Halsbury's Laws of England property is that which belongs to person exclusively of others and can be subject to bargain and sale. It includes goodwill, trademarks, licenses to use a patent, book debts, options to purchase life policies and other right under a contract.

Property can be classified into two broad categories :

1. Tangible – (Movable and Immovable)
2. Intangible – (Intellelctual Property)

The subject matter of this book is intellectual property and its legal protection. Therefore, in forthcoming pages all aspects of intellecvtual property rights and various las regulating IPRs will be discussed in a comprehensive manner.

B. Meaning of Intellectual Property :

Human beings are superior from other living creatures because they posses intellect Creative genus of human being creates intellectual property; **which in turns,** when property exploited, can earn wealth. Since it is essentiral designs, literary and artistic works, symbols used to promote commerce are some commonly known forms of intellectual property.

Basie Concepts of Intellectual Property Law :

The law relating to intellectual property is based on certain basic concepts. Thus patient law centres round the concepts of novely and inventive

step. Design law is based on originality, which not previously published in any other country as well as in India. Trade marks law is based on the concepts of distinctiveness and similarity of marks and similarity of goods. Copyright is based on the concepts of orignally and reproductin of the work in any material form.

Salmond say, the unnatural producvt of man's brains may be as valuable as his hands or his goods. The law therefore, gives him a proprietary right in it.

Since, at present times intellect is an integral part of one's personality and one's intellect palys an imporant role in deciding what sort of labour his hody be engaged into as well as what work his hands take up, it may be safely assumed that one's intellect is one's property in the same way as in one's person or one's bodily labour or work of one's hands i.e. one's skill. With this logic, one's intellect is exclusively his ovw, so is his intellectual labor and intellectual skill. Moving a little further, if these things, namely intellect, intellectual labor and intellectual skill are one's property or characteristic, them anything which comes out of an application of any or all of these is equally one's own. Therefore, naturally, a person should have a right to own these products of his intellect. Needless to say that it is this proprietary right once the product of one's intellect, which has been termed as one's intellectual Property Right.

The statute law relating to intellectual property in India is undergoing changes so as to being them to harmonize with the corresponding laws in the developed countries. This has become necessary after India signing the TGTT and TRIPS and becoming a member of WTO.

Why Legal Protection for intellectual Property ?

Every, human endeavour which promote economic, social, scientific and cultural development of society must be encouraged and the creator must be suitably rewarded by affording legal protection to his intellectual creation. Thus the Intellectual Propert Rights (IPRs) are the legal rights governing the use of creations of human minds.

The intellectual property law regulate the creation, use and exploitation of mental or creative labour. It prevents third parties from becoming unjustly

enriched by reaping what they have not sown. This is a branch of the law which protects some of the finer manifestations of human achievement.

Scope of Intellectual Property Rights :

The Convention establishing World Intellectual Property Organisation (WIPO) has given a wider definition of IPRs. According to this definitioon the IPRs shall include the rights relating to :

1. Literary, artistic and scientific work;
2. Performances of performing artists, phonograms and broadcasts;
3. Inventions in all fields of human endeaviour;
4. Scientific discoveries;
5. Industrial designs;
6. Trade marks, service marks, and commerciqal names and designations.
7. Protection against unfair competition and; all other rights resulting from intellectual activity in the industrial, scientific literary or artistic fields.

Competition Law :

In old days, intellectual property and competition law were often considered as like poles of a maget that repel each other. As a result of this apparent antagonism between the two, intellectuals property rights regime was considered to be creating monopolies to supr innovation, while the competition law eliminates monopolies. In contrast, it has been realized that both works in tandem and have complementary roles in driving innovation in today's technologically dynamic markets. Intellectual property reprsents a particular form of ownership and a property right in a intangible, abstract idea expressed in tangible form. For example, copyright is granted when the idea is executed in some tangible form and similar is the cawse of patents, designs and other forms of intellectual property. The essential altribute of grant of intellectual property rights is the right of exclusion, which means the intellectual property right owner can exercise his rights to the exclusion of whole universe. On the other hand, competition law aims at attaining maximum possible producvtion of resources and best possible allocqation of the same. This can be one way fo

looking at the aims of competition law and intellectual property rights. However, competiton and intellectual property law are the two different bodies of law having their independent and different are of operation.

1 Functional aspect of intellectual property and cometition law :

Going mush deeper into the areas of operation of both legal regimes, one can notice that competiton law and intellectual property rights are complementary to each other. It should also be appreciated that the operatinal area of both is different, as intellectual property rights deal with grant of rights by the state whereas competition law deal with use of those rights. At the same time, the rationale behind both meets at the same point. This caqn be further elusidated by looking at the reasons for grant of intellectual property rights.

I.1 Rationale for intellectual property rights :

The existence of intellectyual property regime is bases on followng reasons :

I.I.I Inceative to invent :

Grant of intellectual property right is a mode of providing incentive to the inventor for his invention. At the same time, without this incentive, inventor will not be able to appropriate the full value of his invention bacause of free riders problem attached with intellecltual property due toits specific nature.

Free rider essentially refers to the person who enjoys the benefits of a commodity without paying anything for that. If a new idea is freely approproriable by all on the condition of existence of communal rights to new ieas, incentives for developing such ideas will be lacking. The benefits derivable from these ideas will not be concentrated on their orignation. If we extend some degree of private rights to the origination, these ideas will come forth at a more rapid. This is same as the common law doctrine of unjust enrichment.

- The specific nature of intellectual property is non-rival and no excludable. In the absence of any protective legal regime, non-realness and non-excludability of intellectual property has caused problems for the production of such goods. Non-rival in use means that one individual can consume the good in question.

- **TO ENCOURAGE DISCLOSURE** :

In the absence of any incentive by the state, the individual will keep the invention with himself. Incentive, in the form of temporary monopoly rights, encourages inventor to disclose his invention to the public. In India, patent is granted only when the invent of gives complete details about his invention to the patent office, which is put in the common pool after 20 years. Thus, this has multifarious advantage. Firstly, it increases common knowledge pool. Secondly, if the information about the intellectual property is useful in the ulterior development of other assets, disclosure increases the pace of economic developments by increasing the informatin avaiable to ther investors. Thirdly, in case of patents, the patent office publishes the specification and claims of the patent in their offical journal, which can be used by others for research and development even before the expiry of patent term.

1.1.3 Commercialization of technology :

Intellectual property rights helps in greater commercialization of inventions Intellectual property helps in further licensing of those property rights to entities that are better aboe to exploit those rights in an economic efficient manner.

TO INCREASE DYNAIMC EFFICIENTY:

Dynamic efficiency refers to the development of new products and process3s resulting in socially desirable innovation without any fear of restricting the consumption of the same good by another person. Non-excludability mean that it is difficult or impossible to prevent someone who has not paid for rthe good from concuming it. Grant of temporary monopoly be the state encourages individuals as well as corporations to invent and ripe the fruits of invention in the specified time.

Apart from this, justifications of intellectural property regime can also be found in Locke's theory of property. However, Locke's theory of property is itself subject to slightly different interpretations. One interpretation of the theory is that society rewards labor with property purely on the instrumental grounds that we must provide rewards to get labor. In contract, a normative interpretation of this labor theory says that labor should be rewarded. The later interpretation has been widely accepted in the form of Locke's Labor Theory.

Rationales for competition law :

The dominate view today is that competition law is a tool for promoting social welfare by deferring practices and transactions that tend to increase market power. Competition law aims at maintaining locative as well as productive efficiency (both together are termed as static efficiency) in the market. Productive efficiency means production of output at the lowest possible cost and a locative efficiency refers to optimal allocation to resources to their most valued use. Static efficiency ti necessary for establishing a perfect/free markt. A perfect market is defined as place where thee are number of sellers orin others words, there is no barriers to entry in the market. Perfect market gives the consumers widest possible choices and the lowest possible prices, which is possible only when market remain competitive. Monopolies are viewed as destructing to competiton because in monopoly since only one person can produce and sell a particular product the price of the product will not be equal to marginal cost. [**Deadweight loss is a sort of inefficiency wherin wastage of resources takes place because of lesser production bythe producer, even after having enough resoruces. In case of intellecltual properrty, intellectual property owneer doesn't proudce at an optimal level, i.e., equal to demand to charge a higher price]** This result in creation of artificial scarcity and production below the optimal level at optimal price. This is often considered as deadweight loss **[Marginal cost is the change in total coswt that arises when the quantity produced changes by one unt. In general tems, marginal cost at each level of production includes any additonal costs required to proudce the next unit. In case of optimum efficiency a producer should always produce (and well) the last unit if the marginal cost is less than the market price. As the market price will be dictated by supply and demand, it leads to the conclusion that marginal cost equals marginal revenue.].**

Intellectual Property and Completions Law : Working in tandem :

A proper discourse of basic nature of intellectual property rights and competition law reveals that both aims at producing efficiency in the market. In the long run, both aims at consumer welfare and they complement each other. In case of intellelctual property goods, the marginal cost of productin is very

less. The cost incurred is cost of research and development and the cost of inventing new technologies along with ancillary expenditure incurred in bringing up that product in market. Absence of any monopoly right will disallow tht inventor to recover the cost of research and developments. This might result in discouraging investors to invest in bringing up newer technologies, which creates dynamic inefficiency in the market. At the same time, the disclosure requirement of intellectual property provides a pathway for further innovations. Thus, intellectual property regime is definitely dynamically pro-competitive even If it is statically non- competitive. In the long run, technological progress contributes far more to consumers' welfare than does the eliminating of static inefficiencies caused by non competitive pricing. From an economist perspective, intellectual property law is primarily concerned with the provisohn of appropriate ex ante incentive (and increasing competion in innovation markets), while competition law is primarily concerned with ex post incentives (and increasing competition in product markets). But, as Valentine described, both are divergent paths to same goal.

