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Introduction

In the recent times, the Indian economy has seen reform and restructuring initiatives in diverse facets and dimensions (this diversity alludes to the divergent mechanism design, process and instruments adopted for different utility / infrastructure facilities) since mid 1980s. In context of the globalization the emergence of multinational corporations, interdependence of economies, and role of private enterprise in economic development, the global financial crisis is emerging as a watershed in the “regulatory and reform” thinking. In developed economies, well-established reforms are generally regarded as belonging to the post-privatization phase. But in developing economies, privatization has itself been an incomplete and altering process, so that associated regulatory reforms are either new, or poorly understood or conceived: often, privatization and regulatory reforms will proceed piecemeal, without proper sequencing or coordination. In India, after nearly three decades of regulation of various infrastructure sectors like Telecommunications, Power, Oil and Gas, Highways, Ports, Airports and Water in India, it is opportune that finally, the Competition Act, 2002 and policy is being brought into force now. The challenge of actualizing the potential of the Indian economy as also maximizing welfare, including foreign direct investment, gets exacerbated by several factors including the governing legislative policy regulatory framework; the effectiveness and credibility of the regulatory institution and processes; segments of natural / historical / monopolies in each sector; as also gross capital formation for development in the face of competing investment opportunities and financial constraints. Competition law is the body of law dealing with the market behavior of corporate and business entities. It is known by various names, including restrictive trade practices law in Australia and antitrust law in the United States. Different jurisdictions' competition laws may be influenced by different economic and political considerations. However, competition laws are generally based on the premise that while free market behavior is desirable, some interference in the market is necessary to maintain competitive pressures and promote competition amongst producers, and hence to
obtain an efficient allocation of resources. Although the competition policy remedies may have wide-reaching effects, the assessment of their actual effectiveness and wider economic impacts seems to have been neglected somewhat. World problems need world solutions. As globalization develops and international merger activity increases around the world, so too has the number of jurisdictions with antitrust merger control laws and regulations. Thus economic actors merging in a trans-border dimension must potentially review their sales, assets and subsidiaries in more than 60 jurisdictions to determine where notifications to competition authorities are required. Private restraints resulting from anticompetitive arrangements are perceived as becoming more prominent. As the negotiations and discussions taking place in the context of the World Trade Organization (“WTO”)\(^1\) the Organization for Economic Co-operation and Development (“OECD”)\(^2\) and the UN Conference on Trade and Development (“UNCTAD”)\(^3\) demonstrate, the interrelation of trade and competition is increasingly becoming a subject for the international trading community.

As mentioned above, Competition law, in the United States known as antitrust law, are laws that promote or maintain market competition by regulating anti-competitive conduct. The history of competition law reaches back to the Roman Empire. The business practices of market traders, guild and governments have always been subject to scrutiny, and sometimes severe sanctions. Since the twentieth century, competition law has become global. The two largest and most influential systems of competition regulation are United States anti-trust law and European Union Competition Law. National and regional competition authorities across the world have formed international support and enforcement networks. It is worth to mention here that, the substance and practice of

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\(^1\) The WTO was established on 1 January 1995, and is predominantly concerned with issues trade, rather with competition policy. The rules of the WTO do not impose obligations on undertakings in relations to competition

\(^2\) The Organization for Economic Co-operation and Development (OECD) is a Paris-based international economic organization of 30 countries. Most OECD members are high-income economies with a high Human Development Index (HDI) and are regarded as developed countries. It originated in 1948 as the Organization for European Economic Co-operation (OEEC), led by Robert Marjolin of France, to help administer the Marshall Plan for the states. In 1961, it was reformed into the Organization for Economic Co-operation and Development by the Convention on the Organization for Economic Co-operation and Development.

\(^3\) The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body. It is the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues.
competition law varies from jurisdiction to jurisdiction. Protecting the interests of consumers and ensuring that entrepreneurs have an opportunity to compete in the market economy are often treated as important objectives. Competition law is closely connected with law on deregulation of access to markets, state aids and subsidies, the privatization of state owned assets and the establishment of independent sector regulators. In recent decades, competition law has been viewed as a way to provide better public services. The researcher intends to give a brief introduction of Competition Law. What is Competition and why should be regulated?

“Competition is not an end in itself but a process that advances goals of economic well being, ultimately for consumers.”

Law is an instrument to regulate human behavior, be it social life or business life. With the emergence of string and dominating market players, law was required to regulate their behavior in the market. Therefore the competition law was introduced. Competition cannot be left unfettered in the belief that it will drive out unfair trade practices. Free trade, in the modern and technologically more complex age, does not provide all the safeguards. Forces of competition have to be reinforced with a competition law particularly to counter forces of monopoly. By its enactment the Government takes the responsibility for assuring competition among private firms without otherwise interference in their price and output decisions. Furthermore, Competition is a vital element in the lives of consumers. For the consumer’s competition in the economy is a crucial factor in determining benefits, appropriate prices and the variety of choice to choose from. The following anonymous quote aptly sums the essence of competition in achieving maximum good to consumers.

“Competition is good for consumers for the simple reason that it compels producers to offer better deals – lower prices, better quality, new products and more choice”. The aims of competition or anti trust laws are to ensure that consumers pay the most efficient price coupled with the highest quality of goods and services they consume. This according to Economists can only be achieved when effective competition policies are in place. Competition is beneficial in all angles for it –

- Encourages producers to be more efficient
- Places pressure on producers to perform effectively
- Optimizes allocation of resources
- Compels effective pricing
- Increases consumer choice and options
- Promotes consumer welfare

In common parlance, competition in the market means sellers striving independently for buyer’s patronage to maximize profit (or other business objectives). A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product at a price that maximizes his profit. Fair Competition as contemplated by Competition or Antitrust Authorities globally aids consumers, producers, distributors thus benefiting society at large.

