Chapter - II

COMPETITION LAW - HISTORICAL BACKGROUND

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2.1 INTRODUCTION

Competition law has grown enormously in recent years, especially since the 1990s. The growth has been tremendous in terms of geographical regions that have adopted competition law, as well as in the increasing range of economic activities now subject to competition law. With an increasing number of countries that have undertaken economic reforms and embraced the market economy, many of them have also introduced competition law to promote competition culture and process in their markets. Thus there has been increasing reliance on competition policy and law to address market failures and distortions in the form of anti-competitive practices, abuse of dominance etc., The early implementation of a competition law is, as Joseph Stieglitz, has stressed, not a luxury but a real necessity.[1]

In order to appreciate the immense importance and significance of competition law to the national economy, tracing the origins and roots of such law are important as such process enables us in comprehending about the identities, relevancy and objectives apart from the factors that influence decisions.

The original concept of competition, dating from the 18th century, and Adam Smith's Wealth of Nations (1776) merely meant the absence of legal restraint on trade. Modern economic theory, however, which stems from the late 19th century, and led to the first anti-trust legislation, viz, the Sherman Act in the USA in 1890.[2] Thus looking to the development in America many countries gained experience and today almost 90% of the countries across the globe have their own Competition Law. In this chapter

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[1] Quoted by Vinod Dhall in his speech at workshop on "Competition assessment analyses; Instrument for competition advocacy

[2] Canada in fact enacted its first competition law in 1889and some States in the United States too had earlier laws but, on account of their limited effectiveness, they have not acquired comparable significance in antitrust history

the researcher makes an earnest attempt to depict a brief overview of the historical background of the US, European Union, UK and Australian Competition Laws.

2.2 ANTI-TRUST LEGISLATION IN USA

The history of modern competition law is generally traced to the United States, where the Sherman Act was enacted in 1890 out of the growing concern about the formation of trusts by the American companies. Competition Law and Antitrust Laws are used interchangeably in the US and in most western countries. The understanding of the subject will not be complete without tracing out the genesis of these laws. The U.S could be termed as the cradle of Antitrust Laws.[3] USA was first to introduce a coherent competition system. The legislative framework in US is made in three Statures: the Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914, of which the Sherman Act, 1890 is the most important. The Sherman Act was a simple, short statue. It has been argued that 'American antitrust law is not only "law" but also a socio-political statement about our society.'[4] The political consensus reflected in the law during the early years of antitrust, and for a considerable period thereafter, was that high concentration of industry lessened competition.[5] The Antitrust Laws comprise what the Supreme Court calls a "Charter of freedom," designed to protect the core republican values regarding free enterprise in America. John Sherman, a great American Senator put it, "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life." The Sherman Antitrust Act passed by the Congress almost unanimously in 1890 and remains the fulcrum of Antitrust Policy. The Sherman Act, 1890 makes it illegal to try to restrain trade, or to form a monopoly. It gives the Justice Department the mandate to go to Federal Court for orders to stop illegal behavior or to impose remedies.[6]

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[3] Suresh T. Vishwanathan, Law and practice of Competition Act, 2002, 1st ed, 2003,p.3.
[4] T. Sullivan, The Political Economy of the Sherman Act: The first one hundred years, 1st ed, 1991, p.3.
[5] Barry J. Rodger and Angus macCulloch, Law and Policy, 2nd ed, 2006, p.15.
[6] http://en.wikipedia.org/wiki/Antitrust, Accessed on Feb. 04, 2007, 9.10pm.

2.2.1 SHERMAN ACT, 1890-PRECISION AND OVER INCLUSIVENESS

The American Sherman Act, 1890 attempts to sustain the competitive process.[7] The purpose of the Sherman Act, 1890 originated out of popular concern for the U.S economy during a period when a small number of corporations and individuals had accumulated a huge amount of wealth. Corporate organizations, unconcerned with public interests, were spawning in large numbers: dangerous business establishments known as "trusts"[8] were growing in number and suppressing competition. In the interests of curbing business excess and abuse while preserving the competitive nature of the U.S. economy, the Sherman Act, 1890 became one of the first modern Competition Law statutes and the first of such statutes to become a significant factor in legal and economic life.[9]

The Sherman Act, 1890 contains two broadly construed substantive sections of importance. Under Section 1 of the Sherman Act, 1890, "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." Section 2 of Sherman, 1890 makes it a felony for "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations." Fines for such violations now include up to $350,000 for individuals and/or three years imprisonment.

