A CRITICAL ANALYSIS OF COMPETITION LAW IN INDIA

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UNDER SUPERVISION OF:

Ms. Trishla Singh

Astt Professor

SoLS, BBDU

SUBMITTED BY:

Akanksha Raj Mishra

ROLL No.: 1190990002

SoLS, BBDU

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UNIVERSITY ROLL No.1190990002

LL.M. (2019-20)

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LIST OF ABBREVATIONS

A.I.R.	All India Reporter
Art.	Article
All. E.R	All England Reporter
CCI	Competition Commission of India
Consti.	Constitution of India
CBI	Central Beaureau of Investigation
CCI	Competition Commission of India
C.J.	Chief Justice
CPA	Consumer Protection Act
CWP	Civil Writ Petition
DG	Director General of Investigation and Registration
D.L.R.	Delhi Law Review
D.L.T.	Delhi Law Times
EC	European Commission
Edn.	Edition
e.g.	Exampli gratia
Et.al	And Other
EU	European Union
Govt.	Government of India
H.C.	High Court
Ibid	Ibidem
Id	Idem
i.e.	That is
In re	In The Matter of
J.	Justice (Judge)
KB	Kings Bench
L.Q.	Law Quarterly
MCA	Ministry of Corporate Affairs
MRTP	Monopolies and Restrictive Trade Practices
MTP	Monopolistic Trade Practices
NCR	National Capital Region

Ors.	Another
QB	Queens Bench
RTP	Restrictive Trade Practices
S.C.	Supreme Court
SCC	Supreme Court Cases
SCW	Supreme Court weekly
SCR	Supreme Court Reports
SLT	Supreme Law Times
Supra.n.	above note
SLP	Special Leave Petition
Supp.	Supplementary
U.K.	United Kingdom
U.S.A	United States of America.
U.S.	United States of America
Ultra Vires	Beyond the Powers of
UTP	Unfair Trade Practice
V.	Versus
Vide	refer to; Consult
w.e.f.	With Effect From
W L R	World Law Reporter

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(1994) AIR 988; (1993) SCC (3) 499.

22. *United States* v *Trenton Potteries Co.,* 273 US 392. 52

23. *United States* v A. *Alfred Taubman*, 297 F.3d 161. 52

24. *United States of America* v *Microsoft Corporation*, 87 F.supp 2d 30 D.D.C (2000). 63

25. *United States* v *Dubilier Condenser Corp*, 2898 US 178. 60

26. *Vallal Peruman* v *Godfrey Philips (India) Ltd*. 76
IA 91/92 in UTPE 180/92- MRTP Commission.

27. *Yashoda Hospital and Research Centre Ghaziabad* v. *India Bulls Financial Services Ltd. New Delhi*, Case no. 12 of 2010, decided by CCI on March 22, 2011. 32,83

CHAPTER – 1

INTRODUCTION

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary."

-Adam Smith[1]

The consumer is the sovereign or the king is the general phenomenon under capitalist economy. The preferences of the consumer influence and to a great extent regulate the economic activities in a capitalist economy. The production activities are undertaken to satisfy him. The producers of goods and services have to study the nature of the requirements of the consumers by acquainting themselves with the sovereign the king the master.

We all are consumers in one form or another. But in the present socio-economic scenario, we find that the consumer is a victim of many unfair and unethical tactics adopted in the market. The untrained consumer is no match for the businessmen marketing goods and services on an organized basis and by trained professionals. He is very often cheated in quality, quantity and price of goods and services. The consumer who was once the 'King of the market' has become the victim of it. He is often not supplied adequate information as to the characteristics and performance of many consumer goods or services and also he suffers due to the unfairness of many one-sided standard form contracts he is forced to accept without choice. The modern economic, industrial and social developments have made the notion of 'freedom of contract' largely a matter of fiction and an empty slogan so far as many consumer utilities are concerned.

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[1] Adam Smith, "*An inquiry into the Nature and causes of the Wealth of Nations*", (1776) Abridged version published by Orient Publication (1957), p. 111; Also available online at http://www2.hn.psu.edu/faculty/jmanis/adam-smith/Wealth-Nations.pdf , last viewed on May 12, 2012.

For long the advocates of free market economy did argue that the market forces are self-regulatory and capable of taking care of consumer welfare as well. But a perfectly competitive market is just a utopia and the consumer sovereignty a myth. Products are of great variety, many of them are complex and the consumer has imperfect product knowledge. The supplier often has a dominant position vis-à-vis the buyer who has little or no bargaining power in the market. There has been a growing realization for not depending on the old doctrine of Caveat Emptor – "let the buyer beware". The consumer, therefore, needs and deserves legal protection against certain trade practices, business methods and unscrupulous forces.[2]

In many countries and in particular developing countries like India, a large number of consumers are illiterate and ill-informed and possess limited purchasing power in an environment, where there is shortage of goods. Very often, one witnesses the spectacle of a large number of non-essential, sub-standard, adulterated, unsafe and less useful products being pushed through by unscrupulous traders by means of unfair trade practices and deceptive methods. Subtle deception, half-truths and misleading omissions inundate the advertisement media and instead of the consumer being provided with correct, meaningful and useful information on the products, they often get exposed to fictitious information which tends to their making wrong buying decisions.

Further different conditions prevailing in the market like monopoly, cartels, oligopoly etc. also affect the interest of the consumers. Each of the market conditions has its own pros and cons. But in order to have the healthy market it is necessary to maintain healthy competition in the market because the competition enables the consumers to have better choice, better bargaining power and to avail the products on reasonable price.

However monopoly and competition are not novel market phenomenon. Though the normal belief is that 'monopoly is bad for the society, and competition is good but neither the absolute monopoly nor the unfair competition is good for the society. When the legal minds talk about the economic laws, it has to be seen on which economic setup the particular country has relied on. Before making policy on particular setup of economic law it has to be tested on the touchstone of consumers' interest, traders' interest and

[2] Vinod Dahl, "Competition Law in India", *Antitrust Law Journal,* Vol. 21 No. 2, Spring 2007, pp. 3-6.

possible instruments to balance these two interests so that the ultimate interest of the society, that is the economic and social development of the country can be preserved.

It is therefore necessary to maintain healthy competition to have healthy market. Because where there is competition, the consumers have more choice, more bargaining power to have the products on reasonable price.

Vigorous Competition is vital to innovation, strong and effective markets, advancement of consumer interest and productivity which ultimately lead to growth in the economy. Trade and competition are closely connected. Both trade laws and competition laws have the common objective of achieving economic efficiency, by improving the business environment for more efficient resource allocation. Thus to achieve the objective of maximum economic efficiency, the liberal trade policy must be complimented through a sound competition policy by preventing anti-competitive business practices and unnecessary government intervention. A good competition policy, along with a sound competition law, should help in fostering competition, economic efficiency, consumer welfare and freedom of trade, which should equip the Governments in meeting the challenges of globalization by increasing competition in local and national markets.[3]

We, the people of India, as the preamble of Indian constitution declares, have accepted the socialist pattern of society as our goal. One of the principal methods for establishing such a society is prevention of concentration of wealth in few hands or institutions. The trade practice – monopolies, restrictive and unfair- which result from such concentration of power adversely affect free trade and commerce and are thus against the mandate of the Indian constitution.

Competition Law for India was triggered by Articles 38[4] and 39[5] enshrined in the Directive Principles of State Policy, part IV of the Constitution of India. Articles 38 and

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[3] The UK White Paper on Competition, *CentrePiece* Autumn 2010

[4]Constitution of India, 1950, Article 38. State to Secure a Social Order for the Promotion of Welfare of the People.-(1) the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may asocial order in which justice, social, economic and political, shall inform all the institution of the national life.

(2) 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 groups of people residing in different areas or engaged in different vocations

[5]*Ibid*, Article 39. Certain Principles of Policy to be followed by the State:- The State shall, in particular, direct its policy towards securing-

39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing:-

1. that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good; and
2. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Since attaining Independence in 1947, India, for the better part of half a century thereafter, adopted and followed policies comprising what are known as Command-and-Control laws, rules, regulations and executive orders. It was in 1991 that widespread economic reforms were undertaken and consequently the march from Command-and-Control economy to an economy based more on free market principles commenced its stride. As is true of many countries, economic liberalization has taken root in India and the need for an effective competition regime has also been recognized.

After India became a party to the WTO agreement, a perceptible change was noticed in India's foreign trade policy which had been earlier highly restrictive. Recognizing the important linkages between trade and economic growth, the Government of India, in the early 90s took step to integrate the Indian economy with the global economy. Thus, finally enhancing its thrust on globalization India opened up its economy removing controls and resorting to liberalization.

The Government also formulated Competition policy. Competition policy is defined as "those Government measures that directly affect the behavior of enterprise and the

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(a) that the citizens, men and women equally, have the right to an adequate means to 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 to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment

structure of industry"[6]. The objective of competition policy is to promote efficiency and maximize welfare. In this context the appropriate definition to welfare[7] is the sum of the consumers' surplus and producers' surplus and also includes any taxes collected by the government. It is well known that in the presence of competition, welfare maximization is better realized whereas abhorrent taxes are generally welfare- reducing.

There are two elements of such a policy. The first involves putting in place a set of policies that enhance competition in local and national markets. These would include a liberalized trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is a legislation designed to prevent anti-competitive business practice and unnecessary Government intervention- competition law. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regularly framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilities market access and complement other competition promoting activities.

However, there are two schools of thought. One approach is to have totally free and unfettered competition in the belief that it will drive out all unfair practices. The other approach is to assert that the process of free competition should be supported by regulations which preclude any attempt at subversion of free trade any competition. It may be pertinent here to note that in most parts of the world, free competition is supported by relevant rules and regulations to ensure free trade and absence of unfair practices.

The legislative enforcement of healthy trade practices necessitates the promulgation of the competition law. Free competition means total freedom to develop optimum size without any restriction. The limitation, if at all necessary, is not limitation of size but of competition power[8].

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[6] http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf, last viewed on May 15, 2012

[7] http://en.wikipedia.org/wiki/Welfare_economics, last viewed on May 13, 2012.

[8] *Supra* note 2 at p.8.

The ultimate raison d'être of competition is the interest of the consumer. The consumer's right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society notably- adequate spread of information throughout the market, free and easy communication and ready accessibility of goods. A free press, worthy advertisement and even such modern institutions as the internet could support a modern competitive society. Without them, competition cannot thrive in a kind of vacuum.[9]

Competition policy, in this context, thus becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation, non-concentration of economic power[10]. Competition policy should thus have the positive objective of promoting consumer welfare.[11]

While competition policy is, therefore, a desirable objective and useful instrument for serving consumer interest and welfare, there is first a need to bring about a competitive environment. In order to achieve the objects of consumer protection it is necessary to bring in force such a competition law. Often, consumer interest and public interest are considered synonymous. But they are not, and need to be distinguished. In the name of public interest, many governmental policies are formulated which are either anti-competitive in nature or which manifest themselves in anti-competitive behavior. If the consumer is at the fulcrum, consumer interest and consumer welfare should have primacy in all governmental policy formulations.

Consumer is a member of broad class, consisting of people who purchase, use, maintain and dispose of products and services. Consumers are affected by pricing policies, financing practices, quality of goods and services and various trade practices. They are clearly distinguishable from manufacturer, which produce goods, and wholesalers or retailers, who sell goods.

Public interest, on the other hand, is something in which society as a whole has some interest, not fully captured by a competitive market. However, there is a justifiable apprehension that in the name of "public interest", governmental policies may be

[9] *Ibid*
[10] *Ibid*
[11] *Supra* note 6.

fashioned and introduced which may not be in the ultimate interest of the consumers. The asymmetry arises from the fact that all producers are consumers and most of the consumers are producers as well in some other capacity. What is desirable for them in one capacity may be inimical in the other capacity.

Consequently keeping in view the new policy and the Directive of the Constitution, India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act)[12], and made it an integral part of the economic life of the country.

The enactment provides a regulatory mechanism and operates in a framework of checks and balances, and in the philosophical milieu of the '*Laissez Faire'*. It seeks to curb the concentration of economic power in few hands when it may cause a common detriment. Likewise it regulates monopolies, restrictive and unfair trade practices when they adversely affect the public interest. The purpose is to condone the "good" and to condemn the 'bad'.

The MRTP Act has been designed as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that unrestrained interaction of competitive forces would yield greatest material progress though best allocation of our economic resources and at the same time it would result in the availability of goods and services of highest quality at lower prices thereby provide a just and fair deal to the consumers. All business enterprises whether corporate entities registered under the Companies Act or non-corporate organization e.g. proprietary concerns and partnerships fall within the ambit of this legislation. It encompasses the field of production as well as distribution and covers both goods and services. Indeed, there is no other legislation in our country which is as small in size as the MRTP Act as yet so vast conceptually.

The MRTP Act lays down regulatory measures in three distinct areas, viz., concentration of economic power, competition law and consumer protection. The basic purpose of the provisions on prevention of concentration of economic power, as envisaged in the Act, is not to prevent the growth of MRTP houses *per se*, but to control such growth as is, or

[12] Act No. XLIV of 1969.

may be, detrimental to common good. The other objective of the Act is to curb monopolistic, restrictive and unfair trade practices, which distort competition in the trade and industry and which adversely affect the consumers, interest too.

Though in the realm of unfair trade practices, a parallel legislation, viz., the Consumer Protection Act, 1986 has since been framed and which is independently administered through the redressal machineries set up there under, it did not affect the scope and jurisdiction of the MRTP Commission. The scope of Consumer Protection Act is confined to non MRTP organizations; the MRTP Act continued to regulate the activities of both the MRTP and non MRTP business establishments, as hitherto. Over the period of last years when the regulatory provisions on unfair trade practices were introduced in the MRTP Act, voluminous case laws has been built up in this field. The MRTP regulations which, *inter alia*, laid down the procedure for conduct of enquiries by the MRTP Commission have also been recast, with the replacement of erstwhile 1974 regulations by the MRTP Regulations, 1991.

The basic philosophy behind enactment of such a law was state controlled but market free competition. It was felt that to preserve the laudable ideals of free enterprise and protection of the consumer, the state has to intervene to regulate trade and commerce so that there is no undue concentration of means of production and market dominance, which are inimical to the concept of open society. In essence, it is a protective mechanism and its provisions have to be understood in this context.

A perusal of the MRTP Act also shows that there was neither a definition nor a mention of certain offending trade practices which are restrictive in character. For example, abuse of dominance, cartels, collusion and price fixing, bid rigging, boycotts, refusal to deal and predatory pricing were not covered under the Act. Thus, the MRTP Act had become obsolete in the light of the economic developments relating more particularly to competition laws and the need was felt to shift the focus from curbing monopolies to promoting competition.

Finding the ambit of MRTP Act inadequate for fostering competition in the market and eliminating anti-competitive practices in the national and international trade, the Government of India in October 1999 appointed a high level committee on Competition

Policy and Law (The Raghavan Committee)[13] to advise on the competition law consonant with international developments and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May 2000. The draft competition law was drafted and presented to the Government in November 2000. After some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002.[14]

The MRTP Act has metamorphosed into the new law. The new law is designed to repeal the extant MRTP Act. As of now, all provisions of the new law have been brought into force and the the regulatory authority, namely, the Competition Commission of India under the new Act, is constituted. The Competition Appellate Tribunal[15] has also been constituted to hear the appeals from the Commission.

The word 'competition law' is the union of two words first is 'competition' which means 'striving against each other for setting something desired or doing something in best possible manner'[16] and second is 'law' which means 'the system of authoritative materials for grounding and guiding judicial and administrative action recognized by the society. Competition can be defined as a process by which cost efficient production is achieved in a structure where entry and exit are easy, and where reasonable number of players (producers and consumers are present) and close substitution between products of different players in a given industry exists.[17] Law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory the force of law'.[18]

Competition law does nothing but only regulates the supply and demand in the market but it is instrumental in the sense that the whole economics is dependent upon supply and demand. For every market four elements are essential; they are firstly- product (goods[19]

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[13] Vijay Kumar Singh, "Competition Law and Policy in India : The Journey in a Decade" , *NUJS LAW REVIEW* 4 NUJS L.Rev. 523 (2011)
[14] Act N0. XII of 2003.
[15] Section 53A, Competition Act, 2002.
[16] Ramnatha P Aiyer, *Concise Law Dictionary*, (3rd ed.), 2009, p.222.
[17] Government of India, "Report: Working Group on Competition Policy" Planning Commission, February 2007, p.666.
[18] *Id.* at p. 667.
[19] *Supra* note 14, section 2(i)-"goods" means goods as defined in the Sale of Goods Act ,1930 (8 of 1930) and includes-

and services[20]), secondly- supplier (producer and seller), thirdly- price[21] and fourthly- consumer[22].

Supply and demand are two major factors which regulate the market behavior. Competition law is basically in place to regulate these two factors so that it can facilitate its trade practices successfully keeping in view the development of the country, interest of public , trader and consumer. Monopoly is another factor which drives the market in a particular way. "Literal meaning of monopoly is, exclusive possession of the trade in some commodity and this is generally confessed as a privilege by the state. In certain circumstances monopoly in particular kind of trade or business may be in the interest of the public but in other circumstances, it may have a contrary effect and may be destructive of individual enterprises."[23] Monopoly is the situation where there is a single seller of a particular product who has power to control and regulate the market according to his will, for example he can control the supply of the goods.

It is common tendency of the consumers that they go to the market where there are many sellers or agents (for example, *mandi samitis*) because they know that at such a place they will have more information about the product, multiple options to choose a particular product, and moreover products of better quality with sufficient bargain power.

