CHAPTER 1
INTRODUCTION

Competition, a dynamic concept encapsulating a number of ideas, may be valued for many reasons as serving economic, social and political goals. A free market economy implies competition as a regulative force which establishes control over market activities. Competition indeed is the object fostered and protected by competition policy and law. However, the prerequisites to ensure smooth competition process include free market entry and exit, freedom of trade and contract, an efficient monetary system, protection from restrictive business practices, existence of positive and negative sanctions and transparency of market. Competition law is an important tool for encouraging competition and market efficiency. It generally aims at preventing orremedying a business action that may constrain market forces and thereby cause economic harm and weaken economic performance. It prevents economic agents in the market from distorting the competitive process through various kinds of anti-competitive behavior or practices. The basic purpose of the competition law in any country is to ensure that markets remain competitive to the benefit of both traders and consumers. Compliance with competition law ensures that market remains healthy and competitive. This has two pronged effect- businesses tend to be more efficient and innovative and secondly, consumers stand to gain from companies that are more responsive to their needs.

The earliest legislative attempts to underpin the competitive market through legal measures were in Canada and the U.S. In 1890, the U.S. enacted the Sherman Act, followed in 1914 by the Clayton Act and the Federal Trade Commission Act. Collectively, these laws prohibited conspiracies in restraint of trade, monopolization and mergers and acquisitions which would substantially lessen competition or tend to create a monopoly in any line of business. The Federal Trade Commission along with the Department of Justice was empowered to take action against violations of competition laws and has made a significant contribution towards ensuring fair competition in the U.S. market. In the European Union, it is noteworthy that fair competition is embedded in the very Treaty of Rome which is like the constitution of the European Union.

Canada enacted its first law in 1899 and some states of the U.S. had earlier laws but, on account of their limited effectiveness, they have not acquired comparable significance in antitrust history.
Competitiveness involves ability of an enterprise to face competition on a sustainable basis. When it is global competitiveness it has the added condition that the enterprise is able to stand up to competition outside the home market. A global industry is one in which a firm’s competitive position in one country is significantly affected by its position in other countries. Competitiveness, to be sustainable will have to be proved in a competitive atmosphere. Competitiveness gained in the domestic market based on market power conferred by statute or through natural monopoly status or through anticompetitive practices does not lead to sustainable results. An enterprise which is competitive in a monopolized domestic market, drawing on its market power thus gained, will not be competitive in an international environment where it would not have the market power which it enjoys in the domestic market. It will not be able to replicate in a foreign market the anti-competitive environment endowing it with the required market power.\(^2\)

The link between competition, productivity, competitiveness and growth are well recognized. It is productivity that immediately follows competition. Total Factor Productivity (TFP) which involves increase in output not accounted for by increase in inputs is the most reliable measure of productivity growth. TFP growth is the result of technical change and improvements in skills and in the ways of organizing production. Development of skills and the resultant competencies are paramount in this regard. Productivity at firm level determines the productivity at the industry and economy level. Productivity is determined by the level of rivalry among competitors in the market. This brings out the link between competition and productivity. Dominance of the market by one or a few firms tends to vest undue market power in them, which is likely to be abused. The Structuralist approach which considered dominance as \textit{per se} bad was the guiding principle of anti-trust policy even in the US until 1970. This approach gave the way to the predominance of rule of reason analysis except in respect of hard core cartels. The Form based approach of competition has given way to ‘effects’ based analysis and the Appreciable adverse effect on competition (AAEC) is the touch-stone under the Indian Competition Laws.

Competitiveness of nations is not a static phenomenon. A country or an industry or an enterprise which was considered competitive yesterday may be relegated to a

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\(^2\) Augustine Peter Key Note Address “Competition and Competitiveness: Issues and Challenges and Role of Competition Law” symposium on competition and competitiveness (February 26, 2009), New Delhi
lower position today. For example, in 1989 Japan figured as the most competitive nation in the world as per world competitiveness year book. It appeared that Japan’s number one position was unassailable with efficiency and innovation marking its economic growth path. The US which is on number one position in the recent years is on the verge of losing this position soon. The World Competitiveness Yearbook has been evaluating and presenting the competitiveness of nations since 1989. While it provides rankings in terms of size, wealth, origin etc., it also provides overall ranking of competitiveness. India ranked 29th in 2008 out of the overall rankings for the 55 economies covered in the study.\(^3\)

Competitiveness, productivity, growth are all linked to competition in markets. Competition in markets implies broadly that; there is rivalry among them, there is costless entry and exit and no single firm or any group of firms is able to influence market on its own. Modern competition laws prohibit anti-competitive agreements and abuse of dominant position and regulate combinations covering mergers, amalgamations and acquisitions. The Indian competition law is modern and nearly state-of-the-art and based on sound economic principles. This has been testified by OECD Economic Survey 2007 of India and also by the WTO Trade Policy Review of India in 2007.