The judiciary of US plays an important role in interpreting the provisions of the Sherman Act, 1890 and the U.S Competition Law system. The Sherman Act, 1890 for

[7] The antitrust laws comprise what the Supreme Court calls a "charter of freedom," designed to protect the core republican values regarding free enterprise in America. The main goal was never to protect consumers, but to prohibit the use of power to control the marketplace. Although "trust" had a technical legal meaning, the word was commonly used to denote big business, especially a large, growing manufacturing conglomerate of the sort that suddenly emerged in great numbers in the 1880s and 1890s. Indeed, at this time hundreds of small short-line railroads were being bought up and consolidated into giant systems. (Separate laws and policies emerged regarding railroads and financial concerns such as banks and insurance companies.) Republicanism required free competition and the opportunity for Americans to build their own business without being forced to sell out to an economic colossus;

[8] Several large "trusts" (integrated groups of companies) were perceived to be using their economic power to force their competitors out of business, gain unfair terms from their suppliers, and raise prices to consumers. This led to widespread popular resentment in some parts of the country and demands for constraints on the anticompetitive activities of big business; Charles W. Smitherman, "The Future of Global Competition Governance: Lessons from the Transatlantic", 19Am. U.Int'lL.Rev.769.

[9] Supra n. 4.

example, may be enforced not only criminally by the U.S Department of Justice ("DOJ"), but civilly as well by the government and aggrieved parties.[10] In fact, the broad language of the Sherman Act, 1890 essentially demands that the U.S Judiciary play a vital role by injecting flesh and blood to the very general phrases contained within the Sherman Act, 1890. The most important early interpretation of Section 1 of the Sherman Act, 1890 came in United States *v.* Addyston Pipe & Steel Co. 1898, which gave birth to the "rule of reason" commonly applied in Sherman Act, 1890 cases today. Under the "rule of reason,"

"No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party."

It is quite apparent from the decision, only those restraints of trade that are deemed unreasonable violate the Sherman Act, 1890. Of particular importance to the Sherman Act, 1890 has been the interpretation of the section 2 prohibition against those who "monopolize or attempt to monopolize." Under Section 2 of the Sherman Act, 1890 becoming a monopoly or achieving monopoly status is not in itself an illegal act, but rather the act or attempt at monopolization constitutes such an offence. Hence, a company that becomes a dominant force in its industry is not per se perpetrating an illegal act, and the lack of effective competition in the sector and market occupied by the company is not illegal. A monopoly becomes illegal when a company incorporates unfair means to achieve a dominant position or when monopoly power is used to maintain a dominant position and to exclude competition from the market.[11]

Thus attaining monopoly position through legitimate means like product superiority, technology superiority or historical accident is not an offence and in fact it is permitted. The degree of market power that must be shown varies from case to case,

[10] Government antitrust enforcement is just the tip of the iceberg as the Private enforcement of antitrust law in the U.S has played a critical role in shaping the American competition law. One of the important features of the American competition law is it permits the aggrieved and affected party owing to infraction of Antitrust law to claim treble damages from the transgressor

[11] Standard Oil Co., 221 U.S at 16-17 (explaining that monopolization of a particular industry is not per se illegal and that in order to fall within the Sherman Act, the monopoly must secure or acquire "the exclusive right in such trade or commerce by means of which to prevent or restrain others from engaging therein").

although it is often reflected in market share percentage calculations, and the definition of what constitutes unfair monopolizing behavior remains the subject of most cases in this area.[12]

Along with the Sherman Act, 1890, several other statutes exist that form the core of the U.S. Competition Law. One of these acts, the Wilson Tariff Act of 1894, specifically Sections 73-76 of the Wilson Tariff Act, 1894, imposes punitive measures on the abuse of U.S import laws through agreements or conspiracies between importers and others. The Wilson Tariff Act, 1894 forbids "every combination, conspiracy, trust, agreement, or contract" between two or more parties where either party is engaged in importing goods from foreign states into the United States intending to restrain trade or increase market prices. Violations of Wilson Tariff Act, 1894 are almost always brought in conjunction with Sherman Act, 1890 suits and the act is of little significance on its own[13] Business consolidation roared along in the 1890s and 1900s. As a result, the progressive era put Anti-trust high on the agenda. Theodore Roosevelt sued 45 companies under the Sherman Act, 1890 while William Howard Taft sued 75. In 1902, Roosevelt stopped the formation of the Northern Securities Company which threatened to monopolize transportation in the northwest.[14] The Supreme Court of the United States in the Standard **Oil Company *v.* United States[15] has observed:**

"The Anti-trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade , and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which do not unduly restrain inter-state of foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new which would constitute an interference with, or an undue restraint upon, it" [16]