Products manufactured ., processed or mined;
Debentures ,stocks and shares after allotment;
In relation to goods supplied , distributed or controlled in India , goods imported into India;

[20] *Ibid.* Section 2 (u)-service means service of any description which is made available to which is made available to the potential users and includes the provision of services in connection in connection with business of any industrial or commercial matters such as banking, communication ,education, financing ,insurance , chit funds , real-estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement , construction, repair, conveying of news or information and advertising;

[21] *Ibid.* Section 2 (o) - "price", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of the performance of any service although ostensibly relating to any other mater or thing.

[22] *Ibid.* Section 2 (f)- "consumer" means any person who-
buys any goods for consideration which has been paid or promised or partly promised and partly paid, or under any system of deferred payment and includes any user of such goods other then the person who buys such goods for consideration paid or promised or partly promised and partly paid, or under any system of deferred payment when such use is made with the approval of such person , whether such purchase of goods is for resale or for any commercial purpose or for personal use;
hires or avails of any services for consideration which has been paid or promised or partly promised and partly paid , or under the system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of any services for consideration which has been paid or promised or partly promised and partly paid , or under the system of deferred payment, when such services are availed of with the approval of the first mentioned person whether such hiring or availability is for any commercial purpose or for personal use;

[23] *Supra* n. 2, p.12.

Monopoly is created in two ways; first by the state action and second, by self acquired illegal means. Intellectual property laws are the monopoly rights which are given to the individuals by the state to protect the individual's interest in the property which he has created by investing skill, labour, time and money; and state protects the interest of the inventor by recognizing the right of the person over the product to exploit it.

This state created form of monopoly is in the interest of the inventor, consumer and development of the nation also. But it cannot be left unregulated; otherwise there will be sufficient possibility of abuse.

On the other hand cartels are conspiracies against the public. Cartels are nothing but short of thefts, which impair the rights of consumers. They are the efforts of the traders involved in the competition in the market. Actually cartels are the results of the anticompetitive agreements by which the parties regulate the demand and supply in market. There cannot be any valid justification of such type of monopoly.

With the repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (on the enforcement of the Competition Act), the mandate for the Protection of consumers against unfair, and restrictive trade practice primarily vests with Redressal Authorities established under the Consumer Protection Act. To facilitate their task, the definitions of 'Unfair Trade Practice' and Restrictive Trade Practice', have been suitably revised. Anti-competitive agreements (hitherto referred to as Restrictive Trade Practices under the erstwhile MRTP Act) and abuse of Dominance (hitherto referred as Monopolistic Trade Practice under the erstwhile MRTP Act) fall under the domain of competition commission under the Competition Act,2002.

1.1 Research Problem

In this dissertation researcher has thus started with following research problems:-

1- The regulation of market ensuring economic growth, genuine protection of creative endeavors vis a vis interest of consumers and public at large is a dynamic process.

2- At present there is need to examine the nature and scope of social, architectural and legal regulations of genuine competition in market and identify their strengths, weaknesses and areas in need of reform.

3- An analysis over the existing market regulation at National levels is highly required to minimize the threats for monopolistic and restrictive trade practices and simultaneously respecting rightful constitutional / statutory rights of those who invent and create ie; holders of intellectual property rights.

4- An analysis of "competition policy" which led to enactment of Competition Act 2002 and amendment thereafter is also highly required so as to assess whether the existing framework and direction of enactments are in conformity with the intended outcomes of the policy.

5- A detailed analysis of conflicting and coherent provisions of Competition Law, Consumer Laws and laws relating to Intellectual Property Rights with a view to assess the "balance" or "tilt" created by implementation of these laws in market and its impact on Consumers, Business and State is also a required field which has been attempted in this dissertation paper.

1.2 Hypothesis

Regulating market competition through suitable legal interventions for protection of important components of market and industry like consumers, producers, inventors, authors, performers, creators of works etc is necessary for preventing distortions in free and fair competition thus a discipline of regulatory framework and legally backed exceptions is not contrary but supportive to and necessity for free, fair and viable competition in markets.

1.3 Research Methodology

The researcher in this dissertation has adopted "Doctrinal Methodology" for conducting the research. Since competition law is all about the balancing and adjudging between competing interests in market, empirical research needed larger resources, time and scale to collect large data, analyze the data and at the same time not falling victim of being influenced by that set of data which could be made available primarily whereas not getting all competing but hidden interests in market which are not always or rarely available as vocal or effective voices. On the other hand, lot of work has been done giving voice to and addressing concerns of various stakeholders in the market who are primarily the clients of a sound competition policy. And therefore for sake of better

suitability to the topic of research in this paper, doctrinal methodology ie; relying over various texts including books, journals, published papers, reports, case laws, web sources and research works- prominent as well as contemporary have been relied upon in this dissertation along with a critical analysis, interpretations and logical contemplations which are original credits of researcher and author of this dissertation.

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CHAPTER – 2

COMPETITION LAW IN INDIA

This chapter is focused on the existing provisions of Indian Competition Law. An attempt has been made to analyze the provisions keeping in view the concept of consumers' interest.

For years after independence, India followed the strategy of planned economic development. The broad policy objectives were achieving self-reliance and promoting social justice. Self-reliance, over time came to mean import substitution. There were government-imposed controls over entry and exit in the market. Plant and firm size were subject to statutory limitations, and imports and foreign investment were restricted. Government-owned businesses enjoyed protections and preferences and dominated the "commanding heights of the economy" in various sectors. These policies were reflected in many of the state's economic policies, including its industrial, trade, labor, exchange controls, financial sector, and several other policies. In this system, there was little place for competition policy[24].

Competition and monopoly are two competing interest, on the one hand where competition represents the interest of the society the other side monopoly is the representative of individualistic approach. The intellectual property laws talks all about the monopoly but we cannot consider them to be against the societies' interest or the consumer interest. Intellectual property laws talks about the regulated monopoly which is indirectly in the interest of the consumers', it provides protection to the inventor or creator and encourage them to do further things to improve the product of their inventions and creation. No country can be against such protection as it is necessary for the development of socio-economic condition of that country.

That's the reason India while enacting the competitive laws has also taken care of such intellectual property rights. The competitive enactments are against the concentration of monopolistic approach and are against the illegal monopolies and not against the legal

[24] Vinod Dahl, "Competition Law in India", *Antitrust Law Journal,* Vol. 21 No. 2, Spring 2007, p.3.

monopolies. In this chapter the research is focussed on the laws dealing with the promotion of the competition.

Preamble of the constitution talks about securing social justice, economic justice and political justice.[25] Producers and Consumers are part of the every society and economy; no market can exist without the producer and consumer. To balance the interest of both categories, law is there which regulates the behavior of the market player. On the one hand there are monopoly laws related to Copyright, Patent, Trademark, Geographical Indications of the goods, Design, which are protecting the interest of the producer so we can say that it is individualistic approach by the state, on the other hand we have consumer protection laws like Consumer Protection Act, 1986, and Competition Act, 2002, etc. which are the socialistic approach of the state. One protects the interest of the inventor or creator or producer and other and other protects the interest of the consumer. The Directive Principles are the ideals which the union and state governments must keep in mind while they formulate policy or pass a law. They lay down certain social, economic and political principles, to be kept in view by legislature for equitable social developments.

The justification of the competition law can be drawn from Article39[26] of the Constitution of India. Article 39 (b) talks about distributive justice of the sources available, and Article 39 (c) talk s about prohibition of economic system which result in the concentration of wealth and means of production to detriment. The expression 'material resources of the community' used under Article 39 (b) has been held to include

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[25] The Constitution of India, 1950. Preamble, reads as, "We the people of India, having solemnly resolved to constitute India into a-Sovereign, Socialist, Secular, Domestic Republic and to secure to all its citizens: JUSTICE- Social, Economic and Political; LIBERTY of Thought, Expression, Belief, Faith and Worship; EOUALITY of Status and of Opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation; In our Constituent Assembly this twenty sixth day of November, 1949, do hereby Adopt, Enact and Give to ourselves this Constitution.

[26] *Ibid*, Article 39, the State shall, in particular, direct its policy towards securing-
That the citizens, men and women equally, have the right to an adequate means of livelihood;
That the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good;
That the operation of the economic system does not result in the concentration of wealth and means of production to the detriment;
That there is equal work for men and women;
That the health strength of workers, men and women, and the tender age of children are not abused and that the citizens are not forced by economic necessity to enter evocation unsuited to their age or strength;
That the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

such resources in the hands of the private persons and not only those which have already vested in the state.[27] It has been held that a law aimed at doing away with the concentration of big blocks of land in the hands of few individual would sub-serve the directives Contained in sub-clause (b) and (c) of article 39.[28]It has also been observed that material resources would include natural or physical as well as land, movable and immovable property such as land, buildings, workshops, vehicles, etc.[29] the distribution has been interpreted widely to include nationalization of private enterprise and provision for service through the state,[30] be it made by public, private or joint sector. So in conclusion the constitution has inherent idea of distributive economic justice.

Now the study will be focused on existing law dealing with competition and monopoly and how it is concerned with consumers' interest-

Previously the Indian market forces were governed by the MRTP Act, 1969. The main focus of the Act was to regulate, monopolistic trade practices, concentration of economic power, restrictive trade practice and unfair trade practices. The concept of monopolistic trade practices and restrictive trade practices (now dominant position) are being dealt by the Competition Act 2002, and unfair trade practices are being dealt by the Consumer Protection Act, 1986. The MRTP Act, 1969 lost its relevance or in better way we can say that has become obsolete in the context of neoliberal socio-development of postmodern globalization era. To cope with the situation created by the market economics present era India has a need to have new law which would be efficient enough to tackle with such marketing aspect and to protect the interest of the consumer in the better way. Thus the focus has been shifted from prohibition of monopoly to the promotion of competition without curbing monopoly.[31]

The Central Government constituted a High Level Committee on Competition Policy and Law which submitted its Report on 22nd May, 2002 and also consulted all concerned

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[27] *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.*, (1983)1 SCC 147.
[28] *State of Bihar* v. *Kameshwaar Singh,* AIR 1952 SC 252.
[29] *State of T.N*. v. *Abu Kavur Bai*, AIR 1984 SC 326.
[30] *Assam Sillimanite Ltd.* v. *Union of India,* AIR 1992 SC 938.
[31] The Competition Act, 2002, Statement of Objects and Reasons says that, "in the pursuit of globalization, India has responded to opening up its economy, removing controls and resorting to liberalization". The natural corollary of this is that the Indian market should be geared to face competition from within the country and outside. The MRTP Act, 1969 has become obsolete in certain respect in the light of international economic developments relating more particularly to the competition laws and there is a need to shift our focus from curbing monopolies to promoting competition.

parties including the trade and industry associations and the general public. The Central Government thus decided to enact a law on competition.

Keeping in view of the economic development of the country, the Competition Act, 2002 was enacted. The Competition Act, 2002 came into existence in January 2003 and the Competition Commission of India was established in October 2003. The Act states that "it shall be the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India[32]." Thus, it gives the Commission a heavy mandate.

2.1 The Competition Act, 2002

India has had a competition law–the Monopolies and Restrictive trade practice act (MRTPA) since 1969, which has been amended over time. The last amendment was done in 1991 to remove the licensing role of the MRTP Commission (MRTPC) and dilute the merger control provisions to adapt to economic reforms, which set in the same year. Though, over time, it was realized that markets need to be regulated- the type of problems which arose, could not be handled by the MRTP Act. Following that, and through a consultative process, the Competition Act, 2002, was passed by the Parliament.

The Act prohibits anticompetitive agreements (section 3), abuse of dominant position (section 4) and regulates mergers, amalgamations and acquisitions (sections 5 and 6). The above provisions and several connected provisions of the Act have now been brought into force. This was delayed due to a writ petition filed before the Supreme Court of India challenging certain provisions of the Act.[33] After the disposal of the petition by the Supreme Court, the Government passed Competition (Amendment) Act, 2007, bringing out some instrumental changes including the establishment of Competition Appellate Tribunal. However, at this stage we do not have the much benefit of case law which could help in interpreting or explaining the provisions of the Act. While some assistance could be had from the few cases decided by Commission, foreign laws, ultimately it is the language of the new born statute that has to be construed and applied.

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[32] *Supra* note 1, at p. 4.
[33] *Ibid.*

Preamble of the Act states that "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

The objectives of Competition Law have been further highlighted in a recent judgment delivered by Hon'ble Supreme Court as:

"The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices."[34]

The very object[35] of the Act is to-

- Supervise the economic development of the country,
- Establish commission to prevent practice having adverse effect on competition,
- Promote and sustain competition in market
- Protect the interest of consumers[36], and

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34 Judgment in Civil Appeal No. 7999 of 2010 pronounced on 9th September, 2010.

35 Competition Act 2002, Act No. XII of 2003, Object Clause:- An Act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of the consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

36 *Ibid,* Section 2 (f) "Consumer" means any person who-

(i) Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for the personal use;

(ii)Hires or avail of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avail of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is fore any commercial purpose or for personal use;

- Ensure freedom of trade carried on by the other participant in market in India.

The Competition Act has been designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objects are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and ensuring freedom of trade of other participants in the market, all against the backdrop of the economic development of the country. However, the Competition Act is surprisingly compact, composed of only 66 sections. The legislation is procedure-intensive, and is structured in an uncomplicated manner. The raison d'être of the Competition Act is to create an environment conducive to competition. The various salient feature of the Act are as follows:

(i) Prohibition of Anti-competitive Agreements[37]

Firms enter into agreements,[38] which have the potential of restricting competition. They could be formally written documents or oral understandings, and could be horizontal or vertical.

a) Horizontal Agreements: Agreements between two or more enterprises[39] that are at the same stage of the production chain, and in the same market, constitute the horizontal

[37] *Ibid*, Section 3, (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void. (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source 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; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:…

[38] *Ibid,* Section 2 (b)- "agreement" includes any arrangement or understanding or action in concert,— (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

[39] *Ibid*, Section 2 (h)- "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. Explanation.-—For the purposes of

variety. The Act has taken care to define the relevant market. To attract the provisions of law, the products must be substitutable. The Act outlaws any agreement, which causes or is likely to cause an appreciable adverse effect on competition within India. The 'rule of reason' test is used for determining the illegality of an agreement, except in the four types listed in the following paragraph. Four types of agreements between enterprises, involved in the same or similar manufacturing, or trading of goods or services[40], are presumed to have an appreciable effect on competition and are therefore per se illegal:

- Agreements regarding prices,
- Agreements regarding quantities,
- Agreements on bidding[41], and
- Agreements to share or divide markets.

Horizontal agreements, which include cartels, are presumed to lead to unreasonable restrictions of competition and are, therefore, presumed to have an adverse effect on competition. The Act contains leniency provisions, which provide for a reduced penalty on a participant in a cartel[42], who makes a full disclosure of having violated the Act. Be that as it may, the catch is, that the firm that spills the beans, should have done it before the prosecution started. In criminal cases, there is a similar provision, called approver, but the individual can seek leniency after being charge-sheeted also. The logic behind the leniency provisions is that a cartel is a hard nut to crack. This has been quite successful in the USA and has been adopted by other authorities, such as the European Commission also. More often than not, cartels do not have a formal or a written agreement.

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this clause,— (a) "activity" includes profession or occupation; (b) "article" includes a new article and "service" includes a new service; (c) "unit" or "division", in relation to an enterprise, includes— (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the provision of any service;

[40] *Ibid,* Section 2 (u)- "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

[41] *Ibid.*, section 3 (3) Explanation- for the purpose of this sub- section, "bid rigging" means any agreement, between enterprises or person referred to in section (3) engaged in identical or similar production or trading of goods or provisions of services, which has the effect of eliminating or reducing competition for bid or adversely effecting or manipulating the process for bidding.

[42] *Ibid,* Section 2 (c)-"cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services

b) Vertical Agreements: Vertical agreements, in most competition regimes, are not subjected to the rigours of the law. However, where a vertical agreement has the character of distorting or preventing competition, it is not spared from the ambit of law. The Act lists certain factors, inter alia, to be taken into account to determine whether an agreement or a practice has an appreciable effect on competition. The factors are:

* Creation of entry barriers in the market,
* Driving existing competitors out of the market,
* Accrual of benefits to consumers, and
* Improvement in production or distribution of goods.

Exceptions

The Act, however, lays down two exceptions to the applicability of the provisions relating to anti-competitive agreements:

a) Intellectual property Protection with Reasonable Conditions: The Act recognizes that the bundle of rights that are subsumed in Intellectual Property Rights (IPR) should not be distributed in the interests of creativity and intellectual/innovative power of the human mind. However, the relationship between competition law control and intellectual property rights is inherently contradictory, as there is a potential conflict between the two. This because the existence and the exercise of intellectual property rights may generate anti-competitive effects through the monopoly power, granted to the holder of the rights.

The Act does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. Some unreasonable conditions that may accompany IPR licenses and are likely to limit competition, and attract the provisions of the Act include:

- Patent pooling,
- Tie-in agreements[43],
- Prohibiting licensees to use competing technology,

[43] Tie-in agreements include any agreement requiring the purchaser of goods, as a condition of such purchase, to purchase some other goods.

- An agreement to continue paying royalty even after the patent has expired,
- Fixing the prices at which the licensees should sell.

In many competition laws of the world, IPRs are excluded from the coverage. Anyhow, a European case law has said that the IPR per se is not violative of the competition law, but its abuse is certainly covered. The WTO Agreement TRIPS also requires governments to enact suitable legislation to cover the abuse of IPRs.

b) Export Cartels: As is the case of most jurisdictions, export cartels are outside the purview of the Act. A justification of this exemption is that most countries do not desire any shackles in their export efforts, as the problem lies elsewhere.