An absence of an enforceable competition law results in acquisition of undue market power or dominant position as well as abuse of the same by enterprises in the country. Such acquisition can be through anti-competitive agreements or through certain types of mergers, amalgamation or acquisitions which raise concentration in the market unduly and also results in foreclosure of further competition in the market. The growth strategy followed by East Asian economies in the seventies and the eighties put in sharp focus the role of industrial policy. East Asian economies, in particular Japan, South Korea, Taiwan, Malaysia and Singapore, pursued an export oriented growth strategy with state support for selected industries. The concept of national champions permeated their strategy. However, the World Bank publication titled “The East Asian Miracle” published in 1997 brought out in a sharp way the inherent weaknesses of state directed growth strategy. The East Asian crisis of 1996-97 vindicated this viewpoint.

Two important premises need to be looked at in this context:

(i) Competitiveness in the domestic market is essential for being competitive in the global environment;

(ii) Competitiveness in the domestic market will have to be in a competitive environment i.e. based on practices consistent with competition rules to be competitive in the global market. In other words, competitiveness of an enterprise in the domestic market to be sustainable in the international market has to be proved in a competitive environment at home.4

Joseph Stiglitz, the renowned Nobel economist has stressed that strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies. Competition is a key driver of competitiveness of national economies. Competition puts pressure on enterprises to reduce costs, improve quality, undertake innovation and generally to strive towards excellence. Michael Porter, Professor at Harvard University is a recognized authority on competitiveness & economic development; in his view, it is difficult to visualize a business emerging as a global champion if it has not had to face competition at home.

Competition policy operates in two broad areas. One is a set of government and regulatory policies that enhance competition, give primacy to market forces, allow entry and exit, reduce administrative controls and minimize regulations. The other area of competition policy is a law to prohibit anti-competitive practices and regulate mergers that might adversely impact competition. The two areas of competition policy are therefore mutually complementary. Firstly, with competition policies focusing on removing public or government restraints on competition and Secondly, competition law focusing on preventing private restraints from inhibiting competition. Today, most countries have embraced or moved towards a market based economy, recognizing competition as a central principle in their economic reforms. Also, more than 100 countries have enacted modern competition laws and set-up competition authorities.5

Competition law has a hoary history. In the US and Canada it is over a century old, and in Japan and Europe about half a century. Like other economic laws,

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Competition Law has evolved over the decades in with changing economic circumstances and political philosophies. Recent changes include the moves by European states to align their laws with the EC treaty but as they say, the search for the soul of antitrust is still on. Standards in antitrust are being set today by developments in the US and EU. There is no standard tailored for developing countries. The characteristics of emerging markets are different e.g. higher entry barriers in the shape of less developed capital markets and greater regulation, higher concentration ratios, greater incidence of dominance particularly from previous public sector monopolies, marked asymmetries of information, and finally missing economies of scale.

Do these characteristics of emerging markets demand a different law? No law can isolate itself from the surrounding economic realities and political goals. In the European Union, the Competition Law recognizes various goals in addition to economic efficiency and consumer welfare, such as the overriding aim of unifying the common market, and it retains space for objectives like development of less developed regions and state aid, though within a tight framework. The fundamental principles of antitrust have broad applicability i.e. against collusive practices, against abuse of dominance, and merger control, but the accommodation of other objectives and the weightage given to different factors can vary. In India too, while the basic new law is in place, in its enforcement it is to be seen what approach or mix of approaches to the fundamental principles is best suited to the needs of the country.

Globalization of business has also expanded the effect of anticompetitive practices across borders. A cartel in one country may deeply hurt economies in different continents, as has been brought out in recent OECD studies. This has underlined the importance of international cooperation in controlling such practices. Consensus has not emerged yet on how best to build such cooperation. However, increasingly bilateral and regional trade agreements now include cooperation on competition issues. But agreement at the multilateral level in the WTO was shelved in the face of opposition, mainly from developing countries including India. These countries rightly argued that they had not yet gained sufficient experience in antitrust to be able to assess the pros and cons of a multilateral framework. However, the time to gain this experience is now, so that the next time around, developing countries such as

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7 Mehta, Pradeep S.(ed.),'Towards a Functional Competition Policy for India', Ch 1,Centre for Competition, Investment and Economic Regulation(CCIER), Consumer Unity and Trust Society(CUTS),India, 2006
India are on surer footing in negotiations. Meanwhile, it is important that the cooperation on competition enforcement is included in India’s bilateral and regional trade agreements so as to protect our national economy from violations of antitrust originating in other countries.