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[12] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) Holding the defendant guilty of Section 2 violation for drastically increasing its production capacity of aluminum ingot in anticipation of market demand when the defendant held a dominant position): In Re Microsoft Corp. Antitrust Litig., F.3d 322 (4th Cir. 2004) providing an additional example of the evolving interpretations given to illegal monopolization).
[13] Charles W. Smitherman, "the Future of Global Competition Governance: Lessons from the Transatlantic" 19Am. U. Int'l L.Rev. 769.
[14] Supra n. 4.
[15] 221 U.S.1,62 (1911).
[16] Supreme Court agreed that in recent years (1900-1904) Standard had violated the Sherman Act. It broke the monopoly into three dozen separate companies that competed with one another, including Standard Oil of New Jersey (later known as Exxon and now Exxon Mobil), Standard Oil of Indiana

The Sherman Act had even jurisdiction outside the American shores. The U.S Supreme Court in ***Hartford Fire Insurance Co. v. California***[17] *had observed that:*

" it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"

Thus, the court in this case had explicitly recognized the 'effects doctrine.'[18]

In 2004, the Supreme Court took a start toward resolving another conundrum, ruling that when a global conspiracy causes both US harm and independent harm aboard, a private plaintiff may not recover for that independent foreign harm at least unless it is inextricably linked with domestic harm.[19]

The Sherman Act, 1890 had some loopholes. It did not deal with corporate amalgamations. It forbids collusion[20] and monopolization, including predation.[21] It does not deal with anti-competitive mergers. Further, in passing Sherman Act, the Congress did not give any indication of its intention about what the expressions "restraint of trade" and "attempts to gain monopoly", mean and stand for. Uncertainty prevailed about what is legal. In an effort to clear up the ambiguity, Congress passed the Clayton Act, 1914. With its passage, the three routes to monopoly are closed by prohibiting collusion, monopolization including predation and anti-competitive mergers.[22]

(Amoco), Standard Oil Company of New York (Mobil, again, later merged with Exxon to from Exxon Mobil), of California (Chevron), and so on. In approving the breakup the Supreme Court added the "rule of reason": not all big companies, and not all monopolies, are evil, and the courts are to make that decision (not the executive branch). To be harmful a trust had to somehow damage the economic environment of its competitors. Roosevelt for his part distinguished between "good trusts" and bad ones allegedly on the basis of their contribution to the economy. Such arbitrariness gives business leaders reason to believe that they will be prosecuted if they do not cultivate political support for their business. United States Steel Corporation, which was much larger than Standard Oil, won its antitrust suit in 1920 despite never having delivered the benefits to consumers that Standard Oil did. In fact it lobbied for tariff protection that reduced competition and so contending that it was one of the "good trusts" that benefitted the economy is somewhat doubtful. Likewise International Harvester survived its court test, while other trusts were broken up in tobacco, meatpacking, and bathtub fixtures. Over the years hundreds of executives of competing companies who met together illegally to fix prices went to federal prison.

[17] 509 U.S.764, 769 1993.

[18] The Indian Competition law also recognizes the effects doctrine in S.32.

[19] F.Hoffman-La Roche Ltd. V. Empagram S.A., 542 U.S. 155 2004.

[20] Sherman Act, 1890; Section 1.

[21] Sherman Act, 1890: Section 2

[22] D.P. Mittal. Competition Law, 1st ed, 2003,p.5.

2.2.2 CLAYTION ACT, 1914

Congress, however, was concerned that the American Competition Law would not be effective or consistent, if left up to judges to decide on a case on a case basis whether restraints or actions were "reasonable." To limit the discretion of courts to decide what a reasonable restraint is, Congress amended the Sherman Act in 1914.

There were two divergent views on how the Sherman Act, 1890 should be amended. One view argued that the Competition Law should more specifically define what constitutes "unreasonable", and therefore, unlawful business action. The opposing view argued that the circumstances of business transactions and the nature of industries vary too much for Congress to set out specific rules. Instead, this view advocated for the creation of a specialized body of experts that would decide which business actions should be considered lawful and unlawful. Advocates of the latter view argued that an expert body would be less influenced by political considerations than the executive branch, more specifically, the President and the Attorney General.