(ii) Abuse of Dominance

A dominant position has been defined is the Act[44] in terms of the 'position of strength' enjoyed by an enterprise in the relevant market in India, which enables is to operate independently of competitive forces prevailing in the relevant market ; or to affect its competitors or consumers or the relevant market in its favor. There are two platforms to determine a relevant market—the product market and the geographical market.

The Act does not consider dominance as such as prejudicing competition. But it outlaws abuse of dominance. The actions that are considered anti-competitive and illegal in the context of agreement are agreements are also illegal, if undertaken by a dominant firm. These include charging or paying unfair prices; and restriction on quantities, markets and

[44] *Supra* note 12, Section 4. (1) No enterprise or group] shall abuse its dominant position. (2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group.—- (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service. Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access [in any manner]; or (d) 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 (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation.—For the purposes of this section, the expression— (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. (b) "predatory price" means the sale of goods or provision 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 competition or eliminate the competitors. (c) ―group shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.

technical development. A greater threat to competition is from the actions of dominant firms that are inimical to future competition.

One such example is practice of predatory pricing.[45] This in one of the most pernicious forms of it, occurs when an enterprise sales goods or provides services at a price, which is below the cost of producing the goods or providing the services, with a view of limiting competition or driving out competitors, and then raises price to recoup its losses.

After the Competition Commission of India (CCI) is constituted and started deciding cases, there has been a mixed response to the competence and maturity of CCI. For instance if we consider few cases:-

In Re: M/s. SRS Real Estate Limited (Case No. 65/2010[46]), the information was filed under Section 19 of the Competition Act against M/s. SRS Real Estate Ltd., which is engaged in the business of Developing Residential Apartments. The facts of the matter are as under:

The information provider along with 28 other persons had collectively applied for the allotment of 29 independent floors / flats in "SRS Pearl", a project launched by M/s. SRS Real Estate Ltd. at Sector 87, Greater Faridabad, Haryana, in July 2009 through an agent M/s Modern Build tech (P) Ltd. and out of these 28 applicants, 25 are employed in the Reserve Bank of India.

As per the information provider, M/s. SRS Real Estate Ltd., vide letter dated 01.07.2009 had confirmed the bookings in SRS Pearl Floors. The information provider, along with other 28 persons, paid the booking amount of Rs. one lac each to M/s. SRS Real Estate Ltd. It has been stated that M/s. SRS Real Estate Ltd. was to demand remaining installments after submission of necessary documents i.e. license for project, sanctioned layout plan and allotment letter etc.

It has been alleged by the information provider that contrary to the said arrangement M/s. SRS Real Estate Ltd., after one year three months, sent a cheque of Rs. 1 lac as refund amount to each applicant vide its letter dated 10.11.2010 stating that they will not be able to provide the residential unit.

It is alleged by the information provider that the pre-launching of the project is considered illegal by the State Government as per the news item published in the various

[45] *Ibid*., section (2) Explanation (b) "predatory price" means the sale of goods or provision 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 competition or eliminate the competitors.

[46] Decided on January 1, 2011 by the Competition Commission of India

newspapers and M/s. SRS Real Estate had not obtained the necessary approvals from the State Government before launching its project. It had also been alleged that M/s. SRS Real Estate Ltd. has acted arbitrarily and fraudulently by unilaterally canceling the bookings of information provider and other applicants.

The information provider submits that M/s. SRS Real Estate Ltd. is liable to be prosecuted for abusing its dominance position in relevant geographic market in violation of Section 4 of the Act.

With respect to abuse of dominant position, the Commission observed,"As per the information available on public domain, it is seen that there are many known players, in the same line of business, who are of the size of M/s. SRS Real Estate Ltd. in the geographical area of Faridabad. Therefore it cannot be held that M/s/ SRS Real Estate Ltd. enjoys that position of strength by which it can operate independently of the competitive forces prevailing in the market or to affect the competitors or consumers or the relevant market in its favor There is nothing on record to show that M/s SRS Real Estate Ltd. is holding a dominant position, in the relevant market. The information provider has also not been able to place any credible or cogent evidence/material to show or establish the infringement of Section 8 of 4 of the Act in this case and hence the allegations made by the information provider have remained unsubstantiated and uncorroborated.

Prima facie in does not appear to possess sufficient market position in terms of explanation (a) to Section 4 of the Act. Therefore, primo facie there is no contravention of Section 4 of the Act in this case."

Similarly, in '*In Re: M/s. BPTP Ltd. and Others*[47]' and the Commission viewed that BPTP Limited cannot be considered to be in dominant position due to the following reason:

"As per the information available on public domain, it is evident that Party No. 1 BPTP is a well known name in the Real Estate Market and one of the prominent players in Faridabad. From the various websites, like www.99acres.com, www.magicbricks.com and www.makaan.com, which account for most of the organized players, it is seen that there are many players of the size of BPTP in the geographic area of Faridabad in the same line of business. BPTP Ltd, though having a brand value in the market, cannot operate independently of the competitive forces prevailing in the market. Also it is not in

[47] Case No 42/2010 decided on December 16, 2010 by the Competition Commission of India.

a position to affect the competitors in the market in its favor. There is no material on record to indicate that BPTP can be considered to be in a dominant position, irrespective of the way in which the market is defined. Prima facie it does not appear to possess sufficient market power in terms of explanation (a) Section 4 of the Act. So prima facie there is no contravention of Section 4 in this case."

In the above discussed cases, the decision is well founded and CCI got huge acclamation from legal as well as business community. But in instances it has also been vehement ally criticized. In *National Stock Exchange (NSE) Case*, critics observed:-

"The Competition Commission of India (CCI) seems to have erred in the first high-profile case in its short history. The competition regulator ruled that the National Stock Exchange (NSE) abused its dominant position in the currency derivatives market. This was after MCX Stock Exchange (MCX-SX) complained that NSE is deliberately waiving fees in the currency derivatives segment to kill competition.

Its order didn't reveal that two of its members had disagreed with large parts of it. The dissent note by these two members, released late last week after an instruction from the Delhi high court, absolves NSE from the charge of abusing its dominant position.

The dissent note, of course, represents a minority view and doesn't overrule the majority order of CCI. It, however, raises some important questions, which the majority order has ignored. For instance, the majority order almost ignored the role and the position of the United Stock Exchange (USE), which is the third competitor in the currency derivatives market. USE entered the segment about two years after NSE was launched, fully aware that it would not be able to charge fees in the segment. There also doesn't seem to have been an effort to work alongside sector-specific regulators, even though the Competition Act, 2002, provides for such cooperation. As such, the order isn't well-reasoned and doesn't give the impression that it was backed by rigorous analysis. This is unfortunate as the NSE case was an excellent opportunity for CCI to establish its credentials as a regulator.

But regardless of whether CCI or for that matter the Competition Appellate Tribunal comes to reasonable conclusion on the NSE case, issues related to competition in the stock exchange space must be addressed by policymakers. The management at the Bombay Stock Exchange has said in the past that market regulator Securities and Exchange Board of India should have a competition policy that will prevent practices that hold back the development of the market.

Of course, specific charges such as those brought by MCX-SX are best tackled by a competition regulator. But that shouldn't stop policymakers from drafting comprehensive rules for the conduct of stock exchanges. Ever since the Bimal Jalan committee report came out late last year, there have been appeals for a policy framework that encourages greater competition in the exchange space, and a review of the report is under way. Of course, the half-baked CCI report would add fuel to that fire. But the review of the Jalan report shouldn't stop at decisions such as whether stock exchanges should list or not. It's also time for a framework that enables stock exchanges to operate in a healthy competitive environment, with sufficient rules to guard against anti-competitive behaviour."[48]

(iii) Combinations Regulation[49]

The provisions regarding section 5, 6, 20, 29, 31 were notified by the Government in March 2011 and came into effect from 1st June 2011. By virtue of Section 6 (1) persons and enterprises have been prohibited from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination has been declared to be void. However, share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement has been kept out of the purview of Section 6(1) of the Act.

Section 20(4) prescribes the factors to be borne in mind by the Commission in determining whether a combination would have or is likely to have an appreciable adverse effect on competition in the relevant market. These may be enumerated as under—

a) actual and potential level of competition through imports in the market;
b) extent of barriers to entry into the market;
c) level of combination in the market;
d) degree of countervailing power in the market;
e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f) extent of effective competition likely to sustain in a market;

[48] http://www.livemint.com/2011/06/06205858/CCI8217s-missed-opportunity.html
[49] *Supra* note 12, Section 6.

g) extent to which substitutes are available or arc likely to be available in the market;
h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
j) nature and extent of vertical integration in the market;
k) possibility of a failing business;
l) nature and extent of innovation;
m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The procedure for investigation of combination has been prescribed in Section 29 of the Act.

(iv) Competition Commission of India (CCI)

The Competition Commission of India owes its existence to the exercise of the power conferred upon the Central Government pursuant to Section 7[50] of the Competition Act, 2002. Consequently, vide S.O. 1198(E) dated 14th October, 2003 the Competition Commission of India was established. Presently, the head office of the Commission has been notified by the Central Government as New Delhi[51]. The Commission was constituted on March 1, 2009 and it started accepting cases under the Act after September 1, 2009.

The Competition Commission of India comprises of a Chairperson and minimum two and maximum six other Members who are appointed by the Central Government and are whole time members. Prior to the Competition (Amendment) Act, 2007, the maximum number of other members in the Commission was ten. However, it has now been reduced to six. [52]. Prior to the 2007 amendment, a serving or retired judge of a High Court was

[50] *Ibid*, Section 7. (1).
[51] Vide S.O. 1198(E) dated 14th October 2003. However, the Central Government has been empowered by Section 7(3) of the Act to decide the place of the commission from time to time. The Commission is at liberty to establish offices at other places in India by virtue of Section 7(4) of the Act.
[52] www.cci.gov.in Last visited on 08.03.2012

eligible to be appointed as Chairperson and other member but they are no longer entitled to be so appointed.

In the case of *Brahm Dutt* v. *Union of India*[53], a writ petition was filed in the Apex Court seeking writ of mandamus, directing the Union of India to appoint a person who is or has been a Chief Justice of a High Court or a senior Judge of a High Court in India in terms of the directions contained in the decision in *S.P. Sampath Kumar* v. *Union of India & Others*[54]. The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary.

The Union of India on the other hand contended that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and such expertise cannot be supplied by members of the judiciary who can, of course, adjudicate upon matters in dispute. It further contended that so long as the power of judicial review of the High Courts and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the Constitution. It also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers. Since the main functions of the expert body were regulatory in nature, hence such a writ could not be issued.

During the course of the proceedings it was also brought to the notice of the Apex Court that the government was proposing to amend the Act as well as the relevant rules.

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[53] (2005) 2 SCC 431

[54] (1987) 1 SCC 124

Consequently, the Apex Court left the questions open. In 2007, the controversy was resolved by the legislature by amending the said Section 8 Competition Act, 2002.

Director General: The Competition Act makes provision for the appointment[55] of a Director General for assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are provided by or under the Competition Act[56].

Commission to be body corporate: The Competition Commission of India has been expressly recognized to be a body corporate. It has perpetual succession and a common seal. However, the power of the said commission to acquire, hold and dispose of property, both movable and immovable, and to contract and by the said name, sue or be sued has been made subject to the provisions of the Competition Act, 2002[57]

Jurisdiction of the Commission

Jurisdiction is understood as the power or the authority of the designated body to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. Under the Competition Act, the CCI has been empowered to inquire into and decide anti-competitive agreements, abuse of dominant position as well as combinations and hence is said to have jurisdiction to entertain and adjudicate disputes relating thereto. However, the following provisions of the Competition Act also deal with the Jurisdiction of the Commission.

a) Extraterritorial Jurisdiction: The mandate of the Competition Commission extends beyond the boundaries of India. Section 32 of the Competition Act, 2002 makes provision with regard to extraterritorial jurisdiction of the Commission, that is to say, that for certain acts which though take place outside India, but still have an effect on the competition in India, then in such cases, the Commission has power to inquire[58] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act. The following acts are covered under Section 32:

a) an agreement referred to in section 3 has been entered into outside India; or

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[55] Such appointment has to be made by the Central Government by a notification in the official Gazette.
[56] *Supra* note 12, Section 16.
[57] Section 7(2) Competition Act, 2002
[58] Such inquiry shall be in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act

b) any party to such agreement is outside India; or
c) any enterprise abusing the dominant position is outside India; or
d) a combination has taken place outside India; or
e) any party to combination is outside India; or
f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

However, only mentioning Extra-territorial jurisdiction in Competition Act, 2002, is not sufficient unless such extra-territorial jurisdiction is applied and enforced by way of International co-operation. It needs to be borne in mind that by virtue of the Proviso of Section 18, the Competition Commission may enter into any Memorandum[59] or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provisions of this Act.

Illustration: Suppose there is a company in US which takes any action which affects the competition in India. India has not signed any MOU or has not entered into any bilateral Agreement with regard to Competition law. Now the basic question is that how India can exercise extraterritorial jurisdiction under Section 32 of the Competition Act, 2002 in such situation.

Subject-matter jurisdiction and enforcement jurisdiction are two elements of extraterritorial jurisdiction. In this example if any conduct taken in USA affects the conduct inside India, it has subject matter jurisdiction. On the basis of subject-matter jurisdiction the Central Government can declare that summons to be served on any officer in USA (Order V, Rule 26A CPC) or in criminal cases process can be started under Criminal Procedure Code.[60]

But only mentioning extraterritorial jurisdiction under Section 32 is not sufficient unless subject matter jurisdiction is actually enforced. For this purpose the second element of extraterritorial jurisdiction i.e. 'Enforcement jurisdiction' comes into play. 'Enforcement jurisdiction can be exercised by a State in following situations:

1. If there is any Memorandum of Understanding or

[59] A memorandum of understanding (MOU or MoU) is a document describing a bilateral or multilateral agreement between parties. It expresses a convergence of will between the parties, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement. It is a more formal alternative to a gentlemen's agreement. For clarification see; http://en.wikipedia.org/wiki/Memorandum_of_understanding retrieved on 18-02-2010.

[60] Section 105B of Code of Criminal Procedure, 1973 (Assistance in securing transfer of persons)

2. If there is any Bilateral Agreement or
3. If there is any Multilateral Agreement or;
4. If there is any international principle recognized by States.

In this hypothetical case the 'Effects Doctrine'[61] may be taken into account as it well recognized Principle in USA recognized by US Supreme Court in 1945 as well as by other States. After 1945 in several cases in the absence of any Agreement US Supreme Court exercised extraterritorial jurisdiction with regard to competition law. Initially it was resisted by other States but it has been recognized by most of the States. Although only the humble request can be made by the Competition Commission of India and the US Authority can accept this request but it cannot be bound in the absence of any Bilateral or Multilateral Agreement[62].

b) Exclusion of Jurisdiction of the Civil Courts: By virtue of Section 61 of the Competition Act, the CCI has the jurisdiction in respect of anti-competitive agreements, abuse of dominant position as well as combinations to the exclusion of the Civil Courts and no suit or proceeding in respect of any matter which the Commission is empowered by or under the Competition Act shall be entertained or determined by the Civil Courts. Further, no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

The Competition Commission also has the jurisdiction to determine jurisdictional facts[63]. In the case of *Aamir Khan Productions Private Limited Vs. Union of India*[64], Petitioners had challenged the show cause notices issued by the Commission under Section 26(8) read with Section 3(3) of the Competition Act, 2002 mainly on the ground that the Competition Commission established under the Competition Act, 2002 did not have any jurisdiction to initiate any such proceedings in respect of films for which the provisions of the Copyright Act, 1957 contain exhaustive provisions. The petitioners had challenged the jurisdiction of the Competent Commission to initiate any proceedings under the Competition Act against the petitioners, inter alia, on the ground that the exhibition of a feature film, which is a subject matter of copyright exploitation alone, is specifically

[61] The Effects Doctrine is applicable only when the action taken outside the Country has 'direct, substantial, and reasonably foreseeable' effects within the Country. In 1945 Justice Hand of US Supreme Court laid this Doctrine in United States v. Aluminum Co of America, 148 F.2d 416 (2d Cir. 1945).

[62] Chaurasia, Vijay Kumar: The Vacillation and Crux of Extra-territorial Jurisdiction of Competition Law (USA, EU, Canada and India) and International Co-operation: Application and Enforcement Issues

[63] the jurisdictional fact is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction to decide a particular matter.

[64] MANU/MH/1025/2010

excluded under Section 3(5) of the Competition Act and hence the proceedings initiated against the petitioners are without jurisdiction.

The court relied on *Chaube Jagdish Prasad and Anr. v. Ganga Prasad Chaturvedi*[65] wherein Apex Court had stated as under:

"These observations which relate to inferior Courts or tribunals with limited jurisdiction show that there are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists."

The Bombay High Court held: "On a bare reading of the provisions of the Competition Act, 2002, it is clear that the Competition Commission has the jurisdiction to determine whether the preliminary state of facts (on which the further exercise of its jurisdiction depends) exists. There is nothing in the Competition Act, 2002 to indicate that the Competition Commission is not invested with the jurisdiction to determine such jurisdictional fact."

In the instant case, the court did not decide the objection raised as to the bar of Section 3(5) of the Act stating that the all the contentions sought to be raised by the petitioners including the contention based on Section 3(5) of the Competition Act will be considered by the Competition Commission.