**History of Competition governance**

The Law governing Competition is found in over two millennia of history. Roman Emperors and Medieval monarchs alike used tariffs to stabilize prices or support local production. The formal study of "Competition ", began in earnest during the 18th century with such works as Adam smith s ‘The Wealth of Nations’. Different terms were used to describe this area of the law, including "restrictive practices ", "the law of monopolies", "combination Acts " and the "restraint of trade". An early example of competition law is the *Lex Julia de Annona*, enacted during the Roman republic around 50 BC. To protect the grain trade, heavy fines were imposed on anyone directly, deliberately and insidiously stopping supply ships. Under Diocletian in 301 AD an edict imposed the death penalty for anyone violating a tariff system, for example by buying up, concealing or contriving the scarcity of everyday goods. More legislation came under the Constitution of Zeno of 483 AD, which can be traced into Florentine Municipal laws of 1322 and 1325. This provided for confiscation of property and banishment for any trade combination or joint action of monopolies private or granted by the Emperor. Zeno rescinded all previously granted exclusive rights. Justinian I subsequently introduced legislation to pay officials to manage state monopolies. As Europe slipped into the dark ages, so did the records of law making until the Middle Ages brought greater expansion of trade in the time of lex mercatoria. Further under King Edward III the Statute of Labors of 1349 fixed wages of artificers and
workmen and decreed that foodstuffs should be sold at reasonable prices. On top of existing penalties, the statute stated that overcharging merchants must pay the injured party double the sum he received, an idea that has been replicated in punitive treble damages under US antitrust law. The Europe around the 16th century was changing quickly. The new world had just been opened up, overseas trade and plunder was pouring wealth through the international economy and attitudes among businessmen were shifting. In 1561 a system of Industrial Monopoly Licenses, similar to modern patents had been introduced into England. But by the reign of Queen Elizabeth I, the system was reputedly much abused and used merely to preserve privileges, encouraging nothing new in the way of innovation or manufacture. When a protest was made in the House of Commons and a Bill was introduced, the Queen convinced the protesters to challenge the cases in the courts. However, the modern competition legislation has historically evolved on a country level to promote and maintain competition in markets principally within the territorial boundaries of nation–states. National competition law usually does not cover activity beyond territorial borders unless it has significant effects at nation-state level. The protection of international competition is governed by international competition agreements. In 1945, during the negotiations preceding the adoption of the General agreement on Tariff and Trade (GATT) in 1947, limited international competition obligations were proposed within the Charter for an International Trade Organization. These obligations were not included in GATT, but in 1994, with the conclusion of the Uruguay Round of GATT Multilateral Negotiations, the World Trade Organization (WTO) was created. The Agreement Establishing the WTO included a range of limited provisions on various cross-border competition issues on a sector specific basis.

**Objectives of Competition Law**

There is some controversy about, what are or should be the objectives of competition law. However, there is broad agreement that the principle objective is to make the market economy work better by stopping private power from obstructing markets. In this way, the principle objectives is to maintain and protect the competitive process since competition promotes efficiency including dynamic efficiency, increases consumer welfare, and contributes to the progress of the economy as a whole. On the other hand, firms tend
to restrict competition through means such as collusive agreements to fix prices and output, and exploitative and exclusionary measures and seek mergers and other forms of combinations to gain or augment market power. Such market failures undermine the benefits of free and fair competition in the economy and therefore, need to be prohibited through legal devices provided by the competition law. Competition law may subserve some supplementary objectives. One of these is freedom of trade, which has been viewed as the economic counterpart of political democracy. This is the theme of persevering pluralism and distribution of market power, both these objectives reflect the once prevailing fear of allowing concentration of economic power in the hands of a few market agents. While competition law has been mainly aimed at countering private restraints to competition, in recent years the objective has expanded also to lessening the adverse effects of Government intervention in the market place. Competition law may also recognize other objectives and may, therefore allow exemptions to serve such objectives. For instance, the law may allow for the protection of small and medium enterprises for the development of less developed regions⁴.

**Advantages of Competition Law**

The Competition Law – enhances dynamic efficiency and increases economic growth. The World Bank, UNCTAD and the WTO have unanimously identified that competition law can act as an important competition catalyst for long term welfare accumulation and sustainable economic growth by preventing the accumulation of excessive market power and promoting competition. Thus the relationship between competition law and economic growth can be perceived by the following factors:

*Increased rate of technological progress*: Markets motivate the behavior of producers by rewarding good performance and penalizing poor performance. The hope of gain and the fear of loss continually guides producers to optimize production, reduce costs and to invent and innovate. Competition thus motivates greater entrepreneurial activity as firms seek to

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⁴ In South Africa, the law specifically seeks the objective of increasing the participation of black-owned businesses in the economy. (Available at http://www.compcom.co.za/the-law_act–competition_acts.asp)
obtain a strategic advantage over their competitors. Invention and innovation is a key driver of economic growth.

*Increases in productive and allocative efficiency:* Competition ensures that producers continually improve their productive efficiency over time by continually reducing costs. Competition also ensures that price signals remain optimal and assist market responsiveness in achieving efficiency by ensuring production is continually optimized in line with the changing demands of consumers.

**Report of High Level Committee on Competition Policy and Law (Raghavan Committee Report)**

The Government appointed a committee on Competition Policy and Law under the chairmanship of Mr. S. V. S. Raghavan in October 1999 for shifting the focus of the law from curbing monopolies to promoting competition in line with the international environment. The Committee submitted its report to the Prime Minister on May 22, 2000. The main recommendations of the Committee are:

- The enactment of an Indian Competition Act, the setting up of a Competition Commission of India (CCI), the repeal of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, and winding up the MRTP Commission. The pending cases in the MRTP Commission may be transferred to the concerned consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP Cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.
- State monopolies, government procurement and foreign companies should be subject to the Competition Law.
- Competition law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made.
- The Committee recommended that the unfair trade practice cases may be transferred to the consumer courts concerned under the Consumer Protection Act, 1986.
- The pending monopolies and restrictive trade practices cases in the MRTPC may be taken up for adjudication by the CCI.
• The Committee also believed that the repeal of the various laws mentioned would constitute the prerequisites for laying the foundation over which the edifice of the Competition Policy and the Competition Law needs to be raised.