Furthermore, an expert body would understand better the reasons for and the effects of actions of businesses than judges, because they would have specific training and experience in this area of law. There was further expectation that the expert body would be able to design specific rules of business conduct that would define all or most illegal anti-competitive behavior. Curiously, both arguments met with success. In 1914, Congress increased the power of the Attorney General and restricted the powers of the courts when it amended the Sherman Antitrust Act by passing the Clayton Antitrust Act, 1914.[23]

The Clayton Act, 1914 expands on the general prohibition of the Sherman Act, 1890 and addresses anti-competitive problems in their infancy. The Clayton Act provided for private enforcement of the antitrust laws and substantially addressed price discrimination,[24] tying and exclusive dealings,[25] mergers and acquisitions[26] and inter

[23] Kenneth M. Davidson, "Creating Effective Competition Institutions: Ideas for Transitional Economies", 6 Asian -Pac. L. & Pol'y J.3.
[24] Section 2 of the Clayton Act
[25] Ibid. Section 3
[26] Ibid. Section 3

locking directorates.[27] The most important of those provisions today are Section 7 [28] and Section 2.[29] The test for prohibition is "substantially to lessen competition or tend to create a monopoly in any line of business". Thus, monopolizing acts as condemned under the Sherman Act, 1890 were further adumbrated and specified under the Clayton Act, 1914. It prohibits any merger or acquisition of stock or assets. "Where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create monopoly".[30] The Clayton Act, 1914 extended the prohibition of the Sherman Act, 1890 to price discrimination, exclusive dealing and mergers. In 1914, the Congress passed another Act, viz., Federal Trade Commission Act, 1914, to impose a general ban on "unfair" acts, practices and methods of Competition.[31]

2.2.3 FEDERAL TRADE COMMISSION ACT, 1914

The Federal Trade Commission Act, 1914 declares unlawful, unfair methods of competition, and unfair or deceptive acts or practices, in or affecting commerce. It establishes a commission, known as the Federal Trade Commission which is empowered to take action against persons, partnerships, or corporations from using those unfair methods or acts or practices. It is also empowered to take action against conduct that violates the Sherman Act, 1890 and the Clayton Act, 1914 as well as anti-competitive practices that do not fall within the scope of those Acts.[32]

2.2.4 CELLER-DEFAUVER ACT, 1950

The Celler-Kefauver Act, 1950 amended the Clayton Act, 1914. Before its amendment, Section7 of the Clayton Act, 1914 forbade acquisition by one corporation of stock of another. It covered any acquisition by one corporation of all or any part of

[27] Id, section 8
[28] This section has been amended by the Cellar - Kefauver Act, through which Congress expressed concern about increasing concentration
[29] This section has been amended by the Robibson- Patman Act
[30] Clayton Act, 1914; Section 7.
[31] Supra n. 14.p.7.
[32] Supra n. 14.p.7.

the stock of another corporation, whenever there is a reasonable likelihood that the acquisition would result in a restraint of commerce or in the creation of monopoly of any line of commerce, i.e it applied to vertical as well as horizontal stock acquisition.[33] The Celler-Kefauver now forbids acquisition, whether it involved stock or asset. By the amendment of section7 of the Clayton Act, 1914 the Congress intended to close loophole in the original section by broadening its scope so as to cover the entire range of corporate amalgamations from pure stock acquisitions to pure acquisitions of assets.[34]

The overview of the American competition law evidently shows that it is the product of legal evaluation, informed by changes in economic understanding. The antitrust agencies play critical roles not just by filing lawsuits but also by participating in the antitrust conversation by filing amicus briefs, issuing grade lines, delivering speeches, undertaking studies and conducting hearings and workshops. Further, Private enforcement plays a critical role in shaping the American competition Law.[35] In fact, the evaluation continuous to this day as any competition law to be meaningful and purposive must respond to the changing needs and times of the economy.

2.3 COMPETITION LAW OF EUROPEAN UNION

The idea of using law to protect the competitive process emerged in Europe in the 1890s approximately at the same time as the United States enacted its first Antitrust Statute. In Austria, a group of scholars and administrators articulated the idea of using law to encourage economic growth and competitiveness, reduce antagonisms between workers and owners and among regional ethnic groups, it would also give the administrative elite a voice in economic development without giving them excessive opportunities to interfere with business decision making process. The proposed legislation was discussed and almost enacted, but political turmoil within the Empire in 1897 prevented its enactment. After the end of the Second World War, many European

[33] United States v. E.I.Du pont, 353 US 586.

[34] United States v. Philadelphia National Bank 374 US 321.

[35] The Clayton Act, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and recover triple damages, costs and attorneys fees

governments turned to Competition Law as means of encouraging economic revival, reducing class antagonisms and achieving political acceptance of postwar hardships. After 1897, the issue of Competition Law was widely discussed in Europe. The creation of the European Economic Community in 1957 created additional role for Competition Law and placed it at the center of postwar European history.[36]

Following the entry into force of the Treaty of Rome which established the European Economic Community,[37] the companies and firms in European Union were under an obligation to treat the Community Competition Law and the national competition law on the same par. It is to be regarded as domestic law for all purpose[38] The earliest 'Community Competition Controls' were introduced in the Treaty of Pairs establishing the 'European Coal and Steel Community'. The main Competition provisions were introduced in the Treaty of Rome of 1957. This established the European Economic Community (EEC).