The common conception is that measures that deter monopoly increases social wealth, but this principle is subject to a number of qualifications, which including market power and monopoly power. Market power is the capacity to determine price or output in a particular market: it is the absence of a perfectly competitive market characterized by profit maximizing firms having no choice in profit output decisions. When the capacity to determine price and output becomes very substantial, this quantum of market powr is termed as monopoly power. Therefore, the first qualification is that the mere possession of monopoly power, as opposed to its willful acquisition or maintenance is not an offence within the paradigm of competition law. Secondly, competition policymakers have come to recognize that the prospect of attaining market power may encourage innovation; indeed, this is the principal rationale for granting intellectual property rights to innovators. Partially in response to this insight, competition law to days is concerned not only with the static inefficiency defined by deadweight loss, but also with improving consumer welfare over the long run (so-called dynamic efficiency).

However, it should be well understood that the intellectual property regime and competiton law complements each other only at the equilibrium. State can comfortably reward innovation through patents and copyrights so long as the compensation is not significantly in excess of that necesssary to encourage investment in innovation, and the market power that results is not used to distort competition in, for example, related product or service areas. According to Landes and Posner, for copyright law to promote economic efficiency, it must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the cost of administering (intellectual property) protection.

Intellectual property and competition law : Friends in disagreement :

As described above, competition and intellectual property law are complementary with each other because they seek to maximize social welfare in one way or the other. Competition law maximizes social welfare by condemning monopolies while intellectual property law does the same by granting temporary monopolies. The qualification attached to this is that intellectual property law should provide economically meaningful monopolies. Otherwise, competition law which by itself doesn't condemn the mere possession of monopoly power, but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly. United States court summarized this disagreement as follows :

The conflict between the anti-trust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the anti-trust laws prescribe unreasonable restraints of competiton, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented article. When the patented product, as is often the case, represents merely one of many products that effectively compete in a given product market, few anti-trust problems arise. When, however, the patented product is so successful that it evolves into its own economic market, as was the case here, or succeeds in engulfing a large section of preexisting product market, the patent and anti-trust laws necessarily chash. In such cases, the primary purpose of the anti-trust laws to preserve

competiton can be frustrated, albeit temporarily, by a holder's exercise of the patent's inherent exclusionary poer during its term Federal Trade Commission, USA observes that tension between intellectual property and competiton policy, necessarily arises on the grant of invalid intellectual property and abuse or misuse of granted monopoly. These two incidents are discussed herein with reference to patents. As discussed above, both intellectual property and competition law are pro-competitive. For this, in case of patents, if should be ensured at the first level that any unwarranted patent should not be granted because that patent will create unnecessary barriers to market entry along with imposing social cost. Therefore, patent office must ensure about the validity of a patent. However, validity from the perspective of legislation and patent office is different than competition law perspective. In the words of Judge Posner, from the perspective of competition law, a patent is invalid :

If a court thinks an inventing for which a patent is being sought would have been made as soon or almost as soon as it was made even if there were no patent laws, it must pronounce the inventin obvious obvious and the patent invalid.

Thus, the question that should be asked in order to arrive at equilibrium between competition law and patent is that whether a patent is necessary top achieve one of the means through which the patent system encourages innovation. If not, then in theory, patent should not be granted, because patent imposes social cost. However, granting patent right on the basis of above proposition is neither feasible nor practically possible, therefore, the patent regime of a state should anwer this.

The said conflict between MRTP and Competition law came up before the Monopolies and Restrictive Trade Practices (MRTP) Commission in India in Vallal Peruman v Godfrey Philips (India) Ltd. (MRTP) wherein the competiton observed that :

A certification of registration held by an individual or an undertaking invest in him/it, and undoubted right to use trade mark/name etc. so long as the certification of registration is in operation and more importantly, soling as the trade mark is used strictly in conformity with the terms and conditions subject to which it was granted. If however, shale presenting the goods, and merchandise

for sael in the market or for promotion thereof, the holder of the certificate misuse the same by manipulation, distortion, contrivances and embellishment etc. so as to mislead or un unfair trade practices. It will, thus, be seen that the provisions of the Monopolies and Restrictive Trade Practices Act would be attracted only when there is an abuse in exercise of the rights protected therein.... [Valal Perumna V Godfrey Philips (India) Ltd., (MRTP) Commission, 1994].

Second stage pf temsom between intellectual property and competition law arises with regard to conduct of patent business. A patent holder may use patent for obtaining unwarranted market power or to block the competiton. Therefore, the ascendancy of competiton law over intellectual property regime is justifiable, but, for that the pro-competitive and anti-competitive conduct with respect to paten business should be distinguished.

Expansion of IPRs under WTO – TRIPs :

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs_ consists of 73 Articles in VII parts. The Intellectuals property rights are private rights, but there is a need for a multilational framework of principles, rules and disciplines dealing with intellectual property rights. For the first time, under the auspices of the GATT, 1994 the TRIPs have been negotiated under multilateral negotiations.

The World Intellectual Property Organisation (WIPO) is a specialized agency of the United Nations for developing a balanced and accessible international intellectual property regime with an aim to reward creativity, stimulate innovation and contribute to economic development while at the same time safeguarding the public interest.

WIPO was established in the WIPO , Convention in 1967 with a mandate from the member countries to promote the protection of intellectual property through out the world through cooperation among the states and in collaboration with other international organizations.

Although WIPO has given a wideer definition of IPRs, yet the scope of IPRs has been further expanded by Trade Related Intellectual Property agreement of World Trade Oerganization. TRIPs have included within IPRs the

rights of plant breeders, rights arising out of biodiversity, trade secrets and computer tgenerated layout designs.

According to TRIPS the Inteelectual Property Rights are :

Copyright and Relatede Rights :

a. Rights of artists, painters, musicians sculptors, photographers, and authors for copyrights;

b. Rights of computer programmers whether in source or object code for a copyright in their programmers and compilation data;

c. Rights of performance producers of phonogram's (sound recording) and broadcasting organization in respect of fixation on their programmes for copyrights in their work.

2. Rights of traders in their trade marks.

3. Right of manufacturers and producers on geographical indicationn in relation to such products and produce.

4. Rights of designers for their disrtinctive design striking to the eye.

5. Patents :

a. Rights of the inventor for patent of his invention.

b. Rights of plant breeders and farmpers.

c. Rights of biological diversity.

6. Right of compute technologists for their layout design of integrated circuits.

Rights of businessmen for protection of their undisclosed information on technology and management, i.e. business secrets (Art 1(2) of TRIPs).

The Agreement of Trade Related Intellectual Property Rights (TRIPs), which came into force in 11995, the agreement sets the minimum standards to be adopted by the memberts, though they are free to exceed them, Members are free to determine the appropriate method of implementing the provisons of the agreement under this legal system and practices. The TRIPs lays down precise provisions relating to the scope and terms of the IDR and the rights accruing to the right holder, as well as minimum standard and norms for the enforcement of those rights.

India ratified the WTO agreement in December, 1994 and thus became a party to the TRIPs. In order to fulfill its commitment under the agreement, the

Government of India in December 1999 introduced necessary Bills for formulating and amending the laws in practically all fields to IPRs, which are covered under the TRIPs agreement and brought out the necessary changes in IP laws of the country.

The objectives of the protection and enforcement of intellectual property rights are the promotion of technological innovation and the transfer and dissemination of technology, to the metal advantage of producers and users of technological knowledge and in this manner conducive to social and economic welfare and to a balance of right and obligations. Members may adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economics and technological development.

Components of IPRs

The various components of IPRs as envisaged by WIPO and TRIPs have specific aims and objects. Although a detailed study of these specific righrts will be made in subsequent chapters, it is worthwhile to explain, in brief, their meaning hereunder.

Copyrights and Related Rights :

The word copyright is derived from the expression copier of words first used in the context according to the Oxford dictionary in 1586. The subject matter of copyright is the literary, artistic, dramatic, musical, cinematographic tables, compliation including computer database. In most European languages other than English, copyrights is called as author's rights.

The copyrights is to oringianl creation. Mere idea without tangible expression is not granted legal protection. It is an intangible incorporeal right granted to author or originator of certain literary or artistic production, Whereby he is invested for a specified term with sole and exclusive right of multiplying copies of his original work and publishing and selling them.