Competition law is an integral part of the regulatory framework in a market economy. Competition increases economic efficiency, and enhances consumer welfare. The competition communities all over the world are by no means a homogeneous one. It includes competition authorities that are several decades old, and are well established and adequately resourced. On the other hand, it includes authorities that are new born babies that lack trained staff and other resources, so that they can barely be expected to fight powerful enterprises that enjoy political patronage and deep pockets.

There are also variations in the powers enjoyed by the competition authorities. In some countries, the authorities themselves have the power to give remedial orders, while in others they must prosecute in the normal courts for certain types of offences. In either case, though, the orders of competition authorities are generally subject to judicial review. There is no uniformity in the objectives of the laws, as these have been formulated. While generally, the objective is to protect and maintain competition in the markets, some laws emphasize other objectives as well, such as consumer protection or welfare, enabling domestic enterprises to compete in the world market, expand the base of entrepreneurship, support to small and medium enterprises, and even to promote product safety. Such variation in the objectives could be due to different cultural and economic histories and priorities or due to differing perceptions of public interest. Proponents of the so-called pure competition law view with great reservation the importation of such other objectives in the competition law. However, the laws of all the countries cover the three standard limbs of a competition statute viz. merger, abuse of dominance, and anti competitive agreements.

Merger control is generally given a broad connotation and includes in its ambit acquisition of shares or assets or acquisition of control or participation in management. Generally, the laws exclude small mergers by providing a threshold above which only mergers can be scrutinized. However, there are differences in how the threshold is defined e.g. in some countries market share is the defining criterion whereas in other countries the threshold is in terms of assets or turnover. Several laws require a

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mandatory notification of the merger to the competition authority, but in various nations the notification is voluntary. In some countries, a joint venture is generally construed as merger, but the position is not so clear in other countries.\(^9\)

All countries prohibit abuse of dominance. However the way in which the dominance is defined varies. In some countries, no specific test has been prescribed in the law. In other countries, market share is the defining test or is an important factor, whereas in India a host of factors including market share is required to be considered in determining dominance of an enterprise. In some countries, abuse of dominance can be exempted if it serves other objectives e.g. to promote small businesses or exports.\(^10\)

Anti competitive agreements are prohibited in all laws. Generally, these are treated as civil offences, but in Canada cartels face criminal sanctions, and in some countries the authorities have the power to carry out dawn raids in pursuit of cartels or other offences. Some of the countries have provision for granting total or partial immunity to a member of a cartel who is the first to blow the whistle and assist the authority in investigation.

In addition to the three core area that is mergers, abuse of dominance and anti competitive agreements, some countries also mandate the competition authority to undertake competition advocacy\(^11\) and public awareness such as in India. Many competition authorities in the world do undertake competition advocacy. However, a specific provision in the law strengthens the hands of the competition commission and vests its advocacy effort with greater authority. There are also wide differences in the role of the competition authority in regulated sectors of the economy. At the one extreme is Australia where certain sector regulators have been merged with the Australian Competition and Consumers Commission. In other countries, varying levels of authority has been vested in the competition authority to intervene in the regulated sector or in matters before the sector regulators. In South Africa, at one stage the jurisdiction of the competition authority was excluded from regulated sectors, but this position has been reversed in the statute.

The overall position thus is that while the law in all the countries covers the three core areas of mergers, abuse of dominance and anti competitive agreements, and

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\(^10\) Robert D. Anderson and Alberto Heimler: Enforcement Issues and Approaches to Developing Countries.

\(^11\) Philip Lowe and Geraldine Emberger: Competition Advocacy and Interface with Government.
also set up autonomous competition authorities, important differences remain in how these three areas are treated, and in some additional matters such as advocacy and the role in regulated sectors. Further, there are significant variations in the objectives of the competition laws as formulated in the statute. There are differing views on the practicability or even the desirability of convergence. At the one end is the school of thought who strongly advocates greater uniformity in the laws with a centralized dispute settling mechanism such as in the WTO. At the other end there are people who are skeptical whether harmonization and centralization of competition laws is at all the most appropriate solution. In their view, given the existence of different goals and the varying economic and cultural conditions across different countries, decentralized competition policies are more appropriate. For the purposes of a more autonomous and gradual process of convergence certain suggestions can be made.\(^{12}\)

Firstly, informal communication and formal bilateral cooperation agreements between competition authorities should be encouraged. This is already being done by some of the competition authorities in the Commonwealth e.g. Australia has an agreement and an understanding with Canada and similar agreements with a number of other countries. Some of the competition authorities maintain informal communication either about specific matters or generally about competition issues. This network could be expanded. In fact formal bilateral agreements can greatly strengthen cooperation in specific cases as well as bring about convergence in the broader approach to competition issues.

Secondly, technical assistance is an important tool not only towards capacity building but also in bringing about convergence in the laws and in their enforcement. The developed economies that also have the more mature competition agencies can play an important role in this area.