It is however noted that in view of Section 62 of the Competition Act, 2002, Application of other laws is not barred and the provisions of the Competition Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force. Hence, the Competition Commission would have the jurisdiction to inquire into matters covered under IPR laws if the other conditions enumerated in Section 3, 4, 5, or 6 are fulfilled.

Duties and Functions of the Commission: With the liberalization of the economy, there was a realization that the Indian market needs to be geared up to face competition from within the country and outside. Fair competition needed to be ensured in India by

[65] AIR 1959 SC 492

prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose a quasi judicial body, ie, the Competition Commission of India was established. In addition, the Commission was entrusted with the duty to curb the negative aspects of competition by giving it the power to perform different kinds of functions, including passing of interim orders and even imposing penalty. [66]

In terms of the Preamble *and Statement of Objects and Reasons* as also the provisions of Section 18 of the Act, the Commission has primarily been entrusted with the duty to:

- eliminate practices having adverse effect on competition,
- to promote and sustain competition,
- to protect the interests of consumers and
- to ensure freedom of trade carried on by other participants, in markets in India.

In order to facilitate the discharging of its duties or performing its functions under this Act, the Commission is permitted by the Statute to enter into any memorandum or arrangement with any agency of any foreign country. However, for such agreements the prior approval of the Central Government is required[67].

It is pertinent to note here that the term 'competition' has not been defined in the Act. The reason could be that by defining Competition the meaning of Competition is restricted. Therefore competition has to be given a wide meaning keeping in view the purpose of competition which is the economic development of the country. Competition leads to higher productivity innovation, cheaper prices, freedom of choice and decreasing switching costs. Therefore practices which lead to decrease in productivity, innovation, higher prices, decrease of the freedom of choice and increasing switching costs may be classified as anti-competitive or causing adverse effect on competition. It is the duty of the Commission to ensure freedom of trade, eliminate anticompetitive practices, promote and sustain competition and protect the interests of the consumers.[68]

(v) Competition Advocacy

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[66] *Competition Commission of India* v. *Steel Authority of India Ltd. and Anr.* MANU/SC/0690/2010 Civil Appeal No. 7779 of 2010 (Decided On: 09.09.2010)(Supreme Court)

[67] Section 18 of the Competition Act, 2002.

[68] Dissenting opinion of R. Prasad, Member in *Neeraj Malhotra* v. *Deutsche Post Bank Home Finance*, (Case No. 5 of 2009) order dated 2 December , 2010 [Competition Commission of India). Reiterated in Dissenting opinion of R. Prasad, Member in *Yashoda Hospital and Research Centre Ltd. Ghaziabad* v. *India Bulls Financial Services Ltd. New Delhi,* (Case no. 12 of 2010) decided on 22.03.2011

The mandate given to the Commission includes competition advocacy (Section 49). It provides that in formulating a policy on competition (including review of laws related to competition), the government may make a reference to the Commission for its opinion, though the opinion is not binding on government. Further, the Act requires that the Commission "shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about the competition issues." In a country where the competition culture is relatively weak, competition advocacy acquires a great significance in creating general awareness about the benefits of competition and the role of competition law, as well as in influencing government policy in a more pro-competition direction[69].

Advocacy is the ct of influencing or supporting a particular idea or policy. Public policy advocacy is geared towards changing particular public policy and involves taking position on specific policy issues. The principles of transparency and non-discriminatory treatment are crucial to competition law. "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non- enforcement mechanism, mainly through its relationship with other governmental entities by increasing public awareness of the benefits of competition". Successful implementation of competition policy and law largely depend upon the willingness of the people to accept these.[70] The concept of competition advocacy is rather of the recent origin having gained acceptance in developed and developing economies with the gradual opening up of the erstwhile state monopolies in sector such as telecom, electricity etc. competition law was enforced earlier than the competition advocacy.

Raghvan Committee has recommended that CCI must develop relationship with the Ministries and departments of the Government, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply positions in various markets. Such relationships will facilitate communication and search for alternatives that are less harmful to competition and consumer welfare. In most of the countries the concept was automatically to the successful implementation of the competition policy and followed the enforcement of competition law. Through competition advocacy a

[69] *Supra* note 1, at p.12
[70] *Supra* note 12, Section 49.

competition agency can influence government policies by proposing alternative that would be less detrimental to economic efficiency and consumer welfare. The gains sought through competition law can only be realized with effective enforcement. Weak enforcement of competition law is perhaps worse than the absence of competition law. Weak enforcement often reflects a number of factors such as inadequate funding of the enforcement authority.

Advocacy plays a vital role in securing the willingness and acceptability of competition policy and law. Competition advocacy can also be looked at as law enforcement without intervention. It has maximum impact with least intervention and an effective way to garner support to attain competition policy objectives. The CCI is empowered to participate in the formulation of the country's economic policies, and to participate in reviewing the law that impinges on competition at the instance of the central Government. The catch in this is that the CCI can merely advocate to the Government only when called to do so and its recommendations are advisory and not binding. Intelligent and innovative ways can be found by the CCI to raise its flag even without being called for by the Government. This can be done through well-researched discussion papers, like what the Telecom Regulatory Authority of India brings out.

The other advocacy function of the CCI is to do advocacy with the public at large, to create the better understanding of competition issues. In order to promote competition advocacy and create awareness about competition issues, and also to accord training to all concerned, the Act enjoins the establishment of a fund christened the competition fund.[71]

(vi) Miscellaneous Provisions of the Act

Investigation, Prosecution and Adjudication

The adjudicative wing is distinct from the investigative wing in the Act. At the apex of the investigative wing is the Director General (DG), who will only look into the complaints received from the CCI and submit the findings to it.[72] The DG does not have *suo motu* powers of investigation and the investigators will solely be making inquiries at the instance of the CCI. Under the Act, the, DG is also the prosecuting authority.

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[71] *Ibid* Section 51.
[72] *Ibid* Section 41.

The Act deviates from the earlier tradition of appointing only bureaucrats in the investigation team, as under the MRTP Act, and instead seeks to bring in professionals like economists, lawyers, accountants, etc., as investigators. The Act thus induces professionalism in the investigative arm- a step in the right direction.

To ensure competent and effective implementation of competition policy and competition law, it is important and imperative to select suitable individual and free the CCI of the Government control. While it is practically difficult to eliminate political favoritism in appointments, it can be minimized, to a great extent, by resorting to a *collegiums selection process*. The Government has opted for a search committee procedure for the selection of a chairperson and members. A writ petition filed before the Supreme Court had, inter alia, challenged the appointment of a retired bureaucrat as the chairperson, and has sought the appointment of a retired judge to that post[73]. However after to 2007 Amendment, now the issue has been resolved.

Independence of CCI

There are certain provisions in the Act, which undermine the independence and autonomy of the CCI. These include prior approval of the Government, required by the chairperson, in the matter of transfer of a member from one bench, suited in one city, to another bench, suited in another city and the granting of money at the Government's discretions, etc. CCI is also bound by directions of the Government on question of policy, and the power given to the government to supersede the CCI on grounds of public interest.[74]

Appeals and Review Provisions

Appeals against the decisions and orders of the CCI rest with the Competition Appellate Tribunal (CAT) whereas appeals from CAT are preferred to the Supreme Court.[75] Originally there was no provision for the Competition Appellate Tribunal in the Act of 2002, but these provisions were inserted by way of 2007 amendments in the Competition Act.

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[73] Writ Petition (Civil) No. 490 of 2003
[74] *Supra* note 12, Section 25.
[75] *Ibid* Section 53A.

Considering the scope of Appellate Tribunal in, *Competition Commission of India* v. *Steel Authority of India Ltd., and another*,.[76] Hon'ble Supreme Court stated:-

"…the tribunal (Competition Appellate Tribunal) is a quasi-judicial body to exercise judicial scrutiny of otherwise techno-beaurocratic adjudicative body, namely the Competition Commission (of India)."

As with most adjudicatory bodies, the CCI has the power to review its own order on an application made by the aggrieved party.[77]

Notification dated 28th August, 2009 issued by the Ministry of Corporate Affairs (MCA) repealed the Monopolies and Restrictive Trade Practices Act, 1969 (`MRTP ACT') with effect from 1stSeptember, 2009. The repealed Act was replaced by the Competition Act, 2002 (`COMPETITION ACT') as amended by the Competition (Amendment) Act, 2007. Chapter III of the repealed MRTP ACT which dealt with concentration of economic powers through mergers, amalgamations and acquisition was deleted with effect from 27th July, 1991. Therefore, restrictions on mergers, amalgamations and acquisitions in the country did not exist post July, 1991 until SEBI imposed restrictions on listing of unlisted companies through mergers and amalgamations.
Further SEBI announced the Takeover Code in 1994 which has now been substituted by the Code of 1997 and amended from time to time to restrict takeover of listed companies. Restrictions of merger and amalgamation of banking companies, however, continued to be regulated by the Reserve Bank of India throughout. On the Competition Commission of India (CCI) coming into force, the MRTP Commission was to continue to exist for two years con-currently to handle old cases filed prior to 1st September,2009 for a period of two years up to 31stAugust, 2011. However, no new cases were to be taken up by the MRTP Commission. On expiry of two years all pending cases pertaining to monopolistic or restrictive trade practices, including cases having an element of unfair trade practice were to stand transferred to the Competition Appellate Tribunal (CAT) which has to adjudicate such cases in accordance with the provisions of the repealed MRTP Act.

[76] Civil Appeal no. 7779 of 2010 [D. No.12247 of 2010], Judgment dated Sept. 9, 2010.
[77] *Supra* note 12, Section 37.

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and abuse. Market power is variously known in competition jurisdictions as dominant position, monopoly power and substantial market power. The Competition Act, 2002 and amended in 2007 follows the philosophy of modern competition laws and aims at fostering competition, protecting Indian markets against anti-competitive practices by enterprises who always want market leadership to maximize benefits from the market for their progress. The Act prohibits anti-competitive agreements and abuse of dominant position by enterprises and regulates combinations which include mergers, amalgamations and acquisitions thus laying down certain practices from which enterprises shall have to keep away. Enterprises not following the law on competition will have to face penalty which will thwart activities and operation in the market.[78]

Regarding the cases transferred from MRTP Commission. Cases of false or misleading facts, disparaging the goods, services or trade of another person pending under the MRTP Act were be transferred to CCI however, the transferred cases are to be dealt in accordance with the provisions of the repealed MRTP Act.

Investigations/proceedings undertaken by the Director General under the MRTP Act relating to: (i) Monopolistic/restrictive trade practices are transferred to the CCI who may conduct such investigations/proceedings in any manner it deems appropriate. (ii) Unfair trade practices are transferred to the National Commission under the Consumer Protection Act,1986 (iii) cases giving false or misleading facts disparaging the goods, services or trade of another person are transferred to the CCI.

The provisions of the law for the transition from the MRTP regime to CCI regime are clear to avoid ambiguity. Provisions on Combinations (Mergers, Amalgamations and acquisitions) provisions relating to Mergers and Acquisitions termed as combinations are covered by Section 5 and 6 of the Competition Act[79]. Summarizing the facts it is

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[78] Adi P. Talati and Nahar S. Mahala, "*Competition Act, 2002 Law, Practice and Procedure",* Commercial Law Publishers (India) Pvt. Ltd. (2006), p.102.

[79] *Supra* note 12, **Section 5. Combination.-** The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly 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 dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
(A)either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
(B)in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly 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 dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—
(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
(c) any merger or amalgamation in which—
(i) 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 dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
(ii) 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 or the amalgamation, as the case may be, have or would have,—
(A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
(B)in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;
Explanation.— For the purposes of this section,—
(a) "control" includes controlling the affairs or management by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group;
(ii) one or more groups, either jointly or singly, over another group or enterprise;
(b) "group" means two or more enterprises which, directly or indirectly, are in a position to —
(i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or
(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise;
(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical

conclusively crystal clear that though India enacted its first anti-competitive legislation in 1969 known as the Monopolies and Restrictive Trade Practices Act, 1969 to provide that the operation of 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 matters connected therewith or incidental thereto. The scope of MRTP was found to be inadequate considering the changing world trade scenario. Considering the fact, the Indian Government formed a Committee on Competition Policy and Law (The Raghavan Committee) to advice on competition law. Based on the recommendations of the Raghavan Committee the Government enacted the Competition Act, 2002 which came into effect from 13th January,2003.The Competition Act was enacted to provide ,keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensue freedom of trade carried on by

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indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

Sec. 6. Regulation of combinations.- (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of 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.

(3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation.—For the purposes of this section, the expression—

(a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961(43 of 1961);

(b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961);.

other participants in markets, in India, and for matters connected therewith or incidental thereto. The Act was implemented in stages on 31st March,2003, 19th June,2003, 14th October,2003 and 28th August,2009. The Act was amended by the Competition (Amendment) Act, 2007 with effect from 25th September, 2007.

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CHAPTER – 3
CARTELS AND COMPETITION LAW

This chapter of the study is focused on the 'cartel' which causes adverse effect on the competition and create monopoly in the pricing in economic setup of the country. Under this chapter emphasis is on the common features of the cartel, to check how it works and is against the consumers' interest, what mechanism are being followed by some countries and what is the position under the Indian economic legal system.

As competition improves quality, lowers prices, and makes people aware of the consequences of buying a product or a service. The anti-thesis of the competition is monopoly which generally is achieved when a few producers instead of competition with each other come together and from an association or a cartel.[80] Adam smith described cartels as conspiracies against the public[81]. Cartels are nothing short of thefts, which impair the rights of consumers. Cartels have a complex etymology. The term cartel can be traced to *Kartell* from German origins, *Cartello* from Italian origins and the French term *Cartel*.

Cartels came into English usage in the 16th century to denote a written agreement between opposing armies for the exchange of prisoners. By analogy the word *Kartell* is used by German economists to signify a coalition that bought together hostile political parties. Later on this term came to mean an arrangement of business rivals for the purpose of regulating prices or output in the industry. This term is what the Americans came to refer to as 'trusts' or combinations'. As per the Oxford English dictionary the word Cartel was first used in English in 1902 in the Business sense to refer to what were formerly called "producers syndicates" or "trusts" in the sugar or steel industry[82].

In an economic sense the term cartel refers to an association of two or more legal firms that unequivocally agree to coordinate their prices or output for the purpose of increasing their joint profits.

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80 S. S. Kumar, "Cartel and Price Fixation: Worst Type of Anti- Competitive Practice", *Chartered Secretary*, 2006, p. 39.

81 Adam Smith, "*An inquiry into the Nature and causes of the Wealth of Nations",* 1776, Abridged version published by Orient Publication (1957), p. 111; Also available online at http://www2.hn.psu.edu/faculty/jmanis/adam-smith/Wealth-Nations.pdf , last viewed on May 12, 2012.

82 http://en.wikipedia.org/wiki/Cartel

The Supreme Court of India defined cartel as "an association of producers who by agreement among themselves attempt to control production, sale and process of the product to obtain a monopoly."[83]

3.1 Essential Features of cartels[84]

"Cartel behaviour attacks the very heart of a "free economy" – the determination of price and output through competition and consumer preferences- diverts resources from their optimal use, and transfers wealthy to those engaged in illegal activity.[85]

In the light of the above meanings of the term cartel, it is important to understand the nature and how these illegal groups function. Cartels are common opponents of consumers, competition authorities and government agencies and hence need to be analyzed effectively to enable improved detection and stronger deterrent steps to curb their acts. In the struggle against cartels, anti-cartel enforcement authorities must be able to daunt members on the very grounds conductive for the growth and survival of Cartels.

(1) Disobedience of Laws

Producers and manufacturers collude together or constitute cartels in order to maximize their profits. Cartels by their very nature ignore the existence of competition laws as well as the rights of consumers. Their belief and philosophy is only to maximize company profits at whatever costs and cartel members are willing to breach every law in place to attain their goal.

(2) Involvement of Top Management;

Every cartel is strengthened by the involvement of the company or firms' top management including the board of directors. All anti competitive agreements are prepared and negotiated with the aid of subordinate officers assisting top level executives. Thus these agreements are deliberated by a team of highly trained and sophisticated employees.

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83 *Union of India* v. *Hindustan Development Corporation*, 1994 CTJ (SC) (MRTP).

84 G. R. Bhatia, "Combating Cartel in Markets- Issues and Challenges", *Chartered Secretary*, 2006, p. 1012.

85 James F. Griffin, *"A Insider Look at Cartel"*, available at: http://www.Konkurrensvereket.se/upload/filer/ENG/Publications/3rdNordic010412.pdf. last visited on March, 05,2012.

(3) Fear of exposure:

One vital characteristic present among most of the cartels throught the globe despite their size and range of activity is the fear of detection. It is this fear that makes them operate in absolute secrecy, concealing their activity even from other employees of the firm.

(4) Compensation System:

International cartels use compensation schemes to discourage cheating. Any company which sold more than the allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budgeted.

(5) Creating Bogus Trade Associations/ Use of Code Names:

Since cartels operate in secrecy, they go up to great lengths to hide their activities. Using trade associations as a cover usually means using an umbrella protection to avoid arousing any suspicion. The citric acid cartel and lysine cartels are good examples where cartels carried out their activities under the cover of associations.

(6) Arranging Covert Meetings:

Since cartels collude amongst themselves to fix prices, limit production or arrange to any other anti-competitive arrangement they usually assemble by arranging surreptitious meetings to avoid detection or suspicion. At time even agents are appointed to appear on behalf of certain employees.

(7) Fixing prices worldwide:

International cartels usually have the power to control prices on a worldwide basic and such prices are affected almost immediately.