Trade Marks and Service Marks :

Trade mark is a symbol through which goods are sold in market. It is symbol which may denote and distinguish goods of competing traders. They may consist of single letter, numerals, logo, design, word pictorial devices or combination of words and devices.

When a trade mark is used in connection with services such as banking telecommunication, airlines, tourism, etc. they are called service marks.

Patent :

The term patent has its origin in the phrase Letters Patent. These were the instruments under the great seal of King of England addressed by the Crown fto all the subject at large in which the Crown conferred certain rights and privileges on one or more individuals. However, in the recorded history, the first patent was granted in the year 1449 to John of Putnam in Russia for a process of making glass. Patent is granted for inventions which have industrial and commercial value. Any person whose invention has, novelty, involving inventive steps (non obviousness) and is of industrial application, can be granted a monopoly right for a certain term to commercially exploit his invention and earn profit out of his invention.

It is worthwhile to mention here that ever since the TRIps regime has come into force the patent has become a major subject of controversy between developed and developing countries.

Geographical Indications:

An indication which identifies goods, such as agricultural goods, natural goods or manufactured goods as originating in the territory of a country, or a region or locality in that territory are called as geographical indications. These indications denote quality reputation or other characteristics of such goods essentially attributable to its geographical origin. The right conferred on geographical indication confers the right to prevent competition from commercially exploiting the respective rights to the detriment of the owner of that property.

Industrial Designs :

Industrial design means only the features of shape, configuration, pattern, ornament or composition of lines or color applied to any article whether

in two dimensional or three dimensional or in both forms, by any industrial process or means whether manual, mechanical or chemical, separate or combined which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction and does not include any trade mark. In the case of industrial designs the property consists in the exclusive right to apply the design registered under the statute.

Intellectual property (IP) refers to creations of the mind, such as inventions, literary and artistic works; designs; and symbols, names and images used in commerce.

IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.

Intellectual Property can be regarded as a single generic term that protects applications of novil ideas and information that are the commercial value. As per the Competition Act.

Intellectual Property includes :

Copyright and Related Rights.

Trade Marks

Geographical Indications Industrial Designs

Patents

Layout designs of the Integrated Circuits

INTELLECTURAL PROPERTY AND MONOPOLY :

Intellectual Property Rights provide exclusive rights to the holders to perform productive or commercial activity, but this does not automatically include the right to exert restrictive or monopoly power in a market. An Intellectual Property Right generates market power. The potential pejorative character of the power may be unjustifiably great because of public policies like the encouragement of inventions. On the other hand, if investment of recourses to produce ideas or to convey information is left unprotected, the competitors may take advantage and benefit by not being obliged to pay anything for what they take. This may result in lack of inventive to invest in ideas or information

and the consumer may be correspondingly poorer. What is called for is a balance abuse of monopoly and protection of the property holders rights.

Intellectual Property Right endangers competition while competition law engenders competition. A workable solution can be predicated on the distinction between the existence of a right and its exercise. In other words, during the exercise of a right, if a prohibited trade practice is visible to the detriment of public interest or consumer interest, if ought to be assailed under the competition law.

COMPETITION act, 2002 AND IPRS

APPLICABILITY OF COMPETITION LAW ON IPR STATUTES

The Indian competition law, namely, the Competition Act 2002 (the Act) deals with the applicability of section 3 prohibition relating to anti competitive agreements to IPRs. An express provision (section 3(5)] is incorporated in the Act, that reasonable conditions as may be necessary for protecting IPRs during their exercise would not constitute anti competitive agreements. In other words, by implication, reasonable conditions in an IPR agreement that will not fall within the bundle of rights that normally form a part of IPRs would be covere under section 3 of the Act.

In the Competition Act, 2002 section 3(5) thereof in the Chapter relating to prohibition of Agreement (anti Competitive Agreements) states that :

"Nothing contained in this section shall restrict – (1) the right of any person to restrain any infringement of, or to impose reasonable conditions, a may be necessary for protecting any his rights which have been or may be conferred upon him under :

,**COMPETITION COMMISSIONS OF INDIA**

the copyrights Act 1957 of 1957)

the patents Act 1970 (39 of 1970)

the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act 1999 (47 of 1999)

the Geographical Indications of Goods (Registration and Protection) Act 1999

the Designs Act 2000 (16 of 2000)

the Semi-conductor

THE IPR AND COMPETITION LAW INTERFACE

The simple hallmark of competition law is the protection of those principles and practices which enable the efficient functioning of markets. A natural concomitant to this objective is making certain that incumbent enterprises do not engage in anti competitive practices to the detriment of the market. However, the application of competition law standards 0 in terms of practices that should be banned outright, viewed as potentially anti competitive or should be investigated further – varies widely across jurisdictions. The interaction between intellectual property rights (IPRs) and competition law is predominantly created by the non rivalries and non excludable nature of intellectual property, which causes the problem of approachability. The creating of this prism facie inherent tension is due to IPR holders being granted statutory rights to essentially control access to the intellectual property and charging monopoly rents for the use of the IPRs – something apparently in conflict with competition law, which attempts to curtail such market power. Historical, this conflict has been overplayed, right from the early days of the 20th century, when granting patents in particular brought about paranoia regarding monopolies and patent licensing was heavily regulated. However, following the expansion of IPRs to fill out the available market space and a gradual dissolution of the paranoia of automatically associating all IPRs with competition law violations) aided in no small part by the emergence of the law and economics analysis of competition law and IPRs spearheaded by the Chicago school), this view has been tempered.

This tempering has grown into a more well rounded concern of competition la with IPRs owing to two major developments – the expansion in functional coverage of IPR protection and its vertical expansion to a new range of products, especially knowledge based products and the appreciable tread, especially in IPR driven markets such as the US, EU and Japan, of individual market leadership reinforced by IPR protected industrial standards.

However, it is now usually accepted (as typified by the formulation of competition law as public interest law designed to regulate the exercise of economic power that the two regimes are not so much at loggerheads as they pursue the goals of consumer welfare and encouraging innovation through

different means, Premised on the idea that enterprises in a competitive market will be less complacent and have greater incentive to innovate to gain market share, competition law can indeed act as spur for intellectual property. It is thus implicitly understood that the real issue that completion law has is not with the existence but with the exercise of IPRs. Striking this balance involves walking the tightrope between over and under protection of innovators efforts – not compromising on a sufficient incentive for the innovator but also ensuring that follow on invention is not delayed and consumers are not victimized for unnecessarily long periods by high prices.

There theoretical bases have been suggested for this reconciliation between IPRs and competition law regimes :

the view that competition law should only interfere with innovation/ IPRs when social welfare is at risk;

the view that concentration and monopoly markets have the edge over competitive markets in terms of innovation owing to greater capital and resources and

the view that competition law only concerns itself with consumer welfare when the effects of a proposed action on production and innovation efficiency are neutral or indeterminate.

These would suggest that reasonability standard be applied, taking into account the facts and circumstance of the case in question.

Two main concerns dominate this IPR/completion law interface. The first of these is the potential abuse of monopoly pricing, especially in developing countries where effective substitutes to IPR protected products may not be readily available.

Second, competition law seeks to fray a line between permissible business strategies and abuse of IPRs – a line which is often blurred by horizontal agreements, exclusionary licensing restriction, tie-in agreements, excessive exploitation of IPRs and other practices.

However, the limited monopolies granted by IPRs are not per se anti competitive excessively exploitive – they only become anti competitive when the IPR holder looks to extend those rights beyond their intended and proper scope.

Licensing in Competition Law of regard with IPR Section 3(5) of the Act declares that reasonable conditions as may be necessary for protecting any IPR will not attract section 3. The expression reasonable conditions has not been defined or explained in the Act. By implication unreasonable condition that attach to an IPR will attract section 3. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of completion law jabs long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs.

For example a licensing arrangement may include ?

REASONABLE CONDITIONS

Restraints that adversely affect completion in goods markets by dividing the markets among firms that would have competed using different technologies. Similar, an arrangement that effectively merges the Research and Development activities of two or only a few entities that could plausibly engage in Research and Development in the relevant field might harm competition for development of new goods and services. Exclusive arrangements involving exclusive licensing that may give rise to anti competition concerns include cross licensing by parties collectively possessing market power, grant backs and acquisitions of IPRs. A few such practices are described below :

Patent pooling is a restrictive practice, which will not constitute being a part of the bundle of rights forming part of an IPR. This happens when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. They may earn supra-normal profits and keep new entrants out of the market. In particular. In particular, if all the technolgy is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete.

Tie-in-arrangement is yet another such restrictive practice. A licensee may be required to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers. There could be a arrangement forbidding a licensee to compete, or to handle goods which compete with the patentee's.

An agreements\ may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.

There could be a clause, which restricts completion in R & D or prohibits a licensee to use rival technology.

A licensee may be subjected to a condition not to challenge the validity of IPR in question.

A licensee may require to grant back to the licensor any know-how or IPR acquire and not to grant licensee to anyone else. This is likely to augment the market powr of the licensor in an unjustified and anti competitive manner.