The 'European Economic Community' ("EEC"), as the EU was formerly known, was established to create a European common market and "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States".[39] This is now known as the European Community following the adoption of the Treaty of European Union in 1992.[40] Community Law is a separate legal order which applies throughout the European Community, Accordingly, both governments and private citizens, including companies which operate within the Community, are required to comply with the legal rules established by community law.[41]

One of the objectives of the establishment of the European Community was to prevent a re-occurrence of a war in Europe, in order to unite the people, at least

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[36] David J. Gerber, "*Constructing Competition Law in China: The potential value of European and U.S Experience*",

[37] This section has been amended by the Robibson- Patman Act

[38] Luiz Ortiz Blanco, EC Competition Procedure, 1st ed, 1996,p.1.

[39] Spence Weber Waller, The Internationalization of Antitrust Enforcement, 77B.U.L. Rev. 343.

[40] The EEC was originally formed with six Member States, namely, Belgium, France, Germany, Italy, Luxumberg & Netherlands with an object to promote economic integration and at present 21 Countries are holding membership in it. Available at: http://en.wikepdia.org/wiki/Europeaneconomiccommunity#members. accessed on 14th, October, 2010.

[41] Supra n. 3, p. 17.

economically. The Common Market, known since 1992 as the Internal Market, was intended to create interdependence between the States of Europe. However, it was considered that, in order to make such a Common Market operate successfully, it would be necessary to ensure more or less equivalent competitive opportunities existed throughout this 'integrated market'. Accordingly, competition rules were included to assist in the creation of a unified competitive environment and party in an attempt to prevent companies from re-erecting trade barriers.[42]

The fundamental Competition rules of the EC can be found in Chapter 1 of part III of the Treaty of European Union 1991. The Chapter consists of nine Articles.[43] 81 and 82 of the European Union forms the core Competition Law provisions.[44] There are

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[42] Ibid

[43] Articles 81-89 of European Community

[44] Article 81 (1) prohibits:

'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

This includes both horizontal (e.g. between retailers) and vertical (e.g between retailers and suppliers agreements, effectively outlawing the operation of cartels within the EU. Article 81 has been construed very widely to include both informal agreements and concerted practices where firms tend to raise or lower prices at the same time without having physically agreed to do so. However, a coincidental increase in prices will not in itself prove a concerted practice, there must also be evidence that the action has distorted competition within the EU.

Exemptions to Article 81 behaviour include:

1.Article 81(3) which creates an exemption where the practice is beneficial to consumers. E.g. by facilitating technological advances, but without restricting all competition in the area. In practice very few official exemptions were given by the Commission and a new system for dealing with them is currently under review.

2. The Commission has agreed to exempt 'Agreements of minor importance' (except those fixing sale prices) from Article 81. This exemption applies to small companies together holding no more than 10% of relevant market. In this situation as with Article 82 (see below), market definition is a crucial, but often highly difficult, matter to resolve.

3. The Commission has also introduced a collection of block exemptions for different types of contract. These include a list of contract terms which will be permitted and a list of those which are banned in these exemptions.

Article 82 -Abuse of a dominant position

Article 82 is aimed at preventing companies who hold a dominant position in a market from abusing that position to the detriment of consumers. It provides that:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States Abuse may in particular, consist in:

Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions:

Limiting production, markets or technical development to the prejudice of consumers;

Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

also important Competition Law instruments outside the chapters, mainly in the form of Regulations.[45] Article 81(1) of the European Community Law prohibits agreements, decisions by associations or undertakings and concerted practices which restrict or distort Competition and which may affect trade between Member States. By virtue of Article 81(2) of the European Community, an agreement etc caught by paragraph (1) is declared void However, the prohibition may be declared inapplicable in the case of agreements etc which satisfy the efficiency and public benefit requirements of Article 81(3) of the European Union. Article 82 of the European Union prohibits abuse by one or more undertakings of a dominant position in the common market or a substantial part of it which may affect trade between Member States. One piece of secondary legislation should also be mentioned here, namely Merger Regulation, which applies to mergers with' Community dimensions'. EC Competition rules, notwithstanding their apparent clarity, should not be used in isolation but rather in conjunction with several other important Articles of the EC Treaty. These are Articles 2,3 (g) 4,5, 10 and 12.[46]

Thus, the Competition Law is one of the areas of authority of the European Union. It comprises three main policy areas:

Antitrust: The first element is Antitrust i.e control of collusion and other anti-competitive practices which has an effect on the EU.[47] This is covered under Articles 81 and 82 EC respectively. Simply acquiring or maintaining a dominant position does not transgress Article 82. There must be an abuse of that position to constitute infraction of the said Article. Thus, mere dominance is not frowned upon but abuse of such dominance is definitely assailable under the said Article. The thrust of the European Community law is not on the structure but definitely on the behaviour.