3.2 Taxonomy of International cartels

Cartels are of different types internationally. The first type of cartel are called hard core cartels and are essentially made up of private producers who co operate to control prices or allocate shares in world market. Another type of cartels are private export cartels

wherein non state related producers from any country take step to fix prices or engage in market allocation in export markets, but not in their domestic market.[86]

Essentially cartels are agreements to limit output with the object of increasing prices and profits. This is usually carried out in practice by means of price fixing, allocation of production, or sharing geographic markets or product markets. Cartels restrict competition, wherein resources are misallocated and consumer welfare is reduced. Today cartels have been regarded as an antithesis to fair competition and the fight against cartels appears to be the common intention of consumer groups and antitrust authorities.

3.3 Theory of Collusion

The concept of collusion is important in understanding cartel activity since cartels are collusion arrangements. Collusion refers to a situation where market prices are close to monopoly prices, although in an oligopoly market structure.

Collusion may take several forms. It may be explicit, tacit or a combination of the two. Most of the prevailing collusion among cartelists is usually tacit since explicit collusion is prohibited by most antitrust or competition laws.[87] The theory of collusion is important as this paper deals with cartel as monopoly and competition on the touch stone of the consumer. Tacit collusion arises when firms interact repeatedly. The reasons that are conducive to collusion also help in promoting and sustaining cartel formation. Firms collude as they agree to maintain higher pricing module which in the short run enables them to earn greater profits. The main that binds firms/ companies is the element of 'trust' to maintain collusive prices, but in case one member drifts away, the trust ceases to exist and firms act in their individual interests[88]

Factors Promoting Collusion / Cartel Activity

Cartels inflate prices, restrict supply, inhibit efficiency, and reduce innovation. Today, governments around the word accept the principle that industrial progress is best obtained in a free market, where prices are fixed by competition and where success depends on

86 Margaret C. Levenstein, *"Determinants of International Cartel Duration & Role of Cartel Organization",* Also available at: http:// ssrn. Com/ abstract=936912, last visited on March 25,2011.
87 Richard Whish, *"Competition Law",* Oxford University Press (2008), p. 455.
88 *Ibid.*

efficiency rather than market control.[89] There are certain factors which help sustain collusion which promoters growth of cartelization. On analyzing we can arrive at the following relevant factors which promote such behavior.

Number of competitors

The number of competitors in a market is a clear indication of collusive behavior. Smaller the number of competing firms greater is the collusion amongst them. It is usually found collusion is more difficult in the presence of a greater number of competing firms. With greater number of firms an individual firm gets only a small portion of the pie. This leads to two important effects: By undercutting the collusive price, a firm can capture market share from its competitors. For every individual firm to maintain collusion is reduced. It is observed that market shares affect collusive behavior especially if the market is more symmetric.

Entry Barriers

Entry barriers to the market facilitate collusion. Collusion is tighter to sustain if there are law entry barriers. Collusion cannot be sustained in the absence of entry barriers. Collusion occurs effectively when firm interact on a frequent basic: Thus those firms interacting frequently tend to find it easier to collude.

The main difficulties faced in proving cartels and collusions:-

(i) Cartels are conspiracies and to destabilize them, competition authority needs to heavily bank upon "Leniency Programme" or to encourage and motivate whistleblowers,
(ii) The jurisdictional reach is often a restraint and constraint in the investigation and enforcement of overseas cartels; and
(iii) The ever increasing trend to heavily penalize and criminalize cartel conduct has necessitated for competition authority to adopt a high standard of proof and procedure.[90]

89 *Supra* n.1,at p.44
90*Supra* note 1, at p.45

Another thing which makes it difficult to prove cartel is that it has to be proved by circumstantial evidence by setting up a chain of events leading to a common understanding or plan, The underlying issue is that what at the minimum constitutes that meeting of minds which must be directly or circumstantially established to prove that there is restrictive effect on competition. In more than three decades of working the MRTP competition had initiated, *suo moto* or on reference from central or state governments, umpteen number of cases relating to the alleged cartelization but practically every case has ended in utter failure and total fiasco.[91]

Determination of the existence of a cartel by cogent evidence is a Herculean Job. This is because not only the element of meeting of mind is essentially necessary but also, as laid down by the Supreme Court in *Haridas Exports* v. *All India Float Glass Manufacturer Association*[92] the mere formation of cartel by itself will not give rise to an action. Something more must have to be proved to demonstrate the detrimental effect thereof. Even in the case of *Alkali and Chemical Corporation of India Ltd. and Bayer*[93] MRTP Commission held that in the absence of any direct evidence of cartel and the circumstantial evidence not going beyond price parallelism, we find it unsafe to conclude that respondents indulged in any cartel for raising the prices.

At present the methods used by authorities to detect cartels are – information provided by ex-employees, consumers, whistle blowers, suo moto investigation, routine checks and fluctuation in prices. In the recent past economists have suggested that economics can play a greater role in cartel detection. Cartel detection under economics can be discovered through two ways – structural and behavioral. The key element to detect cartels through the structural method would be detecting the presence of these necessary factors that either restrict or sustain cartel formation. In contrast to this method the behavioral method involves either observing the means by which firms coordinate or observing the end result of that coordination. In order to coordinate firms would essentially communicate amongst each other and cartels would have to be detected on the evidence of such communication.

91 S. Gopalakrishnan, "Competition Law- An Analytical Perspective", *Chartered Secretary*, 2008, p. 38.
92 2002 CTJ 353(SC).
93 1984CTJ 211(SC).

Usually antitrust/competition authorities on the basis of information provided by whistle blowers (former employees), leniency programmes, and indirect evidence (complaints from consumers/consumers associations/competitors) lead to inspection and prosecution by the authorities. Reliance on these methods solely does not constitute effective enforcement. In the light of the sophisticated nature of modern days cartels, jurisdictions also need to adopt economic models of cartel detection. Since evidence on the activities of cartels is difficult to procure, research and analysis should form an important constituent of a competition authority's goal. The CCI must adopt a continuous and year through focus on developments in various industries with reference to price mechanisms, share of markets and consumers opinion. Support from various consumers bodies and associations may also play an important role in such research since ultimately consumers feel the real pinch with respect to the maverick moves made by the corporations.

3.4 Regulation of Cartels under Competition Act 2002

The Act prohibits any agreement that causes or likely to cause an appreciable adverse effect on competition within India.[94]Agreements not in line with provisions of S. 3 are deemed void. Section 3 also makes distinction between horizontal and vertical agreements. Horizontal agreements are defined as agreements between competitors. Vertical agreements are defined as agreements at different stages or levels of the production chain. Horizontal agreements apart from certain joint ventures are presumptively deemed to have an appreciable adverse effect on competition and to be void. Thus agreements that provide for price fixing, big rigging or the sharing of a product or geographic market by competitors are presumptively deemed void.

In contrast vertical agreements will be void only if it is demonstrated that such agreement cause or likely to cause an appreciable adverse effect on competition. Thus exclusive supply agreements, exclusive distribution agreements and resale price maintenance agreements will not be presumptively void. These agreements will be void if it can be demonstrated that they are likely to cause an appreciable adverse effect on competition. According to S. 199 of the Act, the CCI can enquire into any alleged contravention of S.3 on its own initiative, based upon the information received from private parties upon a reference made to it by the central government, a state government

94 The Competition Act 2002, Act No. XII OF 2003, Section 3.

or a statutory authority. While determining whether an agreement violates S.3 the commission is required to consider an exhaustive list of factors, including barriers to entry, foreclosure of competition and benefits to consumers.

S.19 also set forth an exhaustive list of f

actors to define the relevant product and geographic markets for making competition evaluations and assessments. The Act also empowers the CCI the power to impose penalties, as well as the power to issue cease and desist and interim orders.

Capacity to be imposed by the CCI under the Act: [95]

1. three times its profit for each year that the prohibited agreement has been in effect; or
2. 10 % of its turnover for each year that the prohibited agreement has been in effect, whichever is higher.

"Fighting cartels is one of the most important areas of activity of any competition authority. Cartels are cancers on the open market economy, which forms the basis of our community."[96]

The key question is whether there is a broad ranging support to treat and prosecute cartels as serious offences? By now the contentions against cartel activity and its harmful effects are well established but what really are the learning lessons for a country like India to adopt? Several challenges confront competition policy system that denominates antitrust offences as crimes and punishes culpable individuals with imprisonment. The road ahead for India in curbing anti cartel activity is lengthy yet not difficult. To strengthen enforcement and treatment of the offence is the first step that CCI would have to adopt to successfully prosecute cartels. Social and Political acceptance for a vigorous criminal competition policy would need to find its place.

Thus India a developing country yet to fully increase its efforts to detect and defeat cartels must adopt the following steps:

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95 *Ibid* Section 27

96 Mr. Mario Monti, *"3rd Nordic Competition Policy Conference Stockholm, 2000"*, available at: Europe.eu/rapid/press release action. Last visited on March28, 2012.

Toughing the existing law against cartels:

As the Organization for economic Co-operation and development has recognized, cartels are "the most egregious violations of competition law."[97]

Presently S.27 (b) only imposes a mere fine in respect to an agreement referred to under S.3 of the 'Act'. This is not a strong deterrent since companies get rid of their misconduct solely on monetary grounds. Personal fines also on individuals will not deter employees of corporations since they will be indemnified by the undertaking itself. The present law does not provide a threat to dissuade companies from entering into such agreements.

A corporate fine on individuals and corporations who breach competition law by their deliberate business decisions is a lenient provision which much be made severe. The American example of the Lysine Tapes[98] clearly testify this effect that they (cartels are serious conspiracies and conscious business decisions, aimed at gross enrichment at the expense of the customer and welfare at large.

Corporate penalties may therefore not constitute the appropriate sanction, because it is the individuals within the corporation who take the decision and hence actually commit the corporate crime.

Adopt measures to increase the likelihood that misconduct will be detected and prosecuted: The business community is more likely to take a developed criminal enforcement system against competition law more seriously. The existing provision makes corporations perceive the risk of being caught by the competition authority in India as a very small, and there lies no fear of detection in their minds. Hence there is the need to cultivate an environment in India where business executives perceive a significant risk of detection if they either enter into, or continue to engage in cartel activity[99].

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97 OECD, *"Fighting Hard Core Cartel: Harm, Effective Sanctions and Leniency Programme",* OECD Publications Service, 2002.
98 Scott D. Hammond, *"Cracking Cartels: Serious Business"*, (2007), p.12. Available at:- http://www.konkurransetilsynet.no/iKnowBase/Content/425750/070222_SCOTT_HAMMOND.PDF, Last visited on May 24, 2012.
99 *Supra* note 1, at p. 45.

To achieve this objective it is desirable that the CCI has access to every available law to ensure crimes in suits are treated as crimes in the streets. The more anxious a company is about the fact that cartel participation may be discovered by the government; the more likely it is to report its wrong doing in exchange for leniency. The leniency program must generate a sense of fear and must be successful in creating panic among cartel members.

Increase sanctions on individuals.

Prison sentences and disqualification of directors and executives for their involvement in cartels sends a strong public signal. Inclusion of criminal prosecution of individual CEO's /directors brings competition law violation as a serious offence and a part of the white collar crime. Managers and employees value their freedom more highly than ordinary street criminals, and hence are more deterred by the prospect of spending time in jail than ordinary criminals may be.

Managers may also be effectively deterred when disqualification orders are set against them. By addressing a sanction that make such employees incompetent to operate in a managerial position of a company of a stipulated time, managers and other staff members will weigh the possible repercussions of this in corporate transgression. India therefore must use a combination of imprisonment, fines and director disqualification as preventive measures to destabilize cartels by making offenders individually and personally liable[100].

Social and institutional support for criminal sanctions:

It is only with the consensus of society that the law can be made stringent. Therefore it is vital that all parts of society in India including consumers, judges, law makers, business associations support the idea for toughing the sentence against competition law offenders.

Thus apart from societal consensus it is extremely important that the competition authority is in favour of imposing stricter criminal law sanctions on individuals. However it must be noted that consensus amongst member of society is necessary to project cases of offences as a serious crime; their disapproval must not deter authorities from enforcing tougher penalties.

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100 *Ibid.*

Ultimately the main aim for any developing country while implementing its competition policy will be to increase compliance and detection against cartels at the lowest social costs. Also in order to move towards an era of criminal enforcement of competition law, a jurisdiction like India must strongly send the signal that criminal sanction to punish individuals who participate in cartels is absolutely essential[101]. For this it is necessary that individuals who are a part of corporate conspiracy are treated as criminals.

Possibilities of Individual Leniency program:

The individual leniency program may be included as a part of the existing leniency program where individuals can approach the CCI to confess that they are participant or report anti-competitive activity that they were compelled to participate as employees of the corporations. Companies must be deterred not only in the race with its competitors but also with its culpable employees.

Individuals who cooperate through this program may receive non prosecution for the anti-competitive activity they report. The inclusion of such a framework within the Indian Law can act as a watchdog of corporate transgression within the organization. When the law makes provisions for jail sentences of culpable executives, such individuals may out of the fear of imprisonment report and help in effective detection of cartel activity.

Transparency in Enforcement Policies:

Once the CCI is fully operational the need in effective enforcement would also include a high level of transparency.

Transparency must be effective in the following areas: (i) transparent standards for opening investigations,(ii) transparent policies on calculation of fines and (iii) transparent application for leniency programs.

3.5 Comparative Analysis of Cartel Enforcement

United States of America:

The relevant law regarding competition in US is contained in the following statues:

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101 *Id* at p.43

The Sherman Act[102]

The Clayton Act 1914

The main provisions that prohibit cartels in the Sherman Act read as follow:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by for not exceeding $ 10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

In *United States* v. *Trenton Potteries Co.*[103], the complaint, under Sherman Act, was that the respondents, controlling some 80% of the business of the manufacturing and distributing in the US vitreous pottery of the type described, combined to fix prices and to limit sales in interstate commerce to jobbers. The court emphasized that the reasonableness or otherwise of the restraint of commerce was a distinct, and the only issue, and the reasonableness of the stipulated prices, under an agreement that was shown as an unreasonable restraint of commerce did not affect the basic issue, viz. whether an agreement was in restraint of commerce. On price-fixing the court said that the aim and result of every price fixing agreement, if effective is the elimination of one form of competition.[104]

In *United Sates* v. *A. Alfred Taubman,*[105]Alfred Taubman a former chairman on the board of Sotheby's holdings Inc. (Sotheby's) and Anthony J Tennant, former chairman on the board of Christie's International plc (Christie's), with conspiring to fix the commission rates charged to sellers of goods at auction, in violation of Section 1 of the Sherman Act, 15 USC § 1.Christie's and Sotheby's, the well known auction houses, were found to be involved in a collusive agreement fixing trading

102 The Sherman Act, 1890.
103 273 US 392, as cited in T. Ramappa, *"Competition Law in India: Policy, Issues, and Development",* Oxford University Press, (2006), p. 89.
104 *Ibid.*
105 297 F.3d 161

terms. The commission fined Sotheby $20.4 million, Christie on the other hand escaped fine because it was the first one to provide crucial evidence, which enabled the Commission to prove the existence of Cartel.[106]

English Law

The relevant law regarding competition in UK is contained in two statues:

The Competition Act 1998 and

The Enterprise Act 2002

The Competition Act prohibits agreements, business practices and behaviour that have or intended to have a damaging effect on competition in UK. Chapter 1 of the Competition Act 1998 prohibits anti-competitive agreements which have an appreciable effect on competition. This chapter includes collusion by competitors on consumers, markets, prices or output. The Competition Commission provides the carrot, and stick approach while enforcing the Act. The stick is the substantial fine for anticompetitive behaviour while the carrot refers to the leniency program which provides incentives for those whistleblowers that cooperate with the authorities to have their fines reduced as much as 100 percent.

The Enterprise Act came into force in 2003 and provides a bigger stick with greater penalties to combat anti-competitive behavior. The measures adopted by the Enterprise Act to control anti-competitive behavior include a criminal cartel offence carrying sentence up to five years imprisonment. It is directed at individuals as well as operates against companies involved in cartel agreements. The Act also qualifies company directors for breach of UK or EU competition law. The most essential part of the Act is to increase powers to investigate anti-competitive behavior.

In the case, *Market Sharing by Arriva Plc and First Group Plc*[107], the Director General of Fair Trading has concluded that Arriva plc and First group plc have infringed Section 2 of the Competition Act 1998 by entering into a market sharing agreement involving bus routes in the Leeds Area. This agreement had as its object the prevention, restriction or

106 *Ibid.*
107 www.oft.gov.uk/shared_oft/ca98_public_register/…../leedsbus.pdf. Last visited on March 06,2012.

distortion of competition within the UK. The OFT imposed a fine of £318,175 for Arriva plc and for First Group plc as £529,852.

In the UK, anti-competitive behavior is prohibited under chapters I and II of the Competition Act 1998 and may be prohibited under articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between business and the abuse of the dominant position by business. Businesses that infringe competition law may face substantial financial penalties of up to ten per cent of their worldwide turnover. Cartels are a particularly damaging form of anti-competitive activity. Their purpose is to increase prices by removing or reducing competition and as a result they directly affect the purchasers of the goods or services, whether they are public or private businesses or individuals. Cartels also have a damaging effect on the wider economy as they remove the incentive for business to operate efficiently and to innovate.

Indian Law

The competition Act 2002, as amended by the competition (amendment) Act, 2007 prohibits any agreement which causes, or is likely to cause appreciable adverse effect on competition in markets in India. Any such agreement is void.