A licensor may fix the prices at which the licensee should sell.

The licensee may be restricted territorially or according to categories of customers.

A licensee may be coerced by the licensor to take several licenses in intellectueral property even though the former may not need all the them. This is known as package licensing which may be regarded as anti competitive.

A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent may be an anti competitive practice.

Restricting the right of the licensee to seals the product of the licensed know-how to person other than those designated by the licensor may be violative of competition. Such a condition is often imposed in the licensing of dual use technologies.

Imposing a trade mark use requirement on the license may be prejudicial to competition, as it could restrict a licensee's freedom to select a trade mark.

Indemnification of the licensor to meet expenses and action in infringement proceedings is likely to be regarded as anti competitive.

Undue restriction on licensee's business could be anti competitive. For instance, the field of use of a during could be a restriction on the licensee, if it is stipulated that it should be used as medicine only for humans and not animals, even though it could be used for both.

Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.

A condition imposed on the licensee to employ or use staff designates by the licensor is likely to be regarded as anti competitive.

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TRIPS : AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTURAL PROPERTY RIGHTS

Settlement of IPR Dispute :

With the Abvent of the TRIPs Agreement, international disputes about governmental regulation of intellectual property rights (IPRs) are now subject to adjudication within the WTO dispute resolution mechanism. The standard model used by economists to explain dispute settlement procedures is misleading for the process is not about preventing countries form exercising market power. Rather, the system is designed to resolve political market failures arising within countries that would be harmful to market access for foreign firms. These issues arise particularly in the context of IPRs. Which may be used as cross-market bargaining chips. This possibility is illustrated by the petition of Ecuador to suspend concessions in this area for European firms in the context of the EU – Banana case. The scope of such an approach remain unclear and there are many fundamental question deserving colse analysis. In this paper I make several basic points relating to the economics of IPRs and the World Trade Organization's (WTO) dispute settlement process. These comments underscore the fact that the injection of IPRs into the globul trading system raises a new dimension for settling disputes.

Dispute Settlement :

The provision of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to

this Agreement and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to exten the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

UNCTAD

The United Nations Conference on Trade and Development (UNCTAD) as established in 1964 as a permanent intergovernmental body.

UNCTAD is the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues. The organization goals are to : maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis.

The primary objective of UNCTAD is to formulate policies relating to all aspects of development including trade, aid, transport, finance and technology. The conference ordinarily meets once in four years; the permanent secretariat is in Deneva.

One of the principal achievements of UNCTAD has been to conceive and implement the Generalised System of Preferences (GSP). It was argued in UNCTAD that to promote exports of manufactured goods from developing countries, it would be necessary to offer special tariff concessions to such exports. Accepting this argument, the developed countries formulated the GSP scheme under which manufacturers exports and some agricultural goods from the developed countries formulated the GSP scheme under which manufacturers exports and some agricultural goods from the developing countries enter duty-free or at reduced rates in the developed countries. Since imports of such items from other developed countries are subject to the normal rates of duties, imports of the same items from developing countries would enjoy a competitive advantage.

The creation of UNCTAD is 1964 was based on concerns of developing countries over the international market, multi national corporations, and great disparity between developed nations and developing nations. The United Nations Conference on Trade and Development was established to provide a

forum where the developing countries could discuss the problems realating to their economic development. The organization grew from the view that exisitn institutions like GATT (now replaced by the World Trade Organization WTO), the International Monetary Fud (IMF), and World Bank wre not property organized to handle ther particular problems of developing countries. Later, in the 1970s and 1980s UNCTAd was closely associated with the idea of a New International Economic Order (NIEO).

The firs UNCTAD conference took place in Geneva in 1964, the second in New Delhi in 1968, the third in Santiago in 1972 fourth in Nairodbi in 1976, the fifth in Manila in 1979, the sixth in Belgrade in 1983, the seventh in Geneva in 1987, the eigth in Cartagena in 1992 and the ninth at Juhannesburg (Sough Africa) in 1996.

Currently, UNCTAD has 194 member states and is head quavered in Geneva, Switzerland, UNCTAD has 400 staff member and a bi-annual (2010-2011) regular budget of $138 million in core expenditures and $72 million in extra budgetary technical assistance funds. It is a member of the United Nations Development Group. There are non- government organizations participating in the activities of UNCTAD.

GATT

The General Agreement on Tariffs and Trade (GATT) was a multilateral agreement regulating international trade. According to its preamble, its purpose was the substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis. It was negotiated during the United Nations Conference on Trade and Employment and was the outcome of the failure of negotiating government to create the International Trade Organization (ITO). GATT was signed in 1947 and lasted until 1994, when it was replaced by the World Trade Organization in 1995.

The original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994. WTO The World Trade Organizations (WTO) is an organization that intends to supervise and liberalize international trade. The organization officially commenced on 1 January 1995 under the Marrakech Agreement, replacing the General Agreement on Traits

and Trade (GATT), which commerce in 1948. The organization deals with regulation of trade between participating countries, it provides a framework for negotiating and formalizing trade agreements, and dispute resolution process aimed at enforcing participant's adherence to WTO agreement, which are signed by representatives of member governments and ratified by their parliaments. Most of the issues that thw WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round (1986-1994).

The organization is attempting to complete negotiations on the Doha Development Round, which was launched in 2001 with an explicit focus on addressing the needs of developing countries. As of June 2012, the future of the Doha Round remained uncertain: the work programmed lists 21 subjects in which the original deadliness of 1 January 2005 was missed, and the round is still incomplete. The conflict between free trade on industrial goods and services but retention of protectionism on farm subsidies to domestic agricultural sector (requested by developed countries and the substantiation of the international liberalization of fair trade on agricultural products (requested by developing countries) remain the major obstacles. These points of contention have hindered any progress to launch new WTO negotiations beyond the Doha Development Round. As a result of this impasse, there has been an increasing number of bilateral free trade agreements signed. As of July 2012, thee were various negotiation groups in the WTO system for the current agricultural trade negotiation which is in the condition of stalemate.

WTO's current Director-General is Roberto Azavedo, who leads a staff of over 600 people in Geneva, Switzerland. A trade facilitation agreement know as the Bali Package was reached by all members on 7 December 2913, the first comprehensive agreement in the organization's history.

COMPEITION AUTHORITIES (REGLUATORY MECHANISM)

Necessity and Competition Law Regime.

Notable features of competition commission of India – Appointment, functions

Powers of commission as Civil Court.

Directions of commission and Director General

Competition Appellate Tribunal-for motion, function powers, awarding compensation.

COMPETION AUTHORITIES (REGULATORY MECHANISN)

Competition Commission of India (CCI) :

Administration and enforcement of the competition law requires an administrative set up. This administrative set up should be more proactive than reactive for the administration of the competition policy. This is not a mere law enforcement agency. This administrative set up should take a proactive stand to be specified and adopted to promote competition by not only proceeding against those who violate the provisions of the competition law, but also, by proceeding against institutional arrangements and public policies that interfere with the fair and free functioning of the markets it is in this context that the CCI in the Act has been entrusted with the following two basic functions :

1. Administration and enforcement of competition law and competition policy to foster economic efficiency and consumer welfare.
2. Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.

Investigation, Prosecution, Adjudication, Mergers Commission and Competition Commission.

Investigation and Prosecution :

Adjudicative wing is distinct and separate from the investigative wing in the act. At the apex level of the investigative wing, thee is an official who has been designated as Director General (DG). The Director General will not have suo motu powers of investigation. He will only look into the complaints received from the CCI and submit his findings to it. Investigators will be solely responsible for making enquiries, for examining documents, for making investigation into complaints and for effecting interface with other investigative agencies of the Government including Ministries and Departments. The DG has been vested under the Act with powers, which are conferred on the CCI, namely, summoning of witnesses, examining them on oath, requiring the discovery and production of documents, receiving evidence on affidavits, issuing commissions for the examination of witnesses etc.

The Act mandates that the investigation staff would need to be chosen form among those, who have experience in investigation and who are known for their integrity and outstanding ability. They should have knowledge of accountancy, management, business, public administration, international trade, law or economics. Htherto, in terms of the dispensation under the MRTP Act they were drawn routinely from those working in the Department of Company Affairs. The Act thus induces professionalism in the investigative wing, a step in the right direction.

Depending on the load, the Government would create Deputy Directors General in all the cities where Benches of CCI are situated. They will investigate the cases referred to them from the Additional (regional) Benches and submit their findings to them direct without necessarily rounting it through Director General at Headquarters. The Act envisages one Principal Bench and Additional Benches, besides Merger Bench (es). The schema of placement of the investigating staff and the procedure and drill for submission of their reports to the CCI and its Benches will be laid down, it is expected, bythe CCI and Government, uder Statutory Rules, Statutory Regulatinos or otherwise.

It is desirable to prepare guidance manuals spelling out the nature, scope and manner fof investigating. By and large, the investigation staff should follow these manuals and any departure there from must have the prior approval of the Director General. This is to ensure that there are no fishing and rowing enquiries designed to threaten and harass corporate.