• The Industries (Development and Regulation) Act, 1951 may no longer be necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and national heritage protection considerations, etc.

• The Industrial Disputes Act, 1947 and the connected statutes need to be amended to provide for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.

• The Board for Industrial Finance & Restructuring (BIFR) formulated under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 should be abolished.

• There should be necessary provision and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. Particularly, agreements relating to foreign investment, intellectual property rights, subsidies, countervailing duties, anti-dumping measures, sanitary and technical barriers to trade and Government procurement need to be reckoned in the Competition Policy/Law with a view to dealing with anti-competition practices.

• The competition law should be made extra territorial. It is pertinent to note that this High Level Committee only discussed the comparative approach with respect to existing laws in other countries in their recommendations in the report. It however does not mention the subject of imposing criminal sanctions on Individuals as a penalty. The High level Committee mentioned about the existing criminal penalties with reference to other jurisdictions only in passing reference.

**Overview of India’s Competition Regime**

Every society needs law in order to meet its unique needs. The structure and the organic growth of every society are different from the other and the law thus needed to regulate it must address it specific needs. With capitalism making an advent in India and
with the Indian subcontinent embracing globalization the need for legislative reform is imperative. The economic buoyancy and the anticipated economic juggernaut in India has thus prompted the legislators in India to engineer a new competition regime. The Competition Act, 2002 has been enacted with the purpose of providing a competition law regime that meets and suits the demands of the changed economic scenario in India. The predominant models of competition law in the world i.e. of the United States of America and Europe have been elucidated in order to provide a reference point and throw light on the prevailing platform of competition law.

**Evolution of Competition legislation in India**

It is important to understand the economic milieu which led India to enact Competition legislation, which aimed specifically at dealing with the issue relating to the protection of the process of competition. The history of the Indian Competitive Legislation goes back to the Monopolies Enquiry Commission\(^5\) when the Indian democracy was in its nascent stage – barely 17 years old, the government of India appointed the monopolies inquiry Commission to enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture. The committee submitted its report along with the monopolies and Restrictive Trade Practices Bills in 1965, which was later passed by the both the houses of parliament and received the assent of the President of India on December 27, 1969. It came into force on June 1\(^st\) 1970, as the Monopolies and Restrictive Practices Act 1969. The Act has a general social policy function as well as economic policy function. The influence of the Constitution of India is eminently clear. The Indian Constitution contains directive principles that guide state policymaking and include the concept that the economic system should function in a manner that does not lead to the concentration of wealth in the hands of the few. Further, the constitutional mandate is also clearly in favor of serving the common good of the society. While the MRTP Act embodied this constitutional mandate, it exempted governmental companies from its purview and focused only upon private entities. Perhaps the philosophy underlying

\(^5\) Details in chapter III
the MRTP Act was that governmental companies were the champion of the public interest, and that private companies were the only entities for which regulation is necessary to promote the public interest. The statement of objects and reason mentioned that the Act was to provide that the operation of the economics system did not result in the concentration of economics power to the common detriment, for the control of monopolies for the prohibition of Monopolistic and Restrictive Trade Practices and for the matters connected therewith and incidental thereto. The provisions of the Act, i.e. on Restrictive Trade Practices, including the resale maintenance are substantially based on the UK legislation and particularly Restrictive Trade Practices Act 1956 and the Resale Price Act 1964. Likewise the provisions on Unfair Trade Practices are influenced by the UK’s Fair Trading Act 1973, The antitrust legislation in US, notably the Sherman Act, the Clayton Act and Federal Trade Commission Act, and also legislation enacted in Japan, Australia, Canada and Germany legislation have also been a guide in framing the provisions relating to monopolistic, restrictive and Unfair Trade Practices. The Unfair Trade Practices, a Consumer Protection provision covering deception, misleading claims and advertising etc was brought in through an amendment in 1984. However, the MRTP Act was unable to deliver as expected, partly due to the weakness in its own structure and composition of the MRTP Commission and also because it was created at a time when all the process attributes of competition such as entry, price, sale, location etc were regulated. The MRTP Act had no influence over the attributes of competition as these were the parts of the separate set of policies. But it was a paradox, as the Act had no power to change the very elements for which it was enacted to. It was in 1991 that the widespread of economic reforms were undertaken and consequently the march from a “command and control” regime to a regime based more on free market principles commenced its stride. It is worth noting that the economic reform undertaken since the early 1990s significantly changed the economic environment of the country. In the wake of economic liberalization and reforms introduced by the Government of India since 1991 with a view to meet the challenges and avail of the opportunities offered by globalization, the Raghavan Committee was set up in 1999 to assess the need to evolve India’s competition regime. The committee in its report of 2000 recommended setting up of a modern competition law and phasing out the MRTP
Act. The committee opined that in order to ensure a really free and competitive market and to assure consumer’s low prices and high quality that flow from the effective competition, it is necessary to curb abuses of market, i.e. predation, takeover and mergers and also Carterlisation. Competition cannot be left unfettered in the belief that it will drive out unfair trade practices. Free Trade in the modern and technological more complex age does not provide all the safeguards. Forces of competition have to be reinforced with the legislations. Thus by the enactment of the Act, the Government takes the responsibility of assuring competition among private firms without otherwise interfering in their price and output decisions. The policy of such regulation while recognizing that competition enhances efficiency, innovation and availability to the consumers of variety of products, focuses its intervention on the core of underlying market failure.