The Competition Act, 2002 Defines Cartel as:-

"Cartel includes an association of producers, sellers, distributors, traders or services provides who by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or, price of or trade in goods or provision of services."[108]

Cartels are agreements between enterprises[109] (including association of enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and the economy.

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[108] *Supra* note 15, Section 2 (c) (2).

[109] *Ibid* Section 2(h):"enterprise" means a person or a department of the government , who or which is , or has been engaged in any activity, relating to the production storage supply, distribution, acquisition or control of the articles or goods, or the provision of the services, of any kind, or in investment, or in the business of acquiring , holding, underwriting or dealing in shares, debenture or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprises is located or at a different place or at different places, but does not include any activity including all activities carried on by the department of the central government dealing with atomic energy,currency,defence and space.

Therefore a cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement:

* To fix prices
* To limit production and supply
* To allocate market share or sales quotas, or
* To engage in collusion bidding or bid rigging in one or more markets.

Agreements between enterprises engaged in identical or similar trade of goods or provision of services are commonly known as horizontal agreements, including cartels of four types specified in the Act are presumed to have appreciable adverse effect on competition and hence are void and anti-competitive. The element in the definition of a cartel is that it requires an agreement[110] between competing enterprises, not to compete, or to restrict competition.

Section 3 sub section (3) of the Act states:

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which---

(a) directly or indirectly determines purchase or sale price;
(b) limits or controls production, supply, markets, technical development, investment or provisions of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or numbers of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding; shall be presumed to have an appreciable adverse effect on competition:

[110] *Ibid* Section 2(b) :"agreement" includes any agreement or understanding or action in concert'-
Whether or not, such arrangement, understanding or action is formal or in writing; or
Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

3.6 Ideal Cartel Policy

The above discussion shows the joint inter play among the important instruments in cartel detection. Effective enforcement of anti cartel measures to eliminate unfair competition is the prime objective of every competition authority. Horizontal agreements and concerted practices between competitors are extremely harmful and undesirable for society, economy and most importantly the consumers. India as a developing nation with significant contribution to international trade and commerce requires a strong competitive regime with strong domestic competition policy. This is turn will also set a precedent that foreign cartels operating in India will be strongly penalized and will not be let go scot-free. Thus it is emphasized that there is inevitable need to strengthen the sanction system to make it difficult for cartels to operate. The ultimate message required to be sent by competition authorities must be that the cost of participating in a cartel will be harsh and no stone shall be left unturned in prosecuting them.

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CHAPTER – 4

COMPETITION LAW AND INTELLECTUAL PROPRETY RIGHTS

This chapter focuses on the relation of competition law and intellectual property rights. The Intellectual Property Rights (IPRs) are nothing but the monopoly rights of the owner of creation or invention or a mark. . The term intellectual property reflects the idea that this subject matter is the product of the mind or the intellect. Under this chapter correlation and conflicting areas between competition and IPR laws are analyzed and outlined. The focus remains on, how the IPR and competition laws are converging to take care of the consumer's ultimate interest.

Twenty first Century will be the century of knowledge, indeed the century of mind. Innovation is the key for the production as well as processing of knowledge. A Nation's ability to convert knowledge into wealth and social good through the process of innovation will determine its future. In this context, issues of generation, valuation, protection and exploitation of Intellectual Property (IP) are becoming critically important all over the world. Exponential growth of scientific knowledge, increasing demands for new forms of intellectual property protection as well as access to IP-related information and increasing dominance of the new knowledge economy over the old "brick and mortar" economy, will pose a challenge in setting the new 21st Century IP agenda.

An ideal regime of Intellectual Property Rights (IPRs) strikes a balance between private incentives for innovators and the public interest of maximising access to the fruits of innovation. This balance is reflected in Article 27[111] of the 1948 Universal Declaration of Human Rights, which recognises both that "Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author" (emphasis added) and that "Everyone has the right ..... to share

111 Universal Declaration of Human Rights, 1948, Art. 27 (2):- Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

in scientific advancement and its benefits"[112]. The burning question seems to be balancing the interest of the inventor and that of the society in an optimum way.

The subject IPRs has been a much debated issue in the post-GATT World Trade Organisation (WTO) scenario. As noted above, issues of generation, protection and exploitation of Intellectual Property are assuming importance and consequently, the impact of IPRs on development and their relevance in nurturing creativity and their increasing role and importance on international trade, investment and economic growth can no longer be overlooked.

By some scholars Intellectual Property Rights and Competition Law have been described as an unhappy marriage. Tension arises between IPR and competition law because IPR creates market power, even a monopoly, depending upon the extent of availability of substitute products. IPR restricts competition, while competition law engenders it. But, there are areas where IPRs and competition law complement each other.

IPR laws recognize that the protection cannot be for an indefinite period, as after sometime it should be available to the wider public and enterprise world in the general interest. Even within the IPR period, the intellectual asset may be used without restriction for certain purposes, such as for research and training[113].

4.1 Nature of Intellectual Property Rights and Competition Law

In a move from the tangible property to the intellectual property, rewarding innovation as well as rewarding value creation has relevance. The society has to encourage people to strive to be innovative and come up with creative solutions to generate wealth and welfare as also to add value to existing goods and services. Roscoe Pound[114] in 'Outline of Jurisprudence' has observed that, 'in a civilized society men must be able to assume that they may control what they have discovered and appropriated to their own use, what

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112 Ibid, Art 27 (1):- Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

113 Ibid, Article 31 of TRIPs provides for the grant of compulsory licenses, under a variety of situations, such as:

• the interest of public health; national emergencies; nil or inadequate exploitation of the patent in the country;

• anti-competitive practices by the patentees or their assignees; and overall national interest.

[114] Roscoe Pound, "*Outline of Jurisprudence"*, as cited in Julius Stone, "*Social and Legal Dimensions of Law"*, (1999), p. 168.

they have created by their own labour, and what they have acquired under the existing social and economic order'.

Intellectual property rights can generally, be considered as specie of intangible property.[115]Its protection has for several centuries formed the foundation of secure prosperity in most modern political systems,[116]and is found at the base of most flourishing industries of today. It is meant to promote creativity and innovation by rewarding innovator with an exclusive, but temporary property right.[117]

As society has grown and personal possessions increased governments have found it desirable to provide for the regulated exchange of property between persons, enable a larger enjoyment of the additions to the wealth of the world by an interchange of property among the creators of this wealth,[118] thus encouraging individual effort and talent to provide effective and efficient promotion of better ways of producing and utilizing the means at hand. This provides an incentive to progressive individuals by rewarding them.[119] Government recognizes the right of property ownership in the fruits of individual work. Be it manual intellectual, or combination of these.' The protection of these rights become a measure of the practical usefulness of the government, as the authority for the preservations of the peace and welfare of the state.[120]

The US Supreme Court in *Kewanee Oil* v. *Bicorn Corp.*[121] justifying protection of intellectual property; observed that, offering a right of exclusion for a limited period is an incentive to inventors to risk the often-enormous costs in terms of time, research and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emancipations by way of increased employment better lives of our citizens. In other words, the right exclusively granted to the creator of intellectual property, promotes

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[115] *Salmond* v. *U S*, 127 US 342 (1890).
[116] S. Jain and S. Tripathy, "Intellectual Property Rights and Competition: Jural Correlative", *JIPR* , 2007, p. 225.
[117] Intellectual Property laws grants exclusive right in the property for a particular time period after the expiration of which property goes to public domain.
[118] W.R.Cornish, "*Intellectual Property: Patents, Copyright, Trademark and Allied Rights"* (2008), (14th ed.), Cambridge University Press, p.193.
[119] *Supra* note 1.
[120] S.Chakarvarthy, "Intellectual Property Rights and Competition Law-A Dichotomy", *Corporate Law Advisor* , 1996, p. 42.
[121] 416 US 470 (1974).

greater common good of citizens. It plays a vital role in dissemination of innovation and facilitating commercial development of ideas.[122]

Analogically speaking had a farmer not planted cultivated and reaped his crops not only would that particular individual been poorer in not possessing the results of his work, but the world as a whole would have been deprived, at least for the time being, of the benefits of such labour .

Thus, recognition of the exclusive property right in such individuals tends to assure a continued supply of desirable and better products for, the consuming public by assuring protection to the worker in the result of his labour when he supplies them to public. Such a guarantee of the exclusive right to enjoyment of property promotes the general welfare of society only so long as it is limited to such use of enjoyment of the property if the property had never existed.[123]

The basic for the recognition of intellectual property by specific grant by government has always been that the innovation into the community enriches the public welfare and the innovator to the extent is a public benefactor.[124]

There is a well-established situation administrative and judicial framework to safeguard Intellectual property rights in India, whether they relate to patents, Trademark, Copyrights or Industrial Design. Protection of IPR in India continues to be strengthened further. The recent years witnessed the consideration and passage of major legislation with regard to protection of IPRs in harmony with international practices and in compliance with India's obligations under TRIPS. These include the Copyrights Act, 1957, Patent Act, 1970, Trademark Act, 1999. The Geographical Indications of Goods Act 1999, Layout of Design Act, 2000.

(1) The Patent (Amendment) Act 2005 was effective from 1st January 2005 to meet its commitment under the WTO agreement on TRIPS. The new bill finally passed by

[122] It was observed in *Bishawnath Prasad Radhay Shyam* v. *Hindustan Metal Industries,* AIR 1982 SC 1444, that the fundamental jurisprudence behind intellectual property is to encourage scientific research, new technology and industrial process.
[123] *Supra* note 4, at 225.
[124] *United States* v. *Dubilier Condenser Corp,* 2898 US 178

Indian Parliament on 23rd March 2005 now recognizes both product and process patents.

(2) India enacted its new Trade Mark Act. 1999 and Trade Mark Rules 2002 with effect from 15th September 2003, to ensure adequate protection to domestic and international brand owner in compliance with the TRIPs agreement.

(3) The Copyright (Amendment) Act 1999 passed by both houses of the Indian Parliament and signed by the President of Indian on Dec. 30,

(4) In consonance with the TRIPs obligation the Geographical Indication act 1999 came in to effect on 15th Sep. 2003 in India. The Act has strengthened the protection of geographical indications in India and was eagerly awaited.

(5) The exiting legislation on industrial design in India is contend in the new Design Act 2000 and this Act was serving is purpose well in the rapidly changing technology and international developments. Therefore in exercise of the powers conferred by section 47 of the design act 2000 the central government had made the Design Rules 2001.

In addition to the above legislative changes the Government of India has taken several measures to string line and strengthens intellectual property administration system in the country. Projects relating to the modernization of patent information services and trademark registry have been implemented with the help of WIPO/UNDP.

Competition Law

Antitrust was neither invented by technicians of commercial law nor by economist themselves. It was instead desired by politicians and by scholars attentive to pillars of democratic system, who saw it as an answer to a crucial problem for democracy.[125]Competition laws are based on the premise that competition is always a stimulant and monopoly is narcotic.[126] It is submitted that the above view may not be applied generically to all situations but on a whole does-provide clarity to the confusion

[125] Vinod Dahl (ed.), "*Competition Law: Concepts and Practices Relevant For India"*, 2007, Oxford University Press, USA, p. 132.

[126] S.D. Israni, "Competition Law in India: A Story of Work in Progress*"*, *Chartered Secretary*, (July, 2006), p. 101.

as it is to enhance consumer welfare.[127] Its concern is 'not to protect business from the working of the market; it is to protect the public from the failure of the market'.

The economic community is best served by free competition in trade and industry. Competition laws are antitrust statues to protect competition. They are concerned primarily with cartels and the acquisition or maintenance of monopoly power by 'unacceptable' means. Its primary purpose is to foster competition'[128] which is turn is indeed to encourage lower prices, better products, and more efficient production methods. It brings opportunities of profit that simulates business to find new, innovative and more efficient methods of production. It is in public interest that quality, price and service in an open, competitive market for goods and services is determining factor in the business rivalry.[129] The common law has traditionally favoured competition and has held agreements and contracts in restraint of trade illegal and unenforceable.[130] The justification for these laws is that monopoly practices are socially harmful because they decrease total surplus. Also, concentrated market power can impair individual and business freedom and can on occasions threat democratic values that require dispersion of economic power.[131]

India's new competition law, the Competition Act 2002 (The Act) was passed by the parliament in Dec.2002 and received the assent of the President of India on 13th January 2003,[132] and thereby became the law of the land. The Act is part of India's economic reform and globalization which necessitated aligning the economic laws of the country with the new economic scenario. The statement of objects and reasons[133] annexed to the Competition bill 2000 states the reasons for enacting the new law in the following words. "In the pursuit of globalization India has responded by opening up its economy, removing control and resorting to liberalization. The natural corollary to this is that the Indian market should be geared to face Competition from within the country and outside."

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[127] Adarsh Ramanujum, "Competition Law and Consumer Protection: Two Wings of Consumer Welfare", *Company Law Journal* , (May, 2008), p. 115.
[128] The Competition Act, 2002, Act No. XII of 2003, Preamble states its objective as 'to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in markets'.
[129] Abhimanya Ghosh and Kabir, "Balance of Competition Law in Indian Pharmaceutical Sector", *Journal of Intellectual Property Rights*, (May2007), p. 18.
[130] S. Goplakrishnan, "Competition Law: An Analytical Perspective*"*, *Chartered Secretary*, 2008, p. 1231.
[131] *Ibid.*
[132] Gazette of India, extraordinary, dated 14th Jan 2003.
[133] Statement of Objects and Reasons annexed to Competition Bill, 2001.

The MRTP Act, 1969 has become obsolete in certain respect in the light of international economic development. Relating more particularly to competition law, and there is a need to shift our focus from curbing monopolies to promoting competition. The principle objective of a competition law of any country is to maintain and protect the competitive process; this figures as a core objective of the Act.

Economic theory asserts that competition itself maximizes consumer interest nevertheless the protection of the interests of the consumers has been emphasized as a distinct objective of the Act. This may be seen in the light of the fundamental right to carry on any trader business that is guaranteed in the Indian constitution.[134] The view corresponds to the school of thought that regards competition law as being important to preservation of economic freedom much as political democracy is important to the protection of fundamental personal freedom.

The Act through the instrumentality of the competition commission of India seeks to prevent practices having adverse effect on competition; to promote and sustain competition in markets; to protect the interest of the consumers and insure freedom of trade carried on by other participant in markets in India and for matters connected there with or incidental there to.

The Act enjoins CCI with the following powers: - to inquire into anti-competitive agreement (e.g. cartels bid rigging etc.), to enquire into abuse of dominant position (e.g. predatory pricing) to regulate certain combinations. (mergers, amalgamations, acquisition of shares or control etc.) and to undertake competition advocacy which includes advise to the central government on competition policy, issues, eating public awareness and in past training on competition issues.

An important aspect of the Act, relates to extra territorial reach. In terms of sec.32 of the Act, CCI has the power to inquire into agreements dominant position and combination. which has or is likely to have an appreciable adverse effect on competition in the relevant market in India irrespective on the fact that an agreement referred to in section 3 has been entered into outside India, or any party to such agreement is out of India or any enterprise

[134] Article 19 (1) (g) of Constitution of India guarantees the Fundamental Rights of citizen, to practice any profession or to carry on any occupation trade or business.

abusing the dominant position is situated outside India or a combination has taken place outside India, or any other matter or practice or action out of such agreement or dominant position or combination is outside India.

4.2 Relationship between Intellectual Property Rights and Competition Law

According to the Anti monopoly law, not only among enterprises fixed price, and also restrictions on numbers of classified sales market behaviour is against the law.

Monopoly abuses the market dominant position. For e.g.-Microsoft's Bundled is an offence.[135] Even monopolistic enterprises seeking behavior is also considered illegal, such as US Sherman Act Sec.2.[136] The reason why Anti Trust Laws prohibits monopolies, cartels, prohibit larger scale merger, it is not the intention to put the large Enterprises in trouble but because in the market monopoly situation, product prices go high, the quality goes poor, which is not a reasonable allocation of resources and as such the interest of the consumers can be protected. Therefore the anti-trust law through the variety of anti-monopoly measures and enterprises, under the pressure of the market competition, force them to lower the cost of products, improve the quality of products, add new products; the results is the optimal allocation of resources and enhance consumer welfare.

IPRs mean people can enjoy their exclusive rights because of their intellectual achievements including patents, exclusive technology, Trade Mark and Copyrights. Many countries have enacted law on patent, Trade Mark, Copyrights Law. In proprietary Technology state generally uses the contract to protect the confidentiality agreement with the licensee exclusive right to use the technology secret. Same as the general Property rights, the most important feature of IPRs is exclusive economic exploitation of the rights of IPR holder, however if misuses his right, the same can be corrected under the competition law, the same shall be the case where holder of IPRs doesn't at all uses his

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[135] *United States of America* v. *Microsoft Corporation*, 87 F .supp 2d 30(D.D.C 2000)

[136] Sherman Antitrust Act of US (1890), Section 2, monopolizes trade a felony. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several states, or with foreign nations shall be deemed guilty of felony and on conviction there of shall be punished by fine not exceeding $10,000,000 if a corporation or if any other person, $350,000 or by imprisonment not exceeding 3 years or both said punishments in the discretion of the court.

right and such inaction of IPR holder amount to non use and can be taken care of under the relevant IPR laws so as to sub-serve the common good.

Other form of misuse of IPRs rights can be geographical demarcation, under pricing etc. which can be corrected by application of competition law. However, the granting of exclusive rights from state is not the ultimate goal it is just a measure for protection of IPR. That means IPR given by the state to the right holder in recognition of their contribution towards social good by their efforts, and to encourage the invention and the creation of works. For example the patent can stimulate the creation and invention; the copy rights can stimulate the production of knowledge products; and the trade mark will help to improve the quality of their products so as to stimulate the production of similar products to encourage price competition and so on.