As stated above market definition is arguably the most important part of any competition case brought under Article 82. However, it is also one of the most complex areas. If the market is defined too widely then it will contain more firms and substitutable products making a finding of a dominant position for one firm unlikely. Likewise, if it is defined too narrowly then there will be a presumption that the defendant company will be found to be dominant. In practice, market definition will be left to economists, rather than lawyers to decide.

[45] Among these are Regulation 1/2003, the Modernization Regulation (on the implementation of the rules on competition laid down in Articles 81 and 82), Regulation 2790/99 (on the application of 81 (3) to categories of vertical agreements), Regulation 2658/2000 (on the application of Article 81 (3) to categories of research and development agreements), regulation 139/2004 (the 'Merger Regulation') and Regulation 772/2004 (on the application of Article 81 (3) to categories of technology transfer agreements).

[46] Maher M. Dabbah, EC and Competition law, 1st ed 2006, pp.9-10.

[47] European Economic Community was renamed as the European Community since 1993.

Mergers: The second element is Mergers i.e control of proposed mergers, acquisitions and joint ventures involving companies, which have a certain, defined amount of turnover in the EU/EEU. Historically, mergers were dealt with by the application of Articles 81 and 82. However, this was considered to be inadequate way of governing mergers and so, in 1989, the EC Merger Regulation[48]came into being.

State aid: The third element is State aid: State aid pertains to control of direct and indirect aid given by EU Member States to companies. Covered under Article 87 of EC. [49]

Primary competence for applying EU Competition Law rests with European Commission and its Directorate General for Competition, although States aids in some sectors, such as transport, are handled by other Directorates General on 1 May 2004 a decentralized regime for antitrust came into force which is intended to increase the application of EU Competition Law by national competition authorities and national courts.[50]

2.4 UNITED KINGDOM COMPETITION ACT, 1998

United Kingdom competition law has underground a great deal of change in the past 15 years, with the current law being set out for the most part in two relatively recent statutes, the Competition Act 1998[51] and Enterprise of 2002.[52] There is now an abundance of literature describing developments over the past fifty years; hence, no

[48] ECMR was introduced. Presently, mergers are governed by the Council Regulation 139/2004 EC (the Merger Regulation

[49] ex Article 92

[50] http://en.wikipedia.org/wiki/EU_competition law.(February 04, 2007, 9:02pm).

[51] The preamble to the Act envisages that it is "An Act to make provision about competition and the abuse of the dominant position in the market, to confer powers in relation to investigations conducted in connection with Article 85 or 86 of the treaty establishing the European community, to amend the Fair Trading Act, 1973 in relation to information which may be required in connection with investigations under that Act, to make provision with respect to the meaning of 'supply of services' in the Fair Trading Act, 1993 & for connected purposes".

[52] The preamble to the Act states that it is 'An Act to establish and provide for the Fair Trading, the Competition Appeal Tribunal and the competition service, to make provision about mergers and market structures and conduct, to amend the constitution and functions of the competition commission, to create an offence for those entering into certain anti-competitive agreements, to provide to the disqualification of directors of companies engaged in certain anti-competitive practices, to make other provision about competition law, to amend the law relating to the protection of the collective interests of consumers, to make further provision about the disclosure of information obtained under competition and consumer legislation, to amend the insolvency Act, 1986 and make other provision about insolvency and for connected purposes.

attempt will be made here to provide an exhaustive account of historical developments. Suffice it to say that the previous system was largely ineffective, difficult to understand and incredibly confusing to handle. The Competition authorities lacked sufficient powers and resources to enforce the law effectively and the regime was deeply and politically influenced. Anti-competitive business practices flourished and went undetected and unpunished.[53]