Adjudication :

Central to effective implementation and enforcement of competition policy and competition law is an appropriate competent and effective adjudicative body, in the instant case, the Competition Commission of India CCI will be the adjudicating body under the Act with autonomy and administrative powers.

CCI will be a multi member body with its Chairperson and Members chosen for their expertise, knowledge and experience in Economics, law, International Trade, Business, Commerce, Industry, Finance, Accountancy, Management, Public Affairs or Administration. The Act stipulates that the Chairperson and Members shall be selected from those, who have been, or are

qualified to be judges of the High Courts or from those who have special knowledge of any of the disciplines listed above. They should not only have special knowledge in one or more of therefore said areas, but also have experience of not less than 15 years therein. Besides, they need to be persons of ability, integrity and standing.

Each Bench will have a judicial member, as it will have the power of imposing sentences of imprisonment, in addition to levying fines.

Mergers Bench

For rthe case of mergers, amalgamations etc. which need to be examined on the touchstone of competition, the Act proposs to have a separate Mergers Bench, which will be part of the Competition Commission of Ias delays can prevent India. This is to ensure that there is no avoidable delay in dealing with such scrutiny, as delays can prevent bodies corporate from being competitive globally. An important rider in the merger provisions, as noted earlier, is that if the Mergers Bench does not finally decide against a merger within a stipulated period of ninety working days, it would be deemed that approval has been accorded.

Competition Commission of India and Selection of Chairperson and members :

In order to ensure competent and effective implementation of competition policy and competition law, it is important and imperative to select suitable persons, suitability having been described in the earlier paragraphs. It cannot be over emphasized that Government ought to ensure that the CCI is free of political control. While, it is practically difficult to eliminate political favoritism, it can be monished to a great extend by resorting to what may be described as a Collegiums Selection Process. The Act, as passed by the Parliament, has left the selection procedure to the Government which will therefore frame Rules in this regard. It is believed that the Government has opted for a search committee procedure for the selection of Chairperson and Members.

Status of the Chairperson & Members of CCI :

The status of the Chairperson and Members of the CCI has been left to the Government of specification by Statutory Rules. It is understood that the government has prescribed the status of the Chairperson to be equal to that of a Judge of the high Court and that of the members to be equal to that of a Secretary to the Central Government. Furthermore, according to the Act, the age cap for the Chairperson is 67 years and that for the Members is 65 years. The Act has created a bar for the Chairperson and Members for a period of one year from the date on which they cases to hold office, to accept any employment in, or connected with the management or administration of any enterprise which has been a party to a proceeding before the Commission under the Act.

Exemptions :

The Act provides for the Government to bring into force its different provisions on different dates by a notification. Furthermore, it empowers the Central Government by notification to exempt form the application of the law or any part thereof for such period, as it deems fit.

any class of enterprises if such exemption necessary in the interest of security of the State or public interest.

Any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.

Any enterprise which performs a sovereign function on behalf of the Central Government or a State Government.

The aforesaid provision in the Act relating to exemptions should enable the Government to take care of the country's goals, objectives and needs. The Act provides flexibility to the Government to use this provision appropriate to the needs of the country.

Appeal And Review Provisions :

Appeals against decision and orders of the CCI lie to the Supreme Court within the limitation period of 60 days. Appeals can be on one or more of the grounds specified in Sec. 100 of the Code of Civil Procedure. Thus, the status given to the CCI is very high with only the Supreme Court having the power to overturn its orders.

The CCI has power under the Act to review its own order on an application made by the party aggrieved by its order.

Competition Appellate Tribunal :

2[ba) Appellate Tribunal means the Competition Appellate Tribunal established under sub-section (1) of Section 53A]

In exercise of the powers conferred by section 53A of the Competition Act, 2002 (12 of 2003), the Competition Appellate Tribunal here by makes the following regulations or regulating the procedure of appeals and applications. These regulations may be called the Competition Appellate Tribunal (Procedure) Regulations, 2011.

Section 3, Language of Tribunal :

The proceedings of the Tribunal shall be conducted in English.

No appeal, application, document or other papers contained in any language other than English, shall be accepted by the Tribunal unless the same is accompanied by a translation thereof in English attested by a translator and countersigned by the party concerned.

Section 4, Sittings of Tribunal :

The Tribunal shall ordinarily have sittings at its headquarters at New Delhi and at such pleas as the Chairperson may be general or special order direct.

Section 6, Functions of Registrar :

According to section 2(i) Registrar means Registrar of the Tribunal and includes the Deputy Registrar of the Tribunal;

The Registrar shall -

receive and register appeals, applications, interlocutory and all other miscellaneous application relating to such appeals or applications, as the case be;

maintain all records of the Tribunal;

represent the Tribunal before the Supreme Court in the event of an appeal under section 53(T) of the Act, and

Perform such other functions as the Chairperson may, from time to time, direct.

Section 7, Registration of Appeal or application :

Every appeal or application supported by an affidavit and a certified copy of the impugned direction, decision or order of the Commission, shall be verified and it found to be in order, be registered by the Registrar and shall be given a serial number.

If the appeal, on scrutiny, is found to be defective, the appellant shall be advised to rectify the defects and after rectification of the defects by the appellant, the appeal shall be registered.

The appeal registered shall be put up for hearing before the Tribunal with a notice to the appellant and the Tribunal, after hearing the appellant, may either dismiss it summarily or direct issue of notice to all necessary parties or may make such orders as the circumstances of the case may require.

In case, the Tribunal directs issuance of notice to the concerned parties, the Registrar shall issue notice, along with the order of the Tribunal and copy of the appeal to all the respondents.

Where at any stage prior to the hearing of the appeal, the appellant desires to withdraw his appeal, he shall make an application to that effect to the Tribunal.

Section 8, Pleadings before Tribunal :

Appeal or application, counters, rejoinders, supplemental pleadings to other documents, as the case may be, shall be accompanied by four copies thereof for the Tribunal's record and such additional number of copies thereof for being served on respondents.

No pleadings, subsequent to the reply, shall be presented except by the leave of the Tribunal upon such terms as the Tribunal may think fit.

The Tribunal may :

Section 9, deliver or Serve notice or other documents.

Section 10, The Tribunal may, if sufficient cause is shown at any stage of any proceeding, adjourn the hearing for a specific time as required.

Section 11, If a party to the proceeding does not appear on the day fixed for hearing, the Tribunal may continue with the proceedings in the absence of such party.

Section 123, The Registrar shall maintain the records and may take the c ustody.

Section 13, Inspect the certified copies of documents and other papers.

DIRECTOR GENERAL APPOINTMENT AND DUTIES :

SECTION 2 (G) of Chapter 11 of the Competition act, 2002 denies Director General, Section 16 of the 2002 Act narrates the provisions about Appointment of Director General Section 41 of the 2002 Act narrates the provision about Duties of Director General.

DEFINITION : Sec. 2 (g) : Director General mean the Director General appointed under sub-section (1) of Section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that Section.

APPOINTMENT OF DIRECTOR GENERAL :

16, appointment of Director General etc. - (1) The Central Government may, be notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into intervention of any of the provisions of this Act and for performing such other functions as are, or may provided by or under this Act.

1- (1-A) The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such additional, Joint, Deputy or Assistant Directors General of such officers or other employees shall be such 8 may be prescribed.

2. (2) Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, hall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.

3. The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers of other employees, shall be such as may prescribed.

The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigations, and knowledge of accountancy, management, business, public

administration, international trade, law or economics and such other qualifications as may be prescribed.

DUTIES OF DIRECTOR GENERAL [Sec.41]

Director General to investigate contravention :

The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of Section 36.

Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act 1956 (1 of 1956), sofar as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

Explanation : For the purposes of this Section :

the words the Central Government under Section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as the Commission.

The word Magistrate under section 140A of the Companies Act, 1956 (1 to 1956) shall be construed as the Chief Metropolitan Magistrate, Delhi.

Chapter VI (containing Sec. 42, 42-A, 43, 43-A, 44-48) of the Competition Act 2002 lays down the detailed provisions about Penalties PENALTIES (Sec. 42, 42-A, 43, 43-A, 44-48)

Contravention of orders of Commission :

The Commission may cause an inquiry to be made into complance of its orders or directions made in exercise of its powers under the Act.

If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under Sections 27, 28, 31, 32, 33, 42-A and 43-A of the Act, he shall be punishable with fine which may exten to rupees one lakh for each day during which such non compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

It any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (223), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which

may extend to three years, or with fine which may extend to rupees twenty five crores, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit :

Provide that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint field by the Commission or any of its officers authorized by it.

42-A Compensation of case of contravention of orders of Commission : Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damages shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under Sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

43. Penalty for failure to comply with directions of Commission and Director General : If any person fails to comply, without reasonable cause, with a direction given by :

the Commission under sub-sections (2) and (4) of Section 36; or

the Director Geneal while exercising powers referred to in sub section (2) of Section 41.

Such person shall be punishable with fine : which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.

43-A. Power to impose penalty for non-furnishing of information on combinations : If any person or enterprise who fails to giv e notice to the Commission under sub-section (2) of Section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.