The Indian Competition Act of 2002

In the pursuit of globalization\(^6\), India has responded by opening up its economy removing controls and restoring to liberalization. The natural corollary of this is that the Indian market should be geared to face competition for within the country and outside\(^7\). the MRTP Act, 1969 has became obsolete in certain respect in the lights of international economic developments relating more particularly to competition laws and there is a need to shift the focus from curbing monopolies to promote competition. There is a significant contrast between the repealed MRTP Act and Competition Act. The Competition Act 2002 was enacted by the parliament of India in December 2002 and received Presidents assent in January, 2003. The intent of the Competition Act is not to prevent the existence of a monopoly across the board. It was realized among the policy making circles that in certain industries, owing to the nature of their operations and economies of scale indeed dictate the creation of a monopoly in order to be able to operate and remain viable and profitable. This

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\(^6\) Globalization is a process in which an economy gets integrated with the rest of the world through trade, investment and financial flows. According to Stiglitz, ‘Globalization is the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportations and communications, and the breaking down of artificial barriers to the flow of goods and services, capital, knowledge and (to the lesser extent) people across borders’

\(^7\) See SM Dugar’s Commentary on The MRTP Law -Competition Law and Consumer Protection Law, PP 572, 4\(^{th}\) Edition 2006 –Vol-1
is in significant contrast to the philosophy which propelled the operation and application of the MRTP Act. The word “Monopoly” is no longer a taboo in corporate world. The Competition Act is a Central Law in India i.e. a Law of the Union Government and there is no corresponding Law enacted at the level of the constituent States. Further the Act has an overriding effect over any inconsistent provision in any other law for the time being in force.

The Act is the part of the Indian economic reform and globalization process which necessitated aligning the economic laws of the country with the new economic scenario. The Competition Act was enacted to fulfill the following objectives:

- To promote and sustain competition in market in India,
- To protect the interest of the consumers,
- To ensure freedom of trade carried on by other participants in the market in India,
- To provide for the establishment of a commission to prevent practices having adverse effect on competition,
- Objectives to be achieved through the establishment of Competition Commission of India

The business aims at profit that is generated through goods sold or services provided to the consumers. The government plays tutelage role and keeps balance that business survives and grows, consumers get goods and services at competitive rate and national economy also prospers and sustains. Striking balance between these two extreme require long-term policy and public confidence in government actions. The three players i.e. consumers, business and government is interconnected and dependent on each other. Therefore if there exists healthy competition amongst the all players, all segment of the society benefits in long term. Modern economic legislation is becoming more complex. It has to take on giant MNCs thriving to drive out small firms from the market. Competition between two un-equal may create situation where small one may whither away in long run. Main areas of competitiveness may be classified as physical competitiveness, intellectual competitiveness, and systemic competitiveness means - attitudes and mindsets that are

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8 See section 60 of the Act
necessary to fostering a competitive instinct. Thus government should provide conducive environment that business compete in a fair way and becomes constant innovative force to create and adopt new ideas in producing goods and delivering service. It should also see that in global economy, the benchmark for efficiency and effectiveness is globally competitive. Business should see that they achieve higher benchmark and becomes global leader by establishing higher benchmark. Keeping all the above factors in consideration the Act is set out with the set of features. The Competition Act mainly covers the following aspects,

- The prohibition of Anti-competitive agreements,
- Prohibition of Abuse of Dominance,
- Regulation of Combinations, and
- Competition advocacy.

Though the Act deals with promoting fair and healthy competition in India by prohibiting activities that have an adverse effect on competition in India, it does not define the term “competition”. The objective of the Act is to promote competition, protect consumers, and promote market efficiency and matters connected therewith.

**Constitution and Competition regulation**

The makers of the constitution had realized that in a poor country like India, political democracy would be useless without economic democracy. Accordingly, they incorporated a few provisions in the constitution with a view to achieve amelioration of the socio-economic condition of the masses. By the Constitution Amendment Act of 1976, we the people of India have accepted a socialistic pattern of society as our goals. One of the principle methods for establishing such a society is preventing concentration of economic power in few hands or institutions. The Directive Principles are designed to usher in a social and economic democracy in the country. These principles obligate the state to take positive action in certain direction in order to promote the welfare of the people and achieve economic democracy. These principles give directions to the legislature and executives in India as regards the manner in which they should exercise their power.
To preserve the laudable ideals of free enterprises 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 is inimical to the concept of open society. The term competition can be correlated with trade. Even Article 19 (1) (g) guarantees to all citizens, the right to practice any profession or to carry on any occupation, trade or business. Further, article 38 and 39 lay down that 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 national life and the state shall in particular, direct its policy towards securing:

- That the ownership and control of material resources are distributed to sub-serve the common good and
- That the operation of economic system does not result in concentration of wealth and means of production to the common detriment.  

Competition is generally understood to mean the process of economic rivalry between producers to attract consumers and enhance profit or both. These producers can be multinational or domestic companies, wholesalers, retailers etc. competitive market ensures efficiency resulting in best possible choice of quality, lowest prices and adequate supplies to consumers. The basic tenets of democracy and market competition are ingrained in the same value system- freedom of individual choice, abhorrence of concentration of power, decentralized decision making and adherence to the rule of law. The common goal of both democracy and market competition is the same i.e. to ensure public welfare. Firms while competing with one another often adopt unfair means to restrict competition. This relates to fixing prices with rivals, setting price which is lower than cost in order to throw out competitors from the market. This is where the competition law assumes a vital role in achieving the target of constitution and economic justice.

**Competition Act provisions**

The amended Competition Act covers four primary competition concerns: (i) Prohibition of cartels and anticompetitive agreements, (ii) Abuses of dominant positions (including predatory pricing, tying, etc.), (iii) regulation of Combinations, and (iv) Competition Act provisions.