The first Competition related statute was the Profiteering Act, 1919 which was aimed at excessive pricing following the First World War. The 1944 White Paper on Employment Policy led to the Monopolies and Restrictive Trade Practices Act 1948[54]. A major concern of the administrative body thereunder, the Monopolies and Restrictive Practices Commission lays down with the activities of trade associations which were prevalent in the UK. Following upon their report, Collective Discrimination, in 1955, the Restrictive Trade Practices Act, 1956 was introduced, and later extended by the Resale Prices Act, 1964. The only other major statutory development before 1973 was the Monopolies and Mergers Act, 1965 which introduced merger controls for the first time. UK entered the European Community in 1973 and, in that year, the Fair Trading Act, 1973 was enacted. This statute was not a response to membership of the Community, but was, essentially consolidating piece of legislation adding a major new feature to the UK Competition Law regime. This statute creates the post of the DGFT, who would be assisted in his task of overseeing Competition Law enforcement in the UK by the Office of Fair Trading (OFT). The 1973 Act covered monopolies and mergers. Further, consolidatory legislation was introduced in 1976, regulating anti-competitive agreements: the Restrictive Trade Practices Act, 1976 (RTPA), the Restrictive Practices Court Act, 1976 and the Resale Prices Act, 1976. The only significant competition legislation introduced by successive Conservative Governments from 1979-97 was the Competition Act, 1980. This Act extended the powers of the DGFT to regulate 'anti-competitive practices' and also introduced a measure, latterly of limited significance, providing for efficiency audits of nationalized industries.

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[53] Supra n.50
[54] Inquiry and Control

After 1980s, there was continuous debate on whether UK Competition Law should be reformed to mirror the Community Competition Law provisions. This has finally resolved by the Competition Act, 1998.

The Competition Act, 1998 repealed previous legislations like Restrictive Practices Court Act, 1976, the Restrictive Trade Practices Act, 1976, the Resale Prices Act, 1976, the Restrictive Trade Practices Act, 1977 and certain provisions of the Competition Act, 1980. This was a major development and the new legislation received a very warm welcome. The Competition Act, 1988 made the UK system of Competition Law more effective and efficacious, especially through the new powers conferred upon the Office of Fair Trading (OFT) to fight baneful anti-competitive practices such as cartels and abuses of market dominance. The Competitive Act, 1998 introduced two important pillars, the Chapter I and the Chapter II prohibitions, modeled on Articles 81 and 82 of European Union respectively.

However, it was quite clear that the Competition Act, 1998 left an unfinished business, and a drive for further reform featured prominently in the current Government ambition to build a 'world-class' system of Competition Law in the UK. This led to the publication of many interesting and highly significant reports and papers and eventually a draft Bill that later became the Enterprise Act, 2002. While not featuring any further modeling on the Competition rules on the EC and dealing extensively with insolvency law, the Act made some very significant changes to the UK Competition Law enforcement regime, including creating a new cartel offence. The Enterprise Act, 2002 also contains key provisions particularly to do with mergers, designed to replace the competition commission provisions of the Old Fair Trading Act, 1973. It is submitted that the adoption of the Competition Act, 1998 and Enterprise Act, 2002 laid the framework for a world-class system of Competition Law. The Enterprises Act, 2002 created a new criminal offence, committed by individuals responsible for serious cartel offences. The new offence, punishable by up to five years in prison is known the 'cartel offence'.[55] It also introduced a power to disqualify individuals from acting as directors where their company has been found guilty of an infringement of relevant competition law.[56]

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[55] This section has been amended by the Robibson- Patman Act.
[56] Ibid, pp.14-15.

2.5 COMPETITION LAW OF AUSTRILIA

Australia is a federation of six States and two territories, having a population of 20 million people. Australian Constitution confers power on the Federal Parliament to make laws to cover all trade within the states by unincorporated businesses and also regarding the business activities of States or Territory Government business enterprises.

Essentially, Australia's competition laws now comprise the provisions in Part IV of the Commonwealth Trade Practices Act, 1974(TPA) and State and Territory counterpart laws known as Competition Code of [the State of Territory] and Competition Policy Reforms Act. The Competition Code's 'mirror' the provisions in Part IV of the TPA but apply them to natural persons rather than just corporations. So the Competition Codes extend the competition laws to unincorporated business (particularly the professions). The State and Territory Competition Policy Reform Acts extend the competition laws to State and Territory governments insofar as those governments carry on business either directly or through an authority of the government.

The object of the TPA is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'[57] It proscribes certain forms of conduct and has detailed provisions for enforcement and providing remedies for the past or proposed contraventions.

The key provisions of Part IV of the TPA dealing with restrictive trade practices (other than the provisions dealing with anti-competitive mergers) are considered to be.[58]

- Contracts, arrangements, or understanding that have the purpose, effect, or likely effect of substantially lessening competition [59]

- Contracts, arrangements, or understandings that restrict dealings or affect competition through exclusionary provisions[60]

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[57] Section 2 TPA

[58] The terms of the relevant provisions of the Trade Practices Act 1974 (Cth) can be accessed at http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/.