The purpose of protection of IPR is a kin to the competition law, as both aim at inspiring activities, into the efficiency of resource allocation. But they both promote competition in a different manner. The competition law is to regulate competition by prohibiting acts which stifle competition as certain practices which if not prohibited can damage real or potential competition. IPRs protection is through the protection of the exclusive rights that in some way restrict competition, stimulates people, to competition in the field of knowledge-based economy to create new inventions or work which subsequently lead to better competition. This also means that between the protection of intellectual property rights and promotion of competition, it is difficult to say which are more important. In fact they both are interdependent and have their respective importance.

Intellectual Property Rights are property rights as mentioned before; all forms of intellectual property have potential to raise competition law problems. However, it is ordinarily expected that IPRs holders by exploring the economic power, transfer the IPR to the third party for their benefits and benefits of society. On the other hand, because the market is in the nature of economic competition, in order to safe-guard competition the law should not allow their legitimate right owner to prevent, restrict for distort effective competition in the market. It is here that the relationship between IPR and competition law became necessary.

The main objective of competition law on the one hand is to regulate firm’s behavior that might harm the competition process. The purpose of intellectual property law on the other

hand is to promote innovation and productive knowledge creation. Imbalances between intellectual Property Protection and competition law can thus have a negative effect on innovation or competition or both. Many scholars believed that intellectual property protection and competition law are complement at least in principle. At a general level the objective of both systems is to promote economic efficiency and enhance consumer welfare. Competition law and IPRs both strive to create an economic environment in which innovation is stimulated by both competition and the promise of earning, returns or investment in innovation.[137]

While the above reasoning suggests that IPRs and competition policy are consistent in principle there are nevertheless tension, arising from the significant differences in focus under competition law and IP law in practice. Both patent and antitrust law broadly strives to increase welfare but do so though channels that often diverge.[138]

Mattias Gasland has pointed out five following significant tension areas where it is difficult to balance IPRs and competition law in practice.[139]

(1) Uncertainty about the optional design of IPR.
(2) Uncertainty about the Effectiveness of antitrust intervention in specific cases.
(3) The different administrative procedures that govern the application of competition policy and intellectual property rights
(4) Uncertainty about the exact value of decentralized decision making in market economic
(5) The problem of temporal commitment.
(6) The problem of international commitment.

In addition competition policy works mainly at the short run and promote practices that tend to drive prices towards low cost, while IP protection is granted with the longer run

[137] Micheal L. Katz, and Howard A Chelansk, "Merger Policy and Innovation*:* must enforcement change of Cambridge", *National Bureau of Economic Research working paper* no.107, 2005, p. 10.
[138] Micheal A Carrier, "Unraveling the Patent Antitrust Paradox*", University of Pennsylvania Law Review* 150 (3), 2002, pp. 761-854.
[139] Mattis Gaslandt, "IPR and Competition Policy*", Research Institute of Industrial Economic, IFW Working Paper* no.726, 2008, pp. 9-17.

perspective of encouraging innovation through rewarding limited periods of exclusive right or penalties against unauthorized copying.[140]

The purpose IPRs is to promote disclosure of information which can be significant for competition in the long run. The gain from disseminating information and knowledge, plus the use of technology permitted by licensing and other arrangements should therefore be balanced against the statistic, short run social costs that arise because the disclosed invention are not freely available.

Complementary Nature of Intellectual Property Rights and Competition Law

The dominion view today is that competition law is a tool for promoting social welfare by deterring practices and transactions that tend to increase market power.

A proper discourse of basic nature of intellectual property rights and competition law reveals that both aim at producing efficiency in the market. In the long run, both aims at consumer welfare and they complement each other. In case of intellectual property goods, the marginal cost of production is very less. The cost incurred is cost of research of development and the cost of inventing new technologies along with ancillary expenditure incurred in bringing up that product in market is on the other hand very high. Absence of any monopoly right will disallow the inventor to recover the cost of research and development. This might result in discouraging investors to invest in bringing up newer technologies, which create 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 then does the elimination of static inefficiencies caused by non- competitive pricing. From an economist's perspective, intellectual property law is primarily concerned with the provision of appropriate *ex ante* incentive (and increasing competition in innovation

[140] Hovenkamp, Herbert J, "*Intellectual property and Antitrust Policy, A Brief Historical Overview",* University of Law and Legal Studies Research (2005), P. 5.

markets), while competition law is primarily concerned with *ex post* incentives (and increasing competition in product markets).[141]

However, it should be well understood that the intellectual property regime and competition law complement each other only at the equilibrium. State can comfortably reward innovation through patent and copyrights so long as the compensation is not significantly in excess of that necessary 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.[142]

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."[143]

4.3 The Provisions of Competition Law Relating to Intellectual Property Rights

1) Intellectual Property Rights and Anti Competitive Agreements.

The Act deals with the applicability of section 3 prohibition relating to anticompetitive agreements with Intellectual property rights. An express provision of section 3(5) (i) is incorporated in the Act, that reasonable conditions as may be necessary for protecting Intellectual property rights during their exercise would not constitute anti competitive agreement. In other words by implication, unreasonable conditions in an IPR agreement that will not fall within the bundle of rights that will normally form the part of IPR would be covered under Section 3 of the Act. Section 3(5) (i) of the Act provides for the exemption from the provision of Section 3 for Intellectual property rights. It states that nothing in the Section shall restrict the right of any person to restrain any infringement of, or his right which has been or may be conferred upon him under

The Copyright Act, 1957

The Patent Act, 1999

The Geographical Indications of Goods (Registration and Protection) Act, 1999

The Design Act, 2000

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[141] *Supra* note 15 at 54.
[142] *Id* at p.99
[143] K.Srinivasulu, "*Intellectual Property Rights"*, (2007), p. 67

The Semi Conductor Integrated Circuit Layout Design Act, 2000.

Thus like the Competition laws of other countries, the Act recognizes the value of Intellectual property rights as an incentive to creativity and economic growth. However to benefit from section 3 (5) (i), the restrictions must be reasonable and necessary to protect the Intellectual property rights.

Section 3 (5) (i) of the Act declares that "reasonable condition as may be necessary for protecting 'any Intellectual property rights will not attract section3". The expression 'Reasonable Conditions' has not been defined and explained in the Act. By implication, unreasonable conditions that attach to the Intellectual property rights will attract section 3. In some countries restriction held unreasonable includes agreements restricting prices, quantity of goods that may be manufactured, agreements providing for payments of royalty after the license period and certain types of exclusivity conditions.[144]

In other words, licensing agreement which is likely to affect adversely the price, quantity, quality or variety of goods and services will fall within the contours of competition law as long as they are not in reasonable and just position with the bundle of rights that go with Intellectual property rights. Exclusive licensing is another category of possible unreasonable condition. Example of arrangement involving exclusive licensing that may give rise to anti- competition concerns includes cross licensing by parties collectively possessing market power, grant backs and acquisition of Intellectual property rights. A few such practices are described below.[145]

(a) Patent pooling is a restrictive practice. This happens when the firms in a manufacturing industry decide to pool their patent and agree not grant licenses to third parties, at the same time fixing quotas and prices; they may earn supernormal profits and keep new entrants out of market. In particular if all the technology is locked in a few hands by a pooling agreement it will be difficult for outsiders to compete.

(b) Tie–in arrangement is yet another such restrictive practice. A licensee may requires particular goods solely from the patentee, thus for closing the

[144] Anderson, Robert, Timothy Danial, and Alberto Heimler *: "Abuse of Dominance' in the World Bank*" OECD (1999), at pp.360-62.

[145] See generally: Advocacy Booklet titled, "*Intellectual Property Rights under the Competition Act,* 2002", Competition Commission of India.

opportunities of other producers. There could be an arrangement for bidding a licensee to compete, or to handle goods which compete with the patentee.

(c) An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalty shall be payable in respect of un patented know how as well as the subject matter of the patent. It would certainly be a bad agreement.

(d) There may be a clause, which restricts competition in research and development, or prohibits a licensee to use rival technology.

(e) A licensee may be subject to a condition not to challenge the validity of Intellectual property rights in question.

(f) A licensee may require to grant back to the licensor any know how or Intellectual property rights acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti- competitive manner.

(g) A licensor may fix the price at which the licensee should sell.

(h) The licensee may be restricted territorially or according to the category of the customers.

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

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

(k) Restricting the right of the licensee to sell the product of the licensed know how to persons other than those designated by the licensor may be violated of competition such a condition is often imposed in the licensing of dual use technologies.

(l) Imposing a Trade Mark use requirement on the licensee may be prejudicial to competition, as it could restrict a licensee's freedom to select a Trade Mark.

(m) Indemnification of the licensor to meet expenses and action in infringement proceeding is likely to be regarded as anti-competitive.

(n) Undue restriction on the licensee's business could be anticompetitive, for instance the field of use of drug 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.

The above list is not exhaustive but illustrative.

2) Intellectual Property Rights and Abuse of Dominant Position

Section 4 of the Act prohibits abuse of dominant position by enterprises or group enjoying dominant position. In this context, it appears that if an enterprises as a group, which acquires dominant position in the relevant market and abuses its dominant position through any of abusive acts, as describe of under section 4 (2), it may held liable for abusing its dominant position, from the aforesaid it can be pointed out that, abuse of Intellectual property rights by the enterprises or group enjoying dominant position by virtue of its IPR portfolio can be checked under the Act if it violates provisions relating to abuse of dominant position as contained under section 4 of the Act.

Actions of the enterprises enjoying dominant position in the relevant market by virtue of their Intellectual Property Rights can be looked into by CCI if such actions fall under any of the abusive acts mentioned under the Act. The Act specifies the following actions by a dominant enterprise or group of enterprise as abuse of dominant position[146].

(1) Unfair or discriminatory conditions or pricing.
(2) Limiting or restricting the production of goods or provision of services or market.
(3) Limiting or restricting technical or scientific development to the prejudice of consumers.
(4) Denying market access in any manner.
(5) Making 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
(6) Using its dominant position in one relevant market to enter into, or protect other relevant market.[147]

[146] *Supra* note 18, Section 4 (2).
[147] It is well established that IPRS involve grant of exclusive rights to the right holder to exploit the results of their innovation so as to provide incentives to innovate. At the same time it is well established that all forms of IPRS have potential to raise competition concerns, it is in this context, the act recognizes the limited monopoly rights granted to Intellectual Property Rights holder under different Intellectual Property Rights statutes. Further, in this direction, the Act exempts the reasonable use of such right by right holder

3) Penalties under the Competition Law to Check Abuse of IPRs

CCI is empowered to inquire into any unreasonable conditions attached to the Intellectual Property Rights agreements and can impose penalty upon each of such right holder or enterprises which are parties to such agreement or abuse, which shall be not more than 10% of the average turnover for the last three preceding financial years. In case an enterprise is a company its director\officials who are guilty are liable to be proceeded against and punished.

In addition, the CCI has power to pass inter alia any or all of the following orders.[148]

i) Direct the parties to discontinue and not to re-enter such agreements
ii) Direct the enterprises concerned to modify the agreements
iii) Direct the enterprises concerned to abide by such other orders as the CCI may pass and comply with the directions, including payment of costs, if any; and
iv) Pass such other order or issue such directions as it may deem fit.

In case of abuse of dominant position under section 4 by virtue of an Intellectual Property Rights by an enterprise, in addition to the above penalties, the CCI has the power to order division of enterprises under section 28.

4.4 TRIPS and Anti-competitive Practices

TRIPs, provides a multilateral framework for the protection and enforcement of IPRs by Members. Therein are included provisions relating to abuse of IPRs and anti-competitive practices that may accompany the rights, Article 8.2 of the TRIPs agreement, entitled 'Principles", provides as follow:

"Appropriate measures, Provided that they are consistent with the provisions of this agreement, may be needed to prevent the abuse of intellectual property rights by rights holder or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

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from the provision of section 3 related to agreement. However by way of implication unreasonable use of Intellectual Property Rights can be scrutinized by CCI , similarly it appears that the act can also scrutinizes the action of the enterprises or group enjoying the dominant position by virtue of its Intellectual Property Rights if it indulge in abusive act s, as laid down under the act .

[148] *Supra* note 18, Section 27.

Further to this general provision, Article 40 of section 8 part II of the Agreement deals with the control of anti-competitive practices in contractual licenses.

In the area of patent, TRIPs agreements allows governments to grant compulsory licenses, under certain conditions in order to remedy abuses. The conditions for the grant of compulsory licenses are set out in Article 31 of TRIPs agreement and also in the last sentence of article 27(1)[149] thereof. Article 31 is entitled 'Other use without authorization of the right holder' and stipulates conditions aimed at safeguarding the legitimate interests of the right holder, on the grant of compulsory licenses and also on government use (use by government or third parties on behalf of the government without the authorization of the right holder). Article 37(2) of TRIPs allows compulsory licensing of layout-designs of integrated circuits or of their use by or the government without the authorization of the right holder.

Again sub-paragraph (k) of article 31 provides that in situations where a practice has been determined after judicial or administrative process to be anti-competitive certain of the conditions are not applicable. In such cases, the applicant for a compulsory license need not seek first a voluntary license or reasonable commercial terms and the compulsory license need not be limited to use predominantly for the supply of the domestic market of the member granting the license.

Moreover, the need to correct anti-competitive practice may be taken into account in determining the amount of remuneration in such cases and the competent authorities shall have the authority to refuse termination of the compulsory license, if and when, the conditions that led to its grant are likely to recur.

There is a basic complementary between intellectual property law and competition law. Intellectual property laws provide for intellectual property to be valued and exchanged and competition laws ensure that the market assigns a fair and efficient value to this property.

[149] Article 27(1) of the TRIPS reads as patent shall be available for any inventions, whether product or processes, in all fields of technology, provided that they are new, involve an incentive step and are capable of industrial application subject to paragraph 4 of Article 65 and paragraph 8 of Article 70 and paragraph 3 of this Article, patent shall be available and patents right enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

Provisions of TRIPs Agreement that are considered to be related to the treatment of anti-competitive practices are in particular Article 6, 8, 31 and 40. Compatibility between competition law and IPR depends on the former being properly applied to the exercise of the later. A proper application of competition law should avoid two extremes. Too stringent an application could lessen innovation. An effective or insufficient application could result in an over-extended grant of market power. Both outcomes would have an adverse effect on output as well as inhibiting effect on trade. *'Future negotiations in the area of IPRs should give equal weight to recognizing the risks of both under-protection and over-protection of IPRs.'*

TRIPs Agreement reflects the thinking that safeguards intended to restrain anti-competitive practices should balance regimes for the protection of the intellectual property which involve the use of IPRs. TRIPs provisions do not clarify the practices that need to be treated as abuse and say little about the remedies that members of the WTO can avail of.[150]

In considering the relationship between IPRs and competition policy, it is important to address the issue as to the extent to which remedies for abuse of such rights could and should be sought within the competition policy and as to what extent the remedies should be found by introducing or strengthening features in laws on intellectual property such as *compulsory licensing*. Article 6 of TRIPS[151] is cognizant of the possibility of legally allowing *parallel imports*, the use or sale of licensed goods outsides the territory in which they have been licensed.

This embraces what is known as the principle of 'exhaustion of rights', implying thereby that once the right holder has authorized the release of the IPR, they are considered to have exhausted. The right holder has, thus, no right to control the use or resale of goods

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[150] Daniel Gravis, "*The TRIPS Agreement: Drafting History and Analysis",* (2003). At p.321

[151] TRIPS, Article 6: [*Marks:* Registration in the Name of the Agent or Representative of the Proprietor Without the Latter's Authorization]: (1) If the agent or representative of the person who is the proprietor of a mark in one of the countries of the Union applies, without such proprietor's authorization, for the registration of the mark in his own name, in one or more countries of the Union, the proprietor shall be entitled to oppose the registration applied for or demand its cancellation or, if the law of the country so allows, the assignment in his favor of the said registration, unless such agent or representative justifies his action. (2)The proprietor of the mark shall, subject to the provisions of paragraph (1), above, be entitled to oppose the use of his mark by his agent or representative if he has not authorized such use. (3) Domestic legislation may provide an equitable time limit within which the proprietor of a mark must exercise the rights provided for in this Article.

that he has put on the market or has allowed the licensee to market. But, however, the words 'without discrimination' in case of import use in article 27 of TRIPS a country to formulate an export – import policy, which can be used for import restrictions.

India and other like mined countries need to examine the desirability of resorting to the window provided in article 40 of TRIPs which allows members of the WTO to specify, in their legislations, licensing practices or conditions that may be an adverse effect of competition and constitute abuse of IPR. There is a need to negotiate this in the WTO.[152]

There is need to incorporate appropriate provisions in TRIPs to enable adoption of measures for protection of public health and nutrition and promotion of public interest in sectors of vital importance for ensuring each country's socio-economic and technological development. There has recently been a controversy in South Africa over access to medicines at affordable prices. The issue at stake was the South Africa's Medicines and Related Substances Control Amendment Act, which allows the country to provide medicines at price that its population can afford by restoring to imports from cheaper sources of supply. This provision was challenged by the pharmaceuticals majors in the global market as being violative of the TRIPs Agreement. They contended that the rights enjoyed by the patentees in the patent regime introduced after the implementation of the TRIPs agreement would be severely curtailed, if the Government used the South Africa law on affordable medicines.[153]

The question is whether enhancing the rights of the patent holders in a disproportionate manner could lead to the emergence of oppressive monopolies and this manifest itself in high prices. Such a situation is difficult to condone in critical sectors like pharmaceuticals, particularly in developing countries like India or South Africa where a majority of the poor do not have access to modern medicines. The remedy possibly lies in operationalizing the objectives and principles of the TRIPs agreement provided for in Articles 7 and 8[154], which refer to several public policy objectives that the agreement

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[152] Graham Dutfield and Suthersanen, "*Global Intellectual Property Law"*, MPG Books Ltd., Cornwall, (2008), p. 53.
[153] *Id* at p.59
[154] TRIPS; Article 7: [*Marks:* Collective Marks]: (1) The countries of the Union undertake to accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment. (2) Each country shall be the judge of the particular conditions under which a collective mark shall be protected and may refuse protection if the mark is contrary to the public interest.

should fulfill. Further, it needs to be successfully argued in the WTO, that the use of compulsory licenses should not be considered as violation of TRIPS agreement.