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9 See Article 39(c)
advocacy — which is defined as raising private sector awareness of the Commission and its intended role. As a result of the delay in the adoption of the Amendments to the Act, only the competition advocacy has been implemented thus far. Notably, the Competition Act does not regulate unfair trade practices (which the MRTP did). Instead, the 1986 Consumer Protection Act now regulates these practices. Moreover, Section 32 of the amended Act specifically provides for the Act’s application to foreign firms and individuals whose actions may have an anticompetitive effect within India, which is a significant departure from the MRTP. The researcher intends to brief the Objectives of the Act as follows:

**Anti-Competitive Agreements**

The Anti-competitive agreements are those as the name suggests the agreement that restricts the Competition. In other words Agreements which generally cause an adverse effect or distort or restrict competition are called anti-competitive agreements. Section 3 of the Act deals with anti-competitive agreements that have an appreciable adverse effect on competition in India. These agreements are not necessarily in writing. Even an arrangement between the parties adversely effecting competition is covered under the Act. The Act declares such agreements as void. The agreements between parties engaged at the same stage of production, supply, distribution etc. are referred to as horizontal agreements e.g., cartel, bid rigging, sharing of market etc are some examples of horizontal agreements. Whereas, agreements between parties at different stages of production, supply, distribution, etc. are referred to as vertical agreements. Some examples of the vertical agreements are tie-in arrangements, exclusive supply agreement, and exclusive distribution agreements, resale price maintenance etc. Since, there is a great chance that vertical anti-competitive agreements may not be anticompetitive, regulators require a systematic economic assessment of whether pro-competitive or anti-competitive effects of a vertical agreement will dominate when these agreements involve enterprises with a significant market share. The most pernicious form of anti-competitive agreement is Carterlisation. Cartel is a non-technical term for various forms of co-operation between companies as understood under the Competition Act 2002. The object of cartels is to regulate the flow of supply of goods and services in the market. In US Anti competitive Agreement are dealt under section 1 of the
The Sherman Act, under EU these are covered under Article 81 of the Treaty of Rome, in UK the anti competitive agreements are included in chapter 1, section 2 and in Australia it is covered in part 4 of the Trade practices Act 1974. The adverse effect on competition refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying time and circumstances. It generally refers to any action which operates to the prejudice of the public interests by unduly restricting competition or unduly obstructing due course of trade. However, the Competition Act of 2002, lists out factors to be taken into considered for adjudicatory purposes to determine whether an agreement or a practice has an appreciable adverse effect on competition, like creation of barriers to new entrants in the market, driving existing competitors by hindering entry into the market and accrual of benefits to consumers.10

**Abuse of Dominant Position**

Ordinarily, merely the fact that a firm or enterprise or undertaking is in a dominant position in the relevant market alone is not prohibited by competition law. The abuse of dominant position is another way of interfering with competition in the market place. In simple terms it refers to the conduct of an enterprise that enjoys “dominant position” as defined under section 4 of the Act. In substance ‘dominant position’ means the position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market. Abuse of dominance is the key for the Act, in so far as dominant enterprises are concerned. It is important to note that the competition Act does not forbid an enterprise from becoming big, Bigness is essential to industrial efficiency and innovation. But where it stifles competition in the market, the law intervenes. The Law, therefore does not prohibit dominance, it prohibits its abuse. The definition of dominance is broadly similar in the competition laws of several countries. In existing competition laws, there are two kinds of prohibition of abuse of dominant positions;

1) The first relates to actions taken by an incumbent firm to exploit its position of dominance by charging higher prices, restricting quantities or more generally using its position to extract rents.

10 Discussed in detail in Chapter V - part A
2) The second relates to action by an incumbent in a dominant position to protect its position of dominance by making it difficult for potential entrants and competitors to enter the market.

A number of factors are taken into account to determine whether a particular undertaking or group of undertakings is in a dominant position in the relevant market. The factors to be taken into account are inter alia market share of the undertaking or enterprise, barriers to entry, size of competitors and financial power of the enterprise. In some jurisdictions, the competition legislations themselves specify the factors to be taken into account but in others case laws may have to be looked into to identify the factors. Determination of relevant market is of great significance in competition assessment. The Indian competition Act\textsuperscript{11} expressly lay down the factors that are to be taken into account to determine dominant position\textsuperscript{12}.

**Regulation of Combination**

The third element of Modern Competition law is Merger/ Combination. The Indian law uses the word “combination’ to cover acquisition of control, mergers and Amalgamation. The combination is anti-competitive if it creates dominant enterprises that subsequently abuses its dominance. Section 6 of the Act deals with regulation of combination which can be in the form of amalgamation, merger and acquisition. The Act prohibits combination that can have appreciable adverse effect on competition in India. The Act has jurisdiction extending beyond the territorial limits of India. Anti-competitive agreements, abuse of dominant position and combinations taking place outside India but adversely effecting Indian Competition are covered under the Act. Even if the party to such agreements or to the combination, is residing outside the boundary of India but his /her activity violates the provisions of the Act fall within the scope of this Act.

The Act imposes a duty upon every person or enterprise to refrain from entering into a combination that can have an appreciable adverse effect on competition. It requires parties to the combination to give notice to the CCI within 30 days of having decided to form the combination. The combination can be in the form of merger, amalgamation or acquisition.

\textsuperscript{11} See section 19 of the Act.
\textsuperscript{12} Discussed in detail in Chapter V - part B
The Act prescribes a maximum period of 210 days before the combination comes into effect. If the CCI is of the opinion that there exists a prima facie case, the Commission issues a show cause notice to the parties. The Commission may also seek the Director General’s opinion on the matter and then direct the parties to publish details of the Combination, as per the direction of the CCI and finally proceed to make its decision.

