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Comparative Overview of Competition Policy and Law in United States of America, United Kingdom and European Union

Over the centuries the world has shrunk gradually; it has become integrated, albeit in an asymmetric fashion. Laws are national but markets do not stop at national boarders. The opening up of national boundaries to trade in this era of globalization has seen a quantum leap in international trade and has placed increasing competitive pressure on all economies, whether developed, developing or transitional. Here, in this chapter the researcher intends to discuss the competition law of the various developed countries like Competition law of United States, United Kingdom, and of European Union. The researcher further intends to analyze the role of international trade organization and how it forced most governments to reassess their national competition policy and to institute necessary changes in light of the developments in the world trade regime.

Introduction

Modern business operates in a world that is highly economically integrated, but at the same time it is politically, culturally and legally diverse. The relationship between competition law and international trade too have complementary functions to each other. Laws are national, but markets do not stop at national borders. The Competition law has a huge impact on foreign commerce of a country because it partially regulates the conduct of the country during international trading activities. Thus the competition law includes national legislations, bilateral, multilateral or regional agreements. But a fragmented international regulatory environment has evolved in which each government has developed its unique approach to promote or maintain market competition by regulating anti-competitive conduct that affects its territory, often without regard to the effect of that regulation on the other state. These domestic competition laws are not usually concerned with activity beyond territorial boarders unless it has significant domestic effects. The limited territorial approach has created complexities in an increasingly globalised and liberalized world environment in which transactions subsume multiple territorial implications. The history of competition law reaches back to the Roman Empire. The business practices of market traders, guilds 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 antitrust law and European Union competition law. National and regional competition authorities across the world have formed international support and enforcement networks. The Anti competitive conduct may have adverse economic effects in multiple jurisdictions, unconfined by territorial boundaries. In this manner, while competition law remains essentially national, competition issues have become increasingly international, creating a regulatory disjunction. Thus, the need for an international regulation of competition and the related matters was felt. In 1945, in negotiations preceding the adoption of the General Agreement on Tariffs and Trade (GATT), limited international competition obligations were proposed within the Charter for an international Trade Organization. While these obligations were not adopted within GATT at its inception in 1947, a number of attempts were subsequently made to address competition and the related matters. The Agreement Establishing the WTO in 1994 included a range of limited provisions addressing various cross-border competition issues on a Sector-Specific basis. The Singapore Ministerial meeting of WTO held in December 1996 suggested sensitization of matters pertinent to competition law and policy in the World Trade Agreements. A working group on trade and competition was established to study the issues “relating to the interaction between trade and competition policy, including anti-competitive practices, to identify the means of making the WTO framework competition policy sensitive”. Many countries have competition laws to deal with anti-competitive agreements among firms engaged in the same lines and firms with vertical integration. Mexican Competition Law seeks to protect Free Market Participation through elimination of monopolies and monopolistic practices. Anti-Trust laws have been popular in the US. The core objective of competition policy in most countries is to maintain a healthy degree of rivalry among firms in markets for goods and services. South Africa, the Netherlands and the UK have come out with laws radically altering competition regulations. There has been a divergence of views on competition policy in Europe and the US. American law focuses on the consumer whereas in Europe, industry gets the focus. But in both regions, competition policy is based on distrust of concentration of economic power. WTO acts as a catalyst for creating borderless globally competitive business environment.
India as signatory of WTO convention took lead in drafting its environment to suit its duty as such signatory of WTO convention. The researcher attempts to make a brief study into the Competition Law of US, UK and EU in support of important case laws.

**Competition Law under United States of America**

United States antitrust law is the body of laws that prohibits anti-competitive behavior (monopoly) and unfair business practices. Antitrust laws are intended to encourage competition in the marketplace. These competition law make illegal certain practices deemed to hurt businesses or consumers or both, or generally to violate standards of ethical behavior. Governmental agencies known as competition regulators, along with private litigants, apply the antitrust and consumer protection laws in hopes of preventing market failure. The term *antitrust* was originally formulated to combat "business trust s", now more commonly known as cartels. Other countries use the term "competition law". Many countries including most of the western world have antitrust laws of some form; for example the European Union has provisions under the Treaty of Rome to maintain fair competition, as does Australia under its Trade practices Act 1974. The first competition Law was the Combines Act of 1889 in Canada, which was later followed by the United States of America. 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 American companies wherein owners of stocks held in competing

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338 The term “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. The Interstate Commerce Act of 1887 began a shift towards federal rather than state regulation of big business. It was followed by the Sherman Antitrust Act of 1890, the Clayton Antitrust Act and the Federal Trade Commission Act of 1914, the Robinson-Patman Act of 1936, and the Celler-Kefauver Act of 1959. 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.) Advocates of strong antitrust laws argued the American economy to be successful requires free competition and the opportunity for individual Americans to build their own businesses. As Senator John Sherman 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.” Congress passed the Sherman Antitrust Act almost unanimously in 1890, and it remains the core of antitrust policy. The Act 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.