[59] section 45

- Contracts, arrangements, or understandings in relation to prices[61]

- Secondary Boycotts[62]

- Misuse of market power [63]

- Exclusive dealing[64]

- Resale price maintenance[65]

A unique and important aspect of Australian competition law is the power granted by the Parliaments to the national competition regulator, the Australian Competition and Consumer Commission (ACCC) to confer immunity, on a case by case basis, to certain forms of restrictive trade practices. The provisions in Part VII of the TPA provide for the power and the role of the ACCC. The State and Territory Competition Codes incorporate these provisions and apply them to persons who are not corporations. There are two options available for obtaining immunity. The first is known as 'Authorization' and the second as 'Notification'.[66]

Authorizations may only be granted prospectively and are available to persons for entry into or giving effect to contracts, arrangements, or understandings that are anti-competitive; engaging in Secondary Boycott conduct; engaging in exclusive dealing conduct; engaging in resale price maintenance; and also for effecting an anti-competitive merger. The statutory test that the ACCC is required to apply in assessing an application for authorization is essentially whether the public benefits of the conduct sought to be engaged in outweighs the anti-competitive detriment of that conduct. Only, if the ACCC is so satisfied can it grant the authorization. The process is a public process that is open and transparent. The ACCC is required to publish draft reasons for its proposed decision and also final reasons for its decision.

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[60] Sections 45 and 4D
[61] Section 45A
[62] Sections 45D, 45DA, 45DB, 45DC, 45DD, 45E, 45DA, and 45EB
[63] Section 46
[64] Section 47
[65] Sections 48 and 96
[66] See the ACCC website at http://www.accc.gov.au/content/index.phtml/itemId/

The Notification option for obtaining immunity is currently only available for exclusive dealing conduct. For exclusive dealing conduct other than third line forcing immunity is conferred by the TPA immediately on loading the line notification. For third line forcing, the immunity is obtained automatically 14 days after the notification is lodged. The onus in this process is on the ACCC to take steps to remove the immunity provided by the notification, if it is satisfied that the public benefit from the notified conduct would not outweigh the likely detriment to the public resulting from the conduct or the lessening of competition.

An appeal by way of rehearing on the merits, to a specialist administrative Tribunal known as the Australian Competition Tribunal, is available from ACCC decision regarding Authorizations and Notifications.

By virtue of the Australian Constitution, the judicial power of the Commonwealth of Australia vests in the High Court of Australia, and any other federal court which the Federal Parliament creates or in such other courts as it invests with federal jurisdiction. Competition law matters in Australia are regarded as 'Special Federal matters' and are accordingly adjudicated upon in Australia. This has meant that a substantial degree of expertise has developed in relation to such matters within the Federal Court of Australia.

The specialist administrative review body for some ACCC and some other competition law related decisions, the Australian Competition Tribunal (formerly known as the Trade Practices Tribunal), has no staff or physical resources of its own. The Tribunal is established under the TPA. The funds appropriated by Parliament for the purposes of the Tribunal are managed by the Federal Court. Registry services and administrative support for the Tribunal are provided by the staff of the Federal Court of Australia. The Tribunal consists of a president and Deputy Presidents and other members appointed by the Governor – General. A presidential member must be a judge of a Federal Court. Other members must have knowledge of or experience in industry, commerce, economic, law, or public administration. For the purpose of hearing and determining proceedings, the Tribunal is constituted by a presidential member and two non-presidential members. Currently, all presidential members are Judges of the Federal Court of Australia.[67]

2.6 CONCLUSION

Modes of analysis, presumptions of legality and illegality, and economic theories of harms and benefits have undergone changes with the rapid changes being witnessed by national economies across the world to suit them to changing needs and times. Law has no autonomy as it always exists for serving the needs and mores of the society and competition law is not an exception to this cardinal and time tested principle. There is no single universal model of competition law suitable and fitted to all the countries across the World. Thus one size fits all is definitely not applicable in this branch of law. The plain and obvious reason for this could undeniably be that the content, contours and parameters of competition law in a country would be shaped and determined by the stage, level and needs of its socio-economic background and development. Therefore, the competition regimes prevailing in the advanced developed countries like U.S. and E U can't simply be imitated and replicated in the developing countries though the best practices and salutary experiences in those regimes can be adopted with necessary changes suited to the mores and needs of developing countries. Therefore, developing countries should have *sui generis* approach in framing their own competition laws, by drawing right lessons from the competition regimes of the developed countries.

[67] See the Tribunal website at http://www.fedcourt.gov.au/aboutct/aboutct_admin_other_act.html.