**Competition Advocacy**

The Act imposes a duty on the CCI to promote and maintain competition. For this purpose, the CCI has power to adjudicate cases pertaining to alleged contravention of the Act. The CCI has both regulatory and adjudicatory powers. It is required to have a good understanding of the market forces, requisite professional skills and experience. Its duty is to protect consumer rights and ensure freedom of trade. In discharging its functions, the CCI will be guided by the principals of natural justice and shall have some powers as are vested in a Civil Court. The CCI will also have the punitive powers enabling it to impose a penalty on the defaulting entity or individual. The Commission also has a right to inquire into cases of alleged anti-competitive agreements or abuse of dominance either suo-moto or on reference of the Central Government or a State Government or Statutory authority or on a receipt of the information and complaint by any person, consumer or their association or trade association. The decision of the CCI can be challenged before the Appellate Tribunals constituted under the Act. The Act provides for a second appeal before the Supreme Court of India from the decision of the Appellate Tribunal. The most important objective of the Act is to promote Competition in India. For this purpose, the CCI has been given the task of promoting competition advocacy. The CCI helps the government in formulating a policy on competition. It can also have its say on regulatory practices in the field of banking, telecommunication and intellectual property rights. The Act requires the CCI to take measures to promote competition advocacy, create awareness and impart training. India has taken a step towards having a healthy and fair competition regime and the CCI has already started its work of promoting competition advocacy by conducting workshops, seminars etc. It is evident that Competition advocacy is an important tool for promoting competition culture within the Government policy making apparatus and has proved very
effective in many countries. However, the effectiveness of this Act will be apparent only once it is fully enforced\(^\text{13}\).

**The Judiciary and Competition Law**

The courts in India as a rule presume constitutional validity of enacted laws. While interpreting a statute, Courts adopt such construction as effectuates the legislative intent behind the statute, restoring to purposive interpretation to give effect to a statute in view of its context and scheme. The Courts have adopted a balanced “common law” approach towards economic policy decisions taken by the Government which is characterized by:

a) Deference to policy making powers as expert-decisions which Government and Parliamentary accountability mechanism are best suited to evolve. The Courts treat policy decisions as involving choices between various options which require exercise of discretion and in this context recognize that the concerned authority must seen to have flexibility.

b) Where policy issues are delegated to expert bodies, courts exercise judicial restraint in interfering with the decision of such bodies unless the same are found to:

1. Fall foul of Wednesbury’s reasonableness and proportionality (as adopted and evolved in Indian Courts in context of the constitutional “reasonability” doctrine enshrined as a fundamental right under Article 14 thereof);
2. Violate or unreasonable restrict any fundamental or constitutional right; and/or
3. Ultra vires the present statute.

This particularly so in a number of cases decide by the Supreme Court of India\(^\text{14}\). Interestingly, over the last few years, Indian Parliament and Courts appear to have adopted two parallel/ alternative models of mechanism design, viz:

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\(^{13}\) Discussed in detail in Chapter IV

\(^{14}\) BALCO Employees’ Union vs Union of India AIR 2002 SC 350
a) In cases of economic regulators with licensing powers -- for electricity\textsuperscript{15}, capital markets\textsuperscript{16} and petroleum and natural gas\textsuperscript{17}, the law vests quasi-judicial powers including dispute resolution.

b) In cases of regulators without licensing powers -- telecom regulator\textsuperscript{18}, competition and airports economic regulator\textsuperscript{19}, the law segregates the regulatory function from the adjudicatory function, such that the regulator (TRAI and CCI) are not vested with adjudicatory functions--- which are vested in a statutory expert Appellate and dispute settlement Tribunal.

However, over the past years certain regulatory laws have evolved which creates overlaps between the domain of sector regulators and the competition regulators\textsuperscript{20}. In any event, given the domains, some level of overlap is unavoidable. The Competition Act, 2002 came into effect in stages and the non-abstain clause (Section) was brought into effect on 19\textsuperscript{th} June, 2003 which gives Competition Act over-riding effect over all other inconsistent laws. For instance, The Electricity Act 2003\textsuperscript{21}, which was enacted and brought into effect on 10\textsuperscript{th} June 2003 wherein section 174 gives Electricity Act over ridding effect over all other laws inconsistent therewith except for the three laws carved out under section 173 (The Consumer Protection Act of 1986, the Atomic Energy Act, 1962 and the Railways Act

\textsuperscript{15} Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commission (SERCs) constituted and functioning under parts X and XI of the Electricity Act 2003 are vested with regulatory and adjudicatory powers while the Appellate Tribunal for Electricity is purely appellate and supervisory in its functions.

\textsuperscript{16} Securities and Exchange Board of India (SEBI) constituted and functioning under Chapter II and IV of the SEBI Act 1992 are vested with regulatory and adjudicatory powers while the Securities Appellate Tribunal is purely appellate and supervisory in its functions.

\textsuperscript{17} Petroleum and Natural Gas Regulatory Board constituted and functioning under Chapter II and III of the PNGRB Act 2006 are vested with regulatory and adjudicatory powers while the Appellate Tribunal for Energy is purely appellate and supervisory in its functions.

\textsuperscript{18} TELECOM Regulatory Authority of India constituted and functioning under part X and XI of the Electricity Act, 2003 and functioning under chapters II and III of the Telecom Regulatory Authority of India Act, 1997 (as amended in 2000 to take away the dispute resolution function and vest the same in the telecom Dispute Settlement and Appellate Tribunal)

\textsuperscript{19} The Airport Economic Regulatory Authority of India is proposed to be constituted and shall function under Chapters II and III of the Airport Economic Regulatory Authority of India Act 2008. In this law, the Dispute resolution function is vested in the Airport Economic Regulatory Authority Appellate Tribunal.