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companies transferred those stocks to trusts which then controlled the activities of those competitors with the view to coordinate their activities in regard to pricing, output, or other areas and thereby, to dominate the market. Such trusts were formed, for instance, in oil, sugar, and whiskey. The Sherman Act was a simple and a short statute and was interpreted by the case laws. The Sherman Act, 1890, attempts to sustain the competitive process. The Act prohibited contracts, combinations or conspiracies in restraint of trade\(^{339}\), and also prohibited monopolization or attempts or conspiracies to monopolize\(^{340}\). Thus the Act was designed to prevent consuming public from conspiracies and monopolies and also small competitors from unfair trade practices. The Act makes it illegal to try to restrain trade, or to form monopoly. The American Antitrust laws are State and Federal Laws created to prevent monopolies. Antitrust laws apply to both businesses and individuals. The philosophy behind the laws is that trusts and monopolies can stagnate markets and prevent others from engaging in healthy market competition. The essence of the Competition law is injury to the public and it is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that such an effect and is deemed to be unlawful. Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today. The Antitrust Division of the U.S. Department of Justice shares responsibility with the Federal Trade Commission (FTC) for enforcement of antitrust laws in USA. The Antitrust Division and the FTC have published extensive guidelines relating to specific areas of Antitrust Law to ensure compliance of the federal antitrust laws. The antitrust laws prescribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to

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\(^{339}\) Section 1 of the Sherman Act, 1890.

\(^{340}\) Section 2 of the Sherman Act, 1890.
protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up. The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed. The United States Supreme Court noted that in US vs Topco Associates, Inc that antitrust laws are the 'Magna Carta of free enterprises' which guarantees each business, no matter how small, the freedom to compete to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster."

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million. The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other

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practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act. Furthermore, the Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."

**Competition Law or antitrust Law has three main elements:**

- Prohibiting agreements or practices that restrict free trading and competition between businesses. This includes in particular the repression of free trade caused by cartels.
- Banning abusive behavior by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing tying, price gouging, refusal to deal and many others.
- Supervising the mergers and acquisition of large corporations, including some joint ventures Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to "remedies" such as an obligation to divest part of the merged business or to offer licenses or access to facilities to enable other businesses to continue competing.

**In USA, the following statutes prohibit anti-competitive agreements:**

1. **Sherman Act:** Section 1 prohibits agreements that constitute restraints of trade\(^{342}\) if they are on balance anti-competitive. The agreement can also be challenged under section 2 if the

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\(^{342}\) Standard oil company case One of the more well known trusts was the Standard Oil Company; John D Rockefeller in the 1870s and 1880s had used economic threats against competitors and secret rebate deals with railroads to build what was called a monopoly in the oil business, though some minor competitors remained in business. In 1911 the Supreme Court agreed that in recent years (1900–1904) Standard had violated the Sherman Act (see Standard Oil Co. of New Jersey v. United States). 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 ExxonMobil), Standard Oil of Indiana (Amoco), Standard Oil Company of New York (Mobil, again, later merged with Exxon to form ExxonMobil), of California (Chevron), and so on. In approving the breakup the Supreme Court
party allegedly indulging in anti-competitive practice has monopoly power and if the agreement anti competitively helps obtain or maintain such monopoly power.

2. **Federal Trade Commission Act**: Section 5 of the Federal Trade Commission Act prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce. The Federal Trade Commission can challenge a vertical anticompetitive agreement under this provision.

3. **Clayton Act**: Under Section 3 of this Act it is unlawful for any person to lease or make a sale of goods is made so as to substantially lessen competition or tend to create a monopoly in any line of commerce. The Act basically stipulates two requirements:

   a) Sales or discounts of goods that are conditional on the purchaser not dealing with rivals and

   b) Proof that their effect may be to substantially lessen competition.

4. **Robinson-Patman Act**: This is a US Federal Law that prohibits what were considered, at the time of passage, to be anticompetitive practices by producers, specifically price discrimination. It grew out of practices in which chain stores were allowed to purchase goods at lower prices than other retailers. The Act provided