44. Penalty for making false statement or omission to furnish material information : If any person, being a party to combination :

makes a statement which is false in any material particular, or knowing it to be false; or

omits to state any material particular knowing it to be material.

Such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

45. Penalty for offences in relation to furnishing of information :

Without prejudice to the provisions of Section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information :

a. makes any statement or furnishes any document which her knows or has reason to believe to be false in any material particular; or

b. omits to state any material fact knowing it to be material; or c

c. willfully alters, suppresses or destroys any document which is required to be furnished as aforesaid.

Such person shall be punishable with fine : which may extend to rupees one crore as may be determined by the commission.

Without prejudice to the provisions of sub-section (1), the Commission may also pass such other order as it deems fit.

46. Power to impose lesser penalty : The Commission may if it is satisfied that any producer, seller, distributor, trader or service provider : included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations :

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under Section 26 has been received before making of such disclosure.

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclsures under this Section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure do not continue to cooperate with the Commission till the completion of the proceedings before the **Commission :**

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceeding :

not complied with the condition on which the lesser penalty was imposed by the Commission; or

had given false evidence; or

the disclosure made is not vital.

And thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not be imposed.

47. Crediting sums realized by way of penalties to Consolidated Fund of India : All sums realized by way of penalties under this Act shall be credited to the CONSOLIDATED fUND OF iNDIA.

CONTRAVENTION BY COMPANIES : (1) Where a person committing con-prevention of any of the provisions of this Act or of any rule, regulation, order made or direction issued there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Provided that noting contained in this sub-section shall render any such person liable to any punishment, the proves that the contravention was committed without his knowledge or that he had exercised all due, diligence to prevent the commission of such contravention.

Notwithstanding anything contained in sub-section (1), where a contravention of nay of the provisions of this Act or of any rule, regulation, order made or direction issued there under has been committed by a I, company and it is proved that the contravention has taken place with the consent or connivance of, or is I attributable to any neglect on the part of, any director, manager, secretary or other officer of the company.

Explanation : For the purposes of this Section :

"company" means a body corporate and includes a firm or other association of individuals; and

"director" in relation to a firm, means a partner in the firm.

COMPETITON ADVOCACY

DEFINITION : The International Competition Network (ICN) in 2002 adopted the following definition of competition advocacy Competition advocacy refer to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationship with other governmental entities and by increasing public awareness of the benefits of competition.

Section 49 of Chapter – VII of the Competition Act, 2002 narrates about Competition Advocacy.

COMPETITON ADVOCACY

49. Competition Advocacy : (1) The Central Government may, in formulating a policy on completion (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be made a references to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the commission shall, within sixty days of making such reference, giv e tis opinion to the Central Government, or the State Government, as the may be, which may thereafter take further action as it deems fit.

The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may be formulating such policy.

The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

THINGS TO REMEMBER :

a. The Competition Advocacy is generally recognized that such activities enhance the transparency of competition policy along with the credibility and the convincing power of the enforcement agencies.

B. On one hand, Competition Advocacy implies convincing other public authorities to abstain from adopting unnecessarily ant competition measures, and helping regulatory agencies to clearly delineate the boundaries of economic regulation, i.e. to determine which markets are characterized by natural monopolies or other market failures, where regulation rather than competition should be the disciplinary force, and which markets are more susceptible to the competitive process.

On the other hand, Competition Advocacy comprises all efforts by competition authorities intended to me other Government entities, the judicial system, economic agents and the public at large more familiar with the benefits of competition and with the role competition law and policy can play in promoting and protecting welfare enhancing competition wherever possible.

C. It is important to note that competition enforcement is much older than competition advocacy. Even though in jurisdictions with a very long enforcements tradition competition advocacy efforts date back to the early decades of the 20th century, there was a renewed emphasis on competition advocacy in the 1970s, or even later in some jurisdictions. Evidently, recently installed competition agencies may take advantage from such developments and take up their advocacy role right from the start.

LIVING WITH CROSS- BORDER COMPETITON
CHALLENGES IN THE ABSENCE OF GLOBAL

Competition Rules :

The liberalization of trade and the spread of “Transnational Corporations (INS) in the developed country markets has resulted in the cross border

competition issues, especially in the developing countries where there is not effective competition regime. The competition laws of the countries deal with mostly restrictive trade practices, abuse of dominance power and mergers and acquisitions. The important cross-border issue relates to the extra-territorial jurisdiction. The United States, after the famous "Alcoa Case" (United States vs. Aluminum Co. of America, 148 F,2nd 416(1945) has applied the "effects doctrine" in the area of antitrust or competition regulation. The Community competition law of EU subscribed to the "Effects doctoring" to restraints or abuses of dominance positions occurring outside the EU, provided that there are effects within the EU between Member States. In order to empower the developing nations (with weak competition regime), the author suggests the formation of Global competition agency, which may be an tutorial idea. The author is of the opinion that due to the failure of WTO. Ministerial Conference at Cancun, parallel initiatives are urgently required to curb anti-competition practices of international dimensions either by way of bilateral and reginal approach or by the global initiatives taken by the international organizations.

Introduction :

As trade and investment regimes are liberalized in most developing countries, the inflow of foregn products and companies creates new challenges. While domestic markets are regulated by governments through various measures, including a competition regime, there is hardly any mechanism for regulating the international market. Hence, the international dimensions of competition challenges are becoming more prominent. Transnational Corporations (INCs) have entered developing country market or increased their activity within these countries. The entering of TNCs can have many positive effects on developing countries economies. It can bring in much needed investments and thus help the development of a country.

At the same time there is a serious concern among these nations that competition would suffered because of the entry of TNCs. Their ability to deal with cross-border competition problems is therefore of vital importance to the level of competition in their domestic markets. The TNCs feel more free to engage in across-th-border anti-competition behavior when the countries to which they export do not have an effective competition regime and can neither

individually nor through cooperation with foreign competition authorities challenge their market behavior. A recent study on the infamous vitamins cartel has validated this as it was found tha the extent of overcharges by the cartel was relatively more in countries without any anti-cartel enforcement.

The process of trade liberalization is often accompanies by the privatization of public monopolies, especially in the utilities sector such as telecommunications, energy and public transport. Although this can possibly lead to an increase in competition as well as improved performance standards, often it has meant that public monopolies turn into private monopolies. In many cases, such monopolies have fallen in the hands of foreign-based TNCs. This in itself is not more detrimental to competition in a particular market than if the monopoly were held by a domestic private enterprise. But it could cause further complication in enforcing a competition policy and law vis- a-vis that particular sector/enterprise.

How do competition authorities in developing countries deal with these cross-border (International) challenges ? The is clearly a difficult task. As Karel van Miert, former EU Competition Commissioner, observed, national or even regional authorities are ill-equipped to grapple with the problems posed by commercial behavior occurring beyond their borders. When competition authorities from highly developed countries/originations like the European Union face difficulties in handling cases with a cross border dimension, it is clear that the authorities in developing countries face even more problem.

Types of Cross-border Competitions Cases :

The type of cross-border anti-competitive practices are quite similar to those in purely domestic cases. The difference only lies in the cross-border (International) dimension of the anti-competitive behaviour. A number of areas where enterprise behavior is perceived to give rise to competition concerns with International dimension are discussed here. Following are few of the reasons that call for a global initiative on competition policy.

Market Access

International Cartels

Export Cartels

M&As with International spillovers

Abusive Practices by TNCs in Small/Developing Economies.

Market Access :

The anti competitive entry restrictions in foreign markets is a major perturbation in the world trading system as it negates the basic objective of free trade as by the Uruguay Round outcome. A market access protocol promises one only to and institutionalize the means to eliminate improper private restraints, but also to narrow the occasions both for extraterritorial competition action and for the use of antidumping laws. In the times to come, the problems of market will surely intensify and the line between public and private restraints will be increasingly blurred.

The issue has already come up before the WTO in the form of the famous Kodak-Fuji case. The dispute was between Japan and the US, where itwas alleged that Fuji effectively prevented Kidak's export to Japanese market by controlling the distribution channel.

International Cartels :

There has been a sharp increase recently in global cartel activity Consumers either directly or indirectly bear the cost of this unlawful conduct in higher prices and reduced choice. Simultaneously, enforcement agencies in rich countries have slapped multi-million dollar fines against vitamin companies, food additive makers, steel manufacturers etc. To date only a handful of countries have taken action to penalise transgressing companies or to recover compensation. No developing country, except Brazil, has taken any action on these cartels.

A World Bank study has shown that in 1997, developing countries imported $81.1bn of goods from industries in which price-fixing conspiracies have been discovered during the 1990s. These imports represented 6.7 percent of imports and 1.2 percent of GDP in developing countries. There might have been several other price-fixing conspiracies, which remained undiscovered. Moreover, all of these cartels are made up to producers, who are mostly from industrialized OECD countries.

But this is just one side of the story. Cartelization is not only about some loss in consumer welfare. It hampers the development of developing countries and growth of their firms through several ways. It has been observed that

producers of raw materials and capital goods ar more prone to cartelization as the goods produced by them are more homogenous in nature compared to consumer goods, which are more differentiated. The infamous vitamins cartel is a glaring example. This directly affects the firms of developing countries.