\textsuperscript{20} Airport Economic Regulatory Authority Act of 2008, being the latest economic regulatory enactment established a tariff and behavioral regulator without licensing powers, vesting adjudicatory function in the Appellate authority.

\textsuperscript{21} Being introduces in the parliament on 30\textsuperscript{th} August 2001, the Bill was passed on 5\textsuperscript{th} May, 2003 and received Presidential assent on 26\textsuperscript{th} May, 2003.
1989), while requiring a harmonious approach with other laws (175). Recognizing this issue, there was significant public consultation. Drawing upon and adopting the international precedents of UK model of concurrency, the 2007 Amendment to the Act lays the foundation for a time bound consultation mechanism that evolve to resolve the issue. However, it is a mere start point. Much will depend on the wisdom of CCI and the concerned Sector Regulators in handling issues involving mixed questions of sector regulation and competition / anti-competitive behaviors.

**International precedents and their applicability to India**

Foreign Court precedents may be referred to in Indian Courts on the basis of certain principles set out as below. As the Act is a new legislation and is yet to be made operational in full, as such no Indian Court precedents on this Act exist. It may be noted that the jurisprudence established under the MRTP Act and the precedents there-under are likely to be of limited assistance as the concepts under the MRTP Act are very different from those under the Act. Therefore, in the evolution and development of the Indian Law on the subject, it could be expected that reference will be made and reliance placed upon on the precedents from the other jurisdictions where the laws are akin to the Act. In this respect, the Supreme Court of India has recognized the following principles:

a) Where there are no decisions of Indian High Courts or Supreme Court then interpretation of foreign Court on provision will be adopted. Indian court will adjust and adopt limit or extend, the principles derived from foreign decisions, suiting the conditions of our society and the country; context of Indian laws, legal procedure and practical realities of litigation in India.

b) Supreme Court is not bound by foreign court decisions and those decisions have only persuasive value--- but the court can borrow the principles laid down in foreign decisions, if the same are in consonance with Indian law keeping in view the changing global scenario²².

c) When a legislature in India enacts a statute which closely resemble similar statute in England and both have the same purpose and object in view, then unless the expressions

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used in the Indian statute is are defined, Courts of law cannot go wrong in interpreting the provisions in the way English Judges have done.

Thus Trade and Competition are interconnected; one doesn’t have any significance without the other. The regulation of trade can be traced back to the time immemorial. The concept of regulation of trade and competition is not new to India. The only change we can witness is the perceptive of trade and competition in the modern period. The regulation of competition is not only beneficiary for the individuals but for the economic development of the country also. India has travelled a long stumbling way to reach the position, what we are enjoying today in the international sphere. Replacing the first competition law of India i.e. MRTP Act of 1969 by the Competition Act 2002 is a great sign of prosperity witnessed by India. Owing to few inadequacies in the Act to meet the situation s, the government of India undertook to carry out two amendments to the Act i.e. 2007 Amendment and 2009 Amendment respectively. In this backdrop the researcher has identified the following issues / the Research questions / and problems.

**Scope of the study**

The Scope of the study is limited to the jurisdiction under the Indian Competition Law. The Indian economy had been characterized by significant government involvement marked with the dominance of large state-owned public enterprises (SOEs). There existed lacunae in the older laws and policies, which needed corrections as India moved ahead in creating a sound economic regulatory regime aimed at delivering higher growth, creating more employment and ensuring distributional justice to all. In order to realize this, India embarked on the path of economic reforms during 1990s by shifting to market driven economic policies. The researcher intends to evaluate the significance of competition policies and regulatory regimes, including the government policies that impeded competition and also to examine the competition-related issues and sectoral dimensions citing examples of selected sectors. The objective of the researcher is to find out the scope of the newly enacted “Competition Law” in India
Hypothesis

- Globalization and economic reforms paved the way for open competition all over the world. The regulatory mechanism tasks is not only to regulate monopolies and anti-competitive practices, but also to ensure free and fair competition by providing equal opportunities for all players in the market coming from all over the world.
- The MRTP Act did not provide any relevant provision for controlling anti-competitive practices and extraterritorial Jurisdiction.
- Competition is the crux of globalization and it is well recognized that globalization has not worked for the benefit of the poor India. It has further led to increase in inequalities across the country.
- The Competition Act 2002 is inadequate in controlling the Anti-competitive practices being adopted by big industrial houses in India.
- The Government is committed to promote the growth of small, medium enterprises and to enhance their competitiveness. Despite of that, the CCI has failed to promote and protect the SMEs from the wave of Liberalisation, Privatization and Globalization.
- Under section 32 of The Competition Act 2002 extraterritorial jurisdiction has been conferred on the Competition Commission. However, India has not entered into any Agreement or Competition Commission has not signed any MOU with its counterparts.
- The current Indian Law by the existing provision in the Act does not treat hardcore cartel activity as a crime and as a result prosecutions of individual’s participants are over looked. Thus the researcher proposes law makers and administrators to consider inclusion of criminal sanctions on individuals for participation in cartel activity.

Research Questions

- Whether the existing laws are effective enough for the regulation of trade and commerce with the pursuit of protecting the interest of small and medium enterprise in India?
• How far the MRTP Act was able to regulate the market and anti-competitive practices in India?
• What was the need for enacting competition legislation for India, even when MRTP Act and Consumer Protection Act were in place for regulating anti-competitive practices?
• Whether free and fair competition could be effectively ensured under the new – Competition regime in India?
• What are the measures under competition regime for ensuring the protection of small and medium enterprise in India in competition with the big industrial houses both in India and World market?
• How international developments including the developments in US and European region s have influenced the making and shaping of Indian Competition regime?