Thirdly, there is a need to broaden the opportunities for sharing experiences between competition authorities and policy makers. This would expand the knowledge about global best practices and would facilitate convergence in the laws in a more organic manner as compared with a coercive approach. Two global platforms for sharing experiences in competition matters have proved most valuable i.e. the International Competition Network and the OECD Global Competition Forum.

Objective of Study

The effect of anti-competitive measures adopted by undertakings to gain profits in an unnatural way is proving to be a bane to the world’s economy, society, culture and is eroding the financial gains which a state can earn and then append them to the well-being of its people. As the European Union and India has emerged as the world’s powerful economic bloc, the economic activities that take place in the European Union and India are having both direct and indirect effect on the developed as well as the developing countries. Further, India being a fast developing economy there is strong need for competition law and policy. Although the domain of anti-competitive measures encompasses a vast field of study and analysis, I propose to restrict my research only to the study of economic and legal implications of these measures in Europe and India. The main objects of my study are:

1. To analyze the concept of Competition and its need in today’s world keeping in mind the impact of Globalization in every sphere of life.
2. To study the meaning of Agreements and Concerted Practices and examine various types of Agreements and Practices which restrict Competition.
3. To study the economic and legal issues arising out of anti-competitive behavior and practices in the European Union and India.
4. To evaluate the response of European Competition Commission, Court of First Instance and European Court of Justice towards eradication of illegal trade practices prevalent throughout the member states.
5. To analyze the development and need of Competition Law in India and study the difference between Monopolies and Restrictive Trade Practices Act, 1969 and the new Indian Competition Act of 2002.
6. To study as to how the Agreements and Practices that restrict competition have been tackled under Indian laws.
7. To examine the direct and indirect implications of such anti-competitive behavior and practices on other countries of the world.
8. To study the institutional and functional deficiencies on the part of the member states of the Union, European and Indian Competition Authorities in tackling this menace.

Research Hypothesis

The hypothesis underlying the research is that the current legal framework as practiced in Europe and India is in need of strong measures to prevent firms from...
entering into agreements which have the effect of restricting competition either between themselves or amongst them and third parties. There is also the need to control attempts by the monopolists or firms with adequate market power to abuse their dominant position and prevent new competition from emerging. In European Union there is need to revamp system for checking abuse of dominant position. Further in India strong Competition Policy and enforcement of new Competition law is required to maintain healthy competition in the market as old law has outlived its utility. There is also the requirement to ensure that workable competition is maintained in saturated markets. The Competition Commission in Europe and in India needs to be more effective in checking the practices that distort competition in the market. It is required that in India new Competition Act should be strictly enforced and in Europe along with fixing of penalties, persons responsible for the distortion of competition should be imprisoned and further their assets should be seized and confiscated in order to stop them from indulging in anti competitive behavior. There is a need for a strong Competition Law to maintain a balance in promoting a healthy competition and a booming economy so that ultimately the consumer is the beneficiary.

**Research Methodology**

The present research will require both theoretical and analytical in-depth study. Study will concentrate on as to how Agreements and Practices have been defined under European Competition laws. Study will also focus on as to how agreements and practices had been defined in the old Act in India and further what are the provisions in the new Competition Act in regard to agreements restricting competition. The theoretical study will deal with the study of concerned literature i.e. Conventions, Notices of the Commission, writings and judicial verdicts pronounced by the European judicial authorities on the agreements and practices restricting competition. Research will also concentrate on the decisions given by the Monopolies and Restrictive Trade Practices Commission, India on the issue. It will also focus on the lacunas and defects in the Competition policies in European Union and India. Focus of the study will be also on need for the strict enforcement of new Competition law in India. The analytical study will comprise analyzing European Treaties, European and Indian National Legislations, Statutes, European Community Regulations, European Commission’s Notices and Guidelines on Competition Law, articles written by eminent jurists on state of Competition law in Europe and India. Further various Law web sites like Lexis Nexus, Manu patra and West Law will also be referred to while carrying the research.
Universe of Study

In the present research all the factors leading to anti competitive practices in the Member nations of the European Union and India will be analyzed. The need to get rid of anti competitive behavior like formation of Cartels, price collusion, customer allocations etc will be thoroughly researched. Study will also address the effect of all the above mentioned factors on Indian economy and need to enforce new Competition Act which has broader approach towards tackling the agreements restricting competition. Various Competition law books, research articles, Conventions, material available on websites of Competition law authorities in Europe, Monopolies and Restrictive Trade Practices Commissions decisions will be analyzed and material will also be taken from legal websites like Lexis Nexis, Westlaw and Manu patra.

Plan of Study

The study proposes to divide the research into seven chapters including this chapter.