Similarly, many developing countries became victims in the flat-rolled steel and heavy electrical equipments cartels. India has significant production capacity of flat-rolled steel but its producers were not part of the global cartel and they were sufficiently punished for that especially at the time of global recession in the sector, India also paid higher prices for some steel products for which its did not have indigenous capacity, when global business in the industry was rather buoyant. Steel being one of the basic goods for different industries and most developing countries, being in lack of indigenous capacity, had to suffer because of high prices.

Heavy electrical equipment is another item that almost all developing countries require to install electricity generation plants to meet their growing energy demand. But higher prices of heavy electrical equipments have significantly raised the cost of installing electricity generating plants and thereby making energy more expensive. Needless to mention this has adversely affected the competitiveness of developing countries. The cartel members also used their excess profits to engage in predatory pricing against newcomers, particularly from developing countries. For example, predatory pricing drove the independent local manufacturers in Brazil to bankruptcy.

Export Cartels :

The limitation of competition laws, as a result of their domestic reach, is evident in the case of export cartels where, absent an effect on the exporting country, its competition authority may have no jurisdiction to control such cartels. Developed countries have generally ignored or often even encouraged export cartels whose activities affect other countries. Developing countries have found it difficult to cope with these, and the cooperating of the developed countries in investigating and discovering such practices has been lacking.

Export cartels have been exempted from control in some countries. For instance, the US Foreign Trade Antitrust Improvements Act of 1982 provided that foreign firms and consumers cannot invoke US law against US firms for acts that lessen competition only in foreign countries. On the other hand, the

Export Trading Company Act of 1982 establishes a procedure for US exporters to obtain a limited immunity from the US antitrust laws for export acts and collaborations, as long as they do not distort competition in the US.

A case of India would be illustrative in explaining how difficult it is to tackle an export cartel that operates from a developed country. When the America soda ash cartel, ANSAC was stopped from doing business in India, they adopted various unfair means to push their case. For example, they lobbied to get import duties reduced from 35% to 25%. Even when that did not work, they lobbied to get GSP privileges withdraw from exports of engineering goods from India. In a later development, the Supreme Court of India stayed the decision of the Indian competition authority, MRTP. Commission stating that the law does not give such powers to the competition authority to prosecute cartels, from across the border.

M&As with International Spillovers :

The increasing rate of mergers in the world market is becoming a major cause of concern for competition authorities the world over. Where there is a merger between two or more worldwide dominant firms in a global market, a competition concern may arise in all markets where these firms conduct business. In other words, even if the merging entities are located in the same country, the effects of possible dominance are not limited to this country alon, but may occur in all countries where these firms conduct business.

Similarly, the regulation of such mergers also has international spillovers as different regimes view mergers with different approaches. Furthermore, competition authorities of al the affected countries may have jurisdiction according to the effects doctrine. This will give rise to multiplicity of jurisdictions, which again is one of the main issues in international economic relations. For example the Gillette-Wilkinson Merger had to be cleared by 14 separate competition authorities.

In the not so distant past, differing decisions in the GE-Honeywell merger case led to a spat between the US and the EU who, otherwise, have been in a co-operative mode for quite some time in the area of competition policy enforcement. The conflict has not been resolved to a great extent. They have agreed, in principle, for simultaneous review of mergers, so tht the merging

companies do not have to face uncertainties in one jurisdiction after getting clearance in another. What is missing is that such a co-operative effort does not include developing and other countries where the merging firms operate. Often, merger of parent bodies leads to an absolute dominance in a developing country, when their subsidiaries also merge. Because the market is either small, or in the past only few foreign companies operated. A multilateral arrangement in this area may be helpful in protecting the interests of developing countries.

Abusive Practices by TNCs in Small/Developing Economies :

This is a serious problem for the developing and more specifically for the least developed countries. Very often they become the targets of anti competitive and unfair practices perpetrated by the TNCs operating from other countries. The ability of these countries to take adquate measures is severely restricted by the small size of their markets, which means not many companies are interested in these markets leding to very low market contestability.

Microsoft is a case in point. The company has been hauled up for indulging in anti competitive practices time and again in the US and the EU. But, by and large, it has not faced such action on other jurisdictions. On the face of it, it is quite clear that some of then were relevant for other countries as well. Moreover, it is difficult to believe that a orally dominant company like Microsoft did not indulge in such practices elsewhere, particularly when the regulatory framework in most other jurisdictions in much weaker.

Dominance of foreign companies is very often the hard reality in small economies. For example, in the small country of Bhutan, 80 percent of the goods sold in the market is imported, mostly from India. The ability of the Bhutan Government to take any action against an Indian supplier indulging in unfair practices is restricted as the refusal to deal by the Indian company may prove disastrous for the country as there may not be other companies interested in doing business in Bhutan immediately. The only options before them is to make a request to the Indian authorities.

Problems in Dealing with Cross- border Cases :

All the problems encountered by the Competition Authorities (Cas) in handling domestic competition cases are also applicable in their handling of cross border competition cases. But they encounter some additional problems while dealing with cross-border cases. There are large differences among the countries on how (or whether) the cases were handled by the competition authorities. Whereas some authorities handled some of the cases very seriously (regardless of whether they were successful in the end), others have not acted at all or only with limited interest or only in few of the cases. Although several problems are caused by the special nature of such cases, sometimes the authorities own lack of action or interest is also an important factor.

Broadly, competition laws everywhere (including developing countries) deal with three main subject ares : 9I) restrictive trade (business) practices; (ii) abuse of dominance or monopoly power, and (iii) mergers and acquisitions. There is no difference whether acts are international or domestic; as a matter of subject the law covers them. The most important legal problem, when it comes to dealing with cross-border issues vis-a-vis domestic competition concerns, lies in the realm of jurisdiction.

Extra Territorial Jurisdiction :

The whole question of jurisdiction is complex. Jurisdiction is a vital and indeed central feature of state sovereignty. If follows from the nature of the sovereignty of states that while a state is supreme internally, that is within its own territorial frontiers, it must not intervene in the domestic affairs of another nation. International law tries to set down rules dealing with the limits of a state's exercise of governmental functions. Although the expanding scope of the United Nations has limited the extent of the doctrine of domestic jurisdiction, the concept does retain validity in recognizing the basic fact that state sovereignty within its own territorial limits is the undeniable foundation of international law as it has evolved, and of the world political and legal system.

Although there is a general presumption against the extra territorial application of legislation, a number of states, particularly the United States, seek to apply their laws outside their territory in the context of economic issues.

On the basis of the so-called effects doctrine they have assumed jurisdiction even though all the conduct complained of takes place in another state.

Although the effects doctrine could theoretically be applied to all kinds of authorities is has been most energetically maintained in the area of antitrust or competition rigidities particularly by the United States. In the famous Alcos case the US Supreme Court declared that any state may impose liabilities, even upon persons not within its allegiance, for the conduct outside its borders that has consequences within it borders which the state reprehends.

The wide-ranging nature of this concept aroused considerable opposition out side the US, as did American attempts to take evidence aboard under very broad pre-trial discovery provisions in US law. Especially the European Community has taken a strong stance against the US approach. However, it is generally accepted now that the Community competition law subscribes to an effects doctrine for determining the reach of Articles 81 and 82. Under this effects doctirine, judicial jurisdiction exists to apply Community competition law to restraints or abuses of dominant positions occurring outside the EU, provided that there are effects within the EU between Member states.

The way Ahead :

Whether to deal with anti competition practices that occur at national level or that have international dimensions, having a strong and well-oiled competition regime is the bare minimum. This requires that Cas in developing countries must have adequate funds and a group of competition law enforcement officials who are technically competent. But unfortunately, both finds and such competent professional are in extremely shorts supply in these countries. One alternative frequently suggested to overcome such shortcomings is to adopt a regional approach to competition enforcements. Pooling of resources can indeed by beneficial in this regard. Such an approach for the small countries has been recognized even in the UNCTAD Set. In this regard, the example of CARICOM (Caribbean Community) arrangements is frequently quoted as a model to follow.

However, a strong competition regime at national levels may not be enough to tackle the cross- border anti competition practices that are affecting developing countries. Indeed it would be a good idea to have provisions for

extra territorial jurisdiction on the basis of the effects doctrine to legally empower the Cas to deal with such cases. However, most of developing countries do no thave enough muscle to actually enforce such provisions. Therefore, there are some primal counterarguments to suggest that multilateral discipline can help the weaker nations too. In this context, the setting up of a global competition agency could possibly by the best solution. However, this may be a Utopian idea given the existing geo political situation.