Research Objectives;

• Evaluation of the existing mechanism for the purpose of regulating trade and Commerce and protecting the interest of small enterprises.
• A probe into the background, features, fabric, working and failures of MRTP mechanism in India.
• An investigation into the need for ensuring free and fair competition in the light of globalization and open market system
• Identification of mechanism to counter the challenges post by the open market competition and an enquiry into efficacy and functioning of competition regime in India.
• Evaluating the adequacy and efficacy and suitability of existing competition regime to tackle the needs of changing economic scenario.

Research methodology

For the purpose of the Research, the researcher has adopted the Doctrinal method of research. The researcher would be conducting a critical and Analytic enquiry into the background, establishment, functioning and as well as the future of the competition regime in India in comparison with countries such as United States, Europe and United States.
Further for the purpose of the research, the researcher would be using primary as well as secondary sources of research. In particular the texts of MRTP Act, Competition Act of India, similar legislations in other regions, reports of the committees, commission for establishing competition regime will be used. Further various literatures in the form of text books, articles, and write ups will be used by the researcher for the research work. The researcher has taken the idea of writing of D.P.Mittal, T. Ramappa, and Richard Whish and many other writers.

Chapterisation

Chapter I; Introduction

In the first chapter the researcher attempts to introduce the research area with broad outline and gives basic idea about the research area. Competition Policy has a significant role to play in promoting competitiveness and growth. The term competiveness appears to have aroused considerable controversy in recent years. On the one hand, the word has become a kind of umbrella term for a wide ranging set of policies. On the other hand, the term evokes an analogy which suggests that nation states compete in the same way that firms compete. It may be true that the nation s does not compete but firms do. However, it is equally true that while nations may not compete they could help while nations may not compete, they could help the firms to compete more effectively by following a set of macro polices, which can create an enabling environment. Further, the chapter also contains the research issues / problems, research objectives, research hypothesis and also Chapterisation.

Chapter II; Historical background and industrial policies of India

In this chapter, the researcher attempts to make brief study about the constitutional and institutional background for the competition law and policy in India. The researcher discusses the obligations under the constitution of India to the states to direct its policy towards securing and promoting the welfare of the people of India through the Directive principle of state policy and also discuss the concept of Social Justice being addressed in the changing economic scenario. The researcher further attempts to discuss about industrial policies in India, the command and control rule prevailed and its consequence on the economy. The researcher also discusses how far industrial polices facilitating the introduction of Competition Law of India. The researcher tries to give an economic situation of India till date and their role in shaping the competition policy.
Chapter III; Monopolies and Restrictive Trade Practices Act 1969; MRTP Mechanism, its establishment, features and Functioning

In this Chapter the researcher discusses the evolution of the MRTP Act 1969. The Committees set up by then The Government of India for establishing a Statute that could control and prevents the Big Business houses from turning into monopolies, abusing its Monopoly in the Market. The researcher makes a brief study about the objectives, features and function of the MRTP Act. Further, the researcher discusses about strengths, efficacy, amendments and the inability of the MRTP Act to serve the purpose for which it was meant. The researcher highlights the reasons and means for the downfall of the MRTP mechanism in India. The Researcher further throws the light on the role of International Organization such as IMF and WTO for enacting a new Act called Competition Law that could control the market and the players and help the Business of India to trade in the International Market.

Chapter IV; The overview of Competition Regime in India -----The Competition mechanism, its establishment, functioning and its efficacy

In this Chapter, the researcher discusses the First and New Competition regime of India i.e. The Competition Act 2002. The Act was established on the account of poor performance of the MRTP Act to control Indian market and its players. The Country felt the need of the legislation that could address all problems and issues pertaining to trade and market both domestically and internationally, as a result of this a new Act on Competition was enacted. The researcher attempted to make an in-depth analysis of about the background of setting up of an Act, the objectives and role of the New Act in the ever Changing Economic Scenario. The researcher makes a deep study into the main objectives of the Act, namely –preventing Anti- Competitive Agreements, Abuse of Dominance and Combinations. The researcher also tries to make brief Comparative study between the old Legislation and the new Legislation i.e., MRTP Act 1969 and Competition Act 2002 respectively. The researcher further being able to gather the opinion of various developed Countries on Indian Competition Act.

Chapter V Competition regulatory Authority of India --- Competition Commission of India ----CCI and Competition Advocacy

In this chapter the researcher discusses the competition Regulatory Authority of India -- CCI, which is the sole Competition enforcement agency. It has also been assigned to take a proactive stand to promote Competition. The Competition (Amendment) Act, 2007 provided for the establishment of Appellate Tribunal for adjudicating claim for the Compensation and for hearing appeal against the direction of decision made or order passed by the Commission. The researcher further discusses the composition, term and
working of the Commission and Competition Appellate Tribunal. The researcher also attempts to analyze the relationship between the Commission and the other Sectoral regulators, the CCI role as a Advocate to promote Competition among the business class. The researcher also identifies the uncertainties in the working of the CCI, which is to be addressed as early as possible.

**Chapter VI Comparative overview of Competition Policy and Law in US, UK and European Union**

In this chapter the researcher discusses the evolution of Competition regulatory authority, Competition Legislation of the world in particular with the United States, United Kingdom and European Union. The competition Law addresses as Antitrust Legislation abroad. The working of antitrust legislation is very well established in US, UK and EU. The Antitrust Legislation is the role model for many countries both developed and developing countries to enact Competition Legislation. The researcher further discusses the role and working of many International Organization like WTO, UNICAD, OECD and ICN working exclusively in the field of Competition. The researcher also discusses the importance of International treaties for the implementing the Competition Law abroad.

**Chapter VII Conclusion, Findings and Suggestions**

This Chapter being the final one provides conclusive remarks on the entire work. It draws inferences with regard to the constitutional mandate in India, the role of industrial polices in shaping up the competition policy and Law in India. The Evolution of Competition Act, its function and future of the Act. The role of Commission as Competition Advocacy is the pre-dominate one. The work is later followed by the finding and suggestions drawn by the researcher during the course of the researcher work.