With regard to the position geographical indications, article 22 of the TRIPS agreement under the WTO auspices requires its member to provide a legal means for interested parties to prevent the use geographical indications which may mislead the public as to the true place of origin of the goods concerned and to prevent its use accounting to unfair competition in the Paris convention sense.[155]

Some countries are well endowed with diverse agriculture products, which are being exported on a regular basic and for a long time. India for instance enjoys the reputation of high quality in products originating from specific regions in the country. Such products are well known in the international market. By way of illustration, Darjeeling Tea, Basmati Rice, Alphonso Mangoes, Malabar Pepper, Alleppey Green, Cardamom and Hyderabad Grapes can be cited.[156]

TRIPS agreement explicitly provides for protection of geographical indications, such as French champagne. Even if a sparkling wine almost identical to what is made from chardonnay grapes in France can be produced with grapes grown in Goa or Himachal Pradesh, it cannot be labeled champagne under the WTO provisions. Similar considerations will have applied to products such as basmati rice or Darjeeling Tea, which are products uniquely linked to some particular geographical regions,[157] before the TRIPs agreement, geographical indications were not protected in India.

Since then the enactment of a separate law addressing geographical indications has given the necessary impetus to the effect of Indian exporters to protect the geographical indications attached to the goods in question. Thereby creating a domestic base for ensuring that the premium attached to such products is retained both in Indian and foreign

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(3) Nevertheless, the protection of these marks shall not be refused to any association the existence of which is not contrary to the law of the country of origin, on the ground that such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.

Article 8: [*Trade Names*]: A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark.

[155] Unfair competition is defined in Article 10 of the Paris Convention as "Any act of competition contrary to honest practices in industrial or commercial matters."

[156] Latha R.Nair and Rajendra Kumar, "*Geographical Indications; A Search for Identity"*, Lexis Nexis, Butterworths,(2005) p. 109.

[157] *Ibid.*

markets. The promotion of IPR embodied in geographical indications will also help in preventing the geographical indications of goods becoming generic thereby leading to a loss of distinctiveness and consequently protection.

4.5 Dichotomy between Intellectual Property Rights and Competition Law

Competition law is not to be governed by the philosophy of IPRs. Competition law maximizes social welfare by condemning monopolies while intellectual property does the same by granting temporary monopolies.[158] Federal trade commission USA observes that tension between intellectual property and competition policy, necessarily arises on the grant of invalid intellectual property or abuse or misuse of granted monopoly. There are two incidents that are discussed herein with reference to patents. In the case of *Roberts* v. *Sears Reobuck & Co*,[159] Posner J, observed that the validity of patent from the perspective of legislation and patent office is different from competition law perspective. From the perspective of competition law, a patent is invalid.

"If a court thinks an invention 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 invention obvious and the patent invalid."[160]

In the case of *Vallal Peruman* v. *Godfrey Philips (India) Ltd.*[161]it was stated that certification of registration held by an individual or an undertaking vests in him/it, an undoubted right to use trade mark/name etc, so long as the certification of registration is in operation; and more importantly, so long as the trade mark is used strictly in conformity with the terms and conditions, subject to which it was granted. If however, while presenting the goods, and merchandise for sale 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 confuse the consumers, he would be exposing himself to an action of indulging in unfair trade practices. It will thus, be

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[158] Abir Roy and Jayant Kumar, "*Competition Law in India"* , Eastern Law House, (2008), p. 176.
[159] 723 F2d 1324,1346 (7th Cri. 1983)
[160] *Ibid.*
[161] IA 91/92 in UTPE 180/92- MRTP Commission.

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.[162]

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

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[162] *Ibid.*

CHAPTER – 5

CONCLUSION AND SUGGESTIONS

Conclusions

Public good expressing itself through consumer protection is the gist of any market regulation or business law. Our experience from history, show various experiments in the legal and economic frameworks for market operations. These experiments range from ideological right to left i.e. capitalist economy to socialist pattern, in the search of a perfectly just market. Adam Smith tried to visualize the idea of 'perfectly just market' through the so called "invisible hands"[163] to be effective in a purely capitalist economic system, where market forces are relied on as self-regulatory and capable of making ultimate good.

In the socialist camp there were differences among Marx and Proudhon regarding the role of market forces in search of a 'perfectly just market.' But as our analysis has proved it was concluded ultimately that the 'perfectly just market' is only a mirage. Though almost just market can be achieved through continuous efforts and enforcement of laws, but perfectly just market remains a far dream. It has also been found in the study that the of 'invisible hands' of Smith were actually the 'hands of competition' operating in the market; and the rift in the socialist camp was nothing but over the idea of 'degree of competition' to be kept unrestricted in the state-run economic system.

After identifying such a vital importance of competition, attempts were made, mainly focused to ensure free and fair competition so that interest of consumers and enrichment of nation can be better served. Starting from the west, the idea and efforts to implement it, spread across the globe. The trend in recent years, particularly after the disintegration of the first centrally planned systems, is inclination towards market oriented systems and even within market oriented systems, such as in the USA and UK, successful initiative have been undertaken to deregulate previously regulated industries, so as to enhance the role of market forces in shaping those industries. These changes emanate from a growing

[163] Adam Smith, "An inquiry into the Nature and causes of the Wealth of Nations", (1776) Abridged version published by Orient Publication (1957), p. 111; Also available online at http://www2.hn.psu.edu/faculty/jmanis/adam-smith/Wealth-Nations.pdf , last viewed on May 12, 2012.

global acceptance of the premises that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources the highest quality and the greatest material progress.[164]

Competition law in India is the result of the constitutional goal of socio-economic justice and distributive justice and was against the economic concentration of resources and wealth. Previously when the economy and markets were not open for the foreign player the object was to restrict the monopoly and economic concentration but as the situation changed from time to time law was also changed now the focus has been given to promoting the competition and that too without curbing the monopoly. The journey of the MRTP Act, 1969 to Competition Act, 2002 has witnessed it.

The object of the MRTP Act was to provide operation of the economic system which does not result in the concentration of the economic power to common detriment, another object of the Act was to control of monopolies and to prohibit the monopolistic and restrictive trade practices where as the competition Act has sought to prevent the practices which have the adverse effect on the Competition in the market. The other major object of MRTP Act was to protect the consumers' interest along with the interest of the other participants in the market.

Dominant position, but abuse of it, is prohibited under the law[165]. The Act seeks to ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on this count could endanger large efficient firms[166]. With regard to combinations the combination is also not prohibited but there is regulation on the combinations. The Act imposes the duty on the Commission to eliminate practices which are having adverse effect on the competition for the purposes of promotion and sustaining competition, thus the purpose of protecting consumer's interest can be secured.

Section 19 of the Act gives the power to the commission to conduct an enquiry on its own motion or 'on the receipt of any information from any person, consumer and consumers' association of the trade associations',[167] or 'on the reference made by central

[164] *Northern Pacific Railway Co* v. *United States*, 1958. 356 U.S. 1.
[165] *Dish TV* v. *Prasar Bharti*, Case no. 44/2010, decided by CCI on Dec. 21, 2010.
[166] *M/s Best Xerox Centre* v *Xerox Modi India Ltd.*, Case no. 57/2010 decided by CCI on Dec. 2, 2010.
[167] The Competition Act, 2002, Section 19(a).

government and state government or any statutory authority',[168] in the cases of alleged contravention of the anti-competitive agreements or in the cases of abuse of dominant position. Thus the consumers are given the instrument if their interest has been violated by the traders.

Competition law has its uniqueness under section 49 of the Act where the provision of the competition advocacy is given. This is very important step because by competition advocacy the government is being updated from the suggestions made by the competition commission to the government. Advocacy plays a vital role in securing the willingness and acceptability of competition policy and law. Competition advocacy can also be looked at as law enforcement without intervention.

Intellectual property right (IPR) is considered as monopoly law but actually there is a symbolic relationship between the IPR and competition law for the better protection of interest of the consumer. IPR is very important for the development of the country and consumer's interest because by investing IPR in an inventor state gives the monopoly to exploit the invention. By this, state actually promotes the intellectual to come up with more technologically advanced products and that is betterment of the society.

Cartel which is considered as another type of monopoly has not been recognized by the state because it is neither in the interest of the country nor in the interest of the consumers. Cartels behaviour attacks the very heart of a "free economy" the determination of price and output through competition and consumer preferences diverts resources from their optimal use, and transfer wealth to those engaged in illegal activity.

Section 19 also set forth an exhaustive list of factors to define the relevant product and geographic markets for making competition evaluations and assessments. The Act also empowers the CCI to impose the penalties, as well as the power to issue cease and desist and interim orders. Thus the conclusion on the issue of cartels is that the cartels are always bad for the economic system and consumers interest.

Thus the study concludes that in neo-liberal order where India is following the concepts of socio-economic justice and distributive justice, monopoly in all cases cannot be treated as bad practice, because in the era of the globalization the Indian industries has to compete

[168] *Ibid*., section 19(2)

with the foreign players in the market who are well equipped with the economic resources. The competition is essential requirement for a well developed economy. The message is loud yet clear that a well planned exhaustive competition compliance programme can be of great benefit to all enterprises irrespective of their size, area of operation, jurisdiction involved, nature of products supplied or services rendered and the same is essential for companies, its directors and the delegatee key corporate executives to avoid insurmountable hardships of monetary fines, civil imprisonment, beside loss of hard-earned reputation when the competition authorities, the media and others reveal the misdeeds in public.

The particular monopoly and competition practice is good or bad can be tested on the touchstone of consumers' interest and development of the economy of the country. And at the end of the study it is submitted that India has very effective instrument to draw a balance between monopoly and competition and all depends on the better enforcement of such law.

The objective of competition policy and law is to preserve and promote competition as a means to ensure efficient allocation of resources in an economy, resulting in:-

(a) The best possible choice of quality
(b) The lowest possible price and
(c) Adequate supplies to consumers

To put it differently ensuring competition is just a means to achieve the above state objectives. Different perspectives of consumer welfare mean different things to different groups of people. Those who are relatively rich and can afford all comforts of life are more concerned about their range of choice of goods and services. For those who find it difficult to make their both ends meet, the most important concern for them is not choice but rather access to goods and services. Broadly speaking, while the former aspect is more important in developed world, developing countries would be more concerned about the latter aspect in administering their competition and consumer protection policies. From a developing country perspective the role that the two policies play in promoting development and poverty reduction becomes the focal point in understanding the linkage between the two.

Competition policies promote efficient allocation and utilization of resources, which are usually scarce in developing countries; this also means more output lower prices and consumer welfare. It does not stop there only as more output is also likely to lead to more employment in the economy. Competition may of course lead to some job losses in some sectors or in the short run, but this can be taken care of by putting an appropriate social safety net in place. A good competition policy and law, lowers the entry barriers in the market and makes the environment conducive to promoting entrepreneurship and growth of small and medium enterprises. This has positive implications for development as small business and entrepreneurial activities promote employment growth. The lack of gainful employment or livelihood is considered to be one of the major causes for widespread poverty in developing countries.

Another key problem in many developing and transition economies that have recently introduced competition law, is that newly created competition authorities find that they are confronted by lack of awareness of civil society and consumers as to the purpose of competition policy; and powerful self interested groups who have no interest in promoting an efficiently competitive economy. It can be very difficult in these circumstances for a competition authority to make its voice heard as an effective advocate of competition.

It is not sufficient that competition policy should be understood and implemented by a small community of specialists' .i.e. lawyer, economists and regulators but that it must be actively supported by consumers.[169]

On monopoly, there is a bifurcated opinion about its utility and misuse. Some argue that only monopolists enjoy the wealth to innovate and carry out expensive research. Noted Australian Economist Goseph A. Schumpeter was a champion of the notion that the motivation to innovate was the prospect of monopoly profits and that even if existing monopolists earned such profit in the short term, outsiders would in due course, enter the market and displace them.[170]

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[169] *Ibid*.
[170] Goseph A. Schumpeter, *Capitalism, Socialism and Democracy*, George Allen & Unwin (Publishers) Ltd (1976), at p.132.

In the early years of existence of competition legislation, the link between deception of consumers and adverse competitive effect was taken for granted, although it was not clear which was the primary and which was the secondary concern. The US Supreme court ruled in *FTC* v. *Raladam Corp*.[171] that "the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be lessened."

The *Raladam case* provided the impetus for the 1938 Wheeler Lea Amendment.[172] Since the Wheeler Lea Amendments in the USA, competition jurisprudence and consumer protection jurisprudence seems to have evolved along different paths, but this divergence was not inevitable. The mere fact that competitive injury is no longer a necessary element of a consumer protection case does not means that consumer protection offence are matters of no competitive significance.

There is an interesting parallel line of competition law and consumer protection law. In competition law, there is the traditional distinction between "*per se*" cases and "*rule of reason*" cases.[173] In a *per se* cases the only issue is whether the conduct occurred, while in the *rule of reason* cases, it is necessary to prove adverse market effects and conduct may be defended on the ground that adverse effect are out weighted by beneficial ones. Agreements that are illegal per se could also be condemned under rule of reason, of course but it is unnecessary to plead them that way when adverse effect can be conclusively presumed. Consumer protection laws have a similar structure.

As far as the implementing machinery for the Competition Act is concerned, now Competition Commission of India and Competition Appellate Tribunal both have been constituted. During the short span of its existence, the Commission has already commenced investigations and decided few disputes in sectors including civil aviation, stock markets, private sector banks[174], housing finance companies[175], DTH service

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[171] 316 U. S. 149
[172] Codified in 15 USC, 95 (a).
[173] Thomas Leary, a Structured Outline for the Analysis of Horizontal Agreements (March 2004) available at http://www.Fte.gov/speeches/leary/chair shows casetalk.pdf. (visited on 26 march, 2012)
[174] *Yashoda Hospital and Research Centre Ghaziabad* v. *India Bulls Financial Services Ltd. New Delhi,* Case no. 12 of 2010, decided by CCI on March 22, 2011.
[175] *Neeraj Malhotra* v. *Deutsche Post Bank Home Finance,* Case no. 5 of 2009, decided by CCI on Dec. 2, 2010.

providers[176] and disputes between film producers and multiplex owners[177] in discharge of its duties of promotion and sustenance of competition in India. It however remains to be seen that out of the cases being investigated how many would result in positive findings in respect of anti-competitive practices and out of the cases decided, how many make a far reaching impact. As of now the Competition Commission of India is appreciated on the one hand for speedy disposal and prudent decisions, but it also drew harsh criticism at some instances.

Suggestions

The Act has now become fully operative and the Competition Commission of India has been constituted. However, the Act still suffers from certain lacunas. An examination of the powers of the CCI would suggest that the commission is fully equipped to counter and set right the vagaries of the market place.

While seemingly enjoying carte balance, there appear to be certain glaring lacunae which would militate against the efficacy of the provisions of the Competition Act it would be remembered that the Commission would initiate action upon complaints of anti-competitive agreements abuse of dominant position either *suo moto,* or on the voluntary motion of a person seeking an opinion of the Commission. The following suggestions may be forwarded for the better application of competition law:

1. The lack of a mandatory provision compelling persons or entities, whether public or private, to approach the Commission, is a handicap because they may not be aware of illegality or prevention of certain practice adopted by traders.
2. Corresponding logistical limitations of the Commission to be able to take cognizance on its own motion of every malpractice in the economy should be considered and alternative be provided for.
3. If there is no inbuilt principle that statutory authorities and private persons are required to approach the Commission to determine whether an anti-competitive agreement is in force, or whether there is an abuse of dominant position or

[176] *Dish TV* v. *Prasar Bharti, Case no. 44/2010, decided by CCI on Dec. 21, 2010.*
[177] *Aamir Khan Productions Private Limited* v. *Union of India,* MANU/MH/1025/2010.

whether a combination is detrimental to public interest, one cannot actually rely upon the parties to approach the Commission of their own accord and hence such a provision is needed.

4. The Central Government also enjoys unbridled power in the matters of policy framing and issues direction on questions of policy which shall be binding on the CCI. There must be a reasonable check over this governmental power which may be misused by lobbyists of industry and cartels against public interest.
5. The government also has the power to supersede the CCI, against which the CCI can make a representation to the Government. This poses a real threat to the independence of CCI. This governmental power should also be checked with reasonable limitations.[178]
6. Consultation by the Central Government in evolving competition policy with the CCI should be made mandatory, instead of discretionary, as contemplated in the Act.[179]
7. Moreover, the Act does not address the abuses of Intellectual Property Rights, which are monopoly rights for limited period of time. This should be considered and provided with a solution by suitable amendment in the Competition Act 2002.

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[178] The Competition Act 2002, Section 56.
[179] *Ibid*, Section 49.

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