The need for a multilateral approach to competition policy was recognized even in the Havana Charter, which unsuccessfully tried to set up International Trade Organization just after the World War II. The General Agreement on Tariffs and Trade (GATT), which emerged instead, was based on the Havana Charter. Yet competition issues took a backseat. The issues came up for discussions at multilateral for a, time and again and eventually the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted in 1980 under the auspices of **UNCTAD.**

The issues pertaining to competition and measures to deal with restrictive business practices were raised in the Uruguay Round negotiations and finally entered to WTO arena through the Singapore Ministerial Declaration in 1995. However, five years after its introduction, WTO Members have recognized the case for competition policy at the WTO. Many countries are still skeptical about the benefits and rationale of such an agreement. The main objection of developing countries, in this regard, is that they do not have adequate experience.

However, there is much uncertainty regarding the final adoption of a multilateral instrument on competition policy at the WTO especially after the failed. Ministerial Conference at Cancun earlier this year. People also question whether the proposed agreement would have the desired effectiveness even if it is finally signed. Firstly, because there is no proposal to have binding global rules and the proposed commitment for cooperation is only voluntary. Secondly, even if the agreement is signed it will be as an outcome of power politics and may lack the mutual trust along nations that is the primary requirement for meaningful cooperation to tackle the cross border competition issues. Thus

parallel initiatives are urgently required to curb anti competitive practices of international dimensions.

Bilateral and Tripartite Tracks :

This US, European Union (EU) and Canada have signed a number of bilateral agreements with other countries to cooperate in the area of application of competition law. While the US has signed such agreements with Australla, Brazil, Canada, Germany, Israel, Japan and Mexico, the EU has concluded such agreements with Canda. Similarly, Canda has signed bilateral agreements with Chile and Mexico. It has also entered into a tripartite cooperation agreement with Australla and New Zealand.

Similarly, there is a tripartite agreement among Denmark, Norway and Lceland, France has an agreement with Germany, China has bilateral agreements with Russia and Kazakhstan, Taiwan has such agreements with Australla and New Zealand, Papua New Guinea has an agreement with Australia. It makes tremendous sense, as it is heavily dependent on its trade with Australia.

Regional Approach :

As mentioned before, there is a strong case for establishing a regional competititon authority by pooling resources and expertise. But this approach can also be of immense help in tackling cross border competition problems as very often they are more pronounced among neighbouring countries. The case for a regional competition authority or at least adequate meansures to cross border anti competitive functions within a region has been recognized in most regional economic integration arrangements. However, in most reglons, no substantive progress has been made.

Such cooperation and pooling if resources become all the more important if smaller economies would like to be able to tackle the mighty. TNCs or global mega-cartels. Small countries are not adequately capable on their own to take action in such situations. If countries with a small market want to take action against the big TNCs, they might blackmail by threatening to pull out of the country or the market. This also because each competition authority has to conduct its own investigation to detect and prove the violation of the relevant laws and calculate the extent of damage. Resource constrained small economies will not be able to do this alone.

A comprehensive regional approach to competition policy was first adopted by the ED and then by CARICOM. Such an approach is at various stages of discussion/adoption in many other regional groupings like Mercosur, COMESA *Common Market for Eastern and Southern Afirica), SADC (Southern African Development Community), EAC (East African Community), CEMAC (Economic and Monetary Community of Central Africa) etc. All of them need to accelerate their efforts in this regard.

Global Initiatives :

Over the last few years, several global initiatives have been taken up to deal competition problems, especially those that have international dimensions. Some are by government or government agencies while others are at non governmental level. None of them are of course to seal with competition related international disputes, but to promote cooperation manner, then international competition disputes can be avoided or even resolved.

However, considering that there exist a number of forums at the global level, it is imperative that proper coordination among them is maintained. Failure to do so may create confusion and may even add to the problems surrounding competition issues with international dimensions. However, it may be noted that multiple forums are not necessarily bad as, collectively, they might bring a balance in the system. The following paragraphs give brief outlines of the existing global initiative which may be strengthened to tackle the competition challenges with international dimensions.

UNCTAD :

In December 1980, the UN General Assembly adopted by resolution a Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices (Popularly called as the Set). This was the first successful attempt at multilaterising competition policy. Even though the Set is not binding on the UN member countries, the importance of the Set and the UNCTAD in this area of work should not be underestimated. The 1990 review conference indicated a high degree of consensus on the contribution of the Set and on UNCTAD's role.

The Set is particularly important for a number of reasons :

Involvement : It has been developed in consultation between developed and developing countries.

Legitimacy : The involvement of both countries of the north and the south countries has given the Set legitimacy in both camps.

Neutrality : The Set gives developing countries a viable route towards the development of competition law that is not tainted by the charge of interference by developed nations.

UNCTAD has become very active in providing technical assistance to developing countries. For example, it is widely acknowledged that the Monopoly Regulation and Fair Trade Act of South Korea was a direct fall out of the adoption of the Set. The example of south Korea is not unique. Many African countries including Ghana, Kenya, Nigeria and Zambia ahave sought UNCTAD help in creating of competition policies. Peru, Sri Lanka, the Philippines, Colombia, Venezuela and Chile have all either received UNCTAD support or have directly adopted lelements of the Set into their own competition laws. Given its history and non-controversial image UNCTAD can become an effeftive forum for promoting cooperation on competition issues among the nations.

OECDs Global Forum :

The OECD is an influential organization with 30 member states, the rich countries of the world. It has a standing committee on Competition Policy and Law, which has its regular 30 member countries as members, other than five observers, Argentian, Brazil, Israel, Lithuania and Russia.

The OECD has been regularly cooperating with a variety of non-OECD countries to provide capacity building. With the advent of the OECD's Global Forum on Competition, it claims, its cooperation with non-OECD countries will extend beyond capacity bulding to include high-level policy dialongue to build mutual understanding, identify best practices, and provide informal advice and feeback on the entire range of competition policy issues. The forum can also be used to promote cooperatin among countries. In this regard, OECD nedds to reinforce its interface with developing countries which at present is at the minimum.

International Competition Network :

The concept for International Competition Network (ICN) has evolved from the recommendations of the International Competition Policy Advisory Committee (ICPAC), a group formed in 1997 by the U.S. Antitrust Division ICPAC was commissioned to think broadly about international competition in the context of economic globalization and focused on issues like multi-jurisdictional merger review, the interface between trade and competition, and the future direction for competition among competition agencies.

ICN is intended to encourage the dissemination of competition experience and best practices, promote the advocacy role of competition agencies and seek to facilitate international cooperation, ICN is not intended to replace or coordinate the work of other organizations. Nor will it exercise any rule making function. However, it can work as an informal platform for promoting cooperation and exchange of information among the CAs.

Track-11 Initiatives :

In most jurisdictions, consumer organizations are nearly absent in competition policy discourse or its implementation. This is despite the fact that the primary objective of competition law in all jurisdictions is to protect and promote both economic and consumer interests. Other Civil Society Organizations (CSOs) have not been too enthusiastic about competition issues either. However, recently there has been much curiosity on the issue among the CSOs, due its inclusion in the WTO discussions.

However, things are changing. The recent announcement of Mario Monti, the ED Competition Commissioner, to involve European consumer groups in the competition enforcement process is a pointer. He has also promised to provide financial support for such groups, if they require it. Monti's announcement should be an eye opener for many other competition authorities, especially in developing countries.

In the changing scenario, when the corporations are getting more global in nature and anti competition practices are also more global, there has to be consumer oriented competition advocacy at the global level. However, it needs to be recognized that the consumer movement itself is not so strong in may countries, especially in the developing world. At the same time it has also been observed that other CSOs are taking more and more interest in economic

issues in geneal and competition policy issues in particular. Thus, Intenational cooperation on competition issues at the civil society level can play a significant role in tackling cross border competition problems. There already exists a Global Competition Forum (GCF) of the competition lawyers under the auspices of the Internatoinal Bard Association.

INCSOC :

A beginning has been made at the level of CSOs as a network of them, namely, International Network of Civil society Organizations on Competition (INCSOC), has been formed recently, INCSOC brings together consumer organizations and other CSOs interested in economic issues in geneal and competition issues in particular, INCSOC intends to work in coordination with ICN, GCF and the other relevant international bodies.

The need for such a network came out as one of the recommendations of the 7-Up project. It was articulated in different seminars/conferences organized as part of implementation as part of implementation of the project as well as other international level meetings where findings of the project were discussed. Hence, the concept of the network was floated by CUTs. Several consumer organizations, other CSOs and competition experts showed overwhelming interest in the idea. As a result the INSOC was formed and formally launched on February 19, 2003 at the final meeting of the 7-Up project at Geneva.

The goal of the network is to promote and maintain healthy competition culture around the world by coalition building among civil society and other interested organizations. The activities of the network will revolve around the objective of building capacity on competition issues, primarily of the civil society organizations, but secondarily of other stakeholder groups. The network is working mailly through working groups. All working groups have a balance of representation from the North and the South, and among regions.

As of now, the network has three working groups; Working Group on Advocacy or WGA, Capacity Buildings Working Group or CBWG and the Working Group for the World Competition Report or WGWCR. The WGA aims to undertake advocacy activities mainly at national level. The CBWG aims to build the capacities of CSOs and other stakeholders around the world. At the international level the WGA will work with the WGWCR to prepare the World

Competition partly the year 2005, for the first time and once in two years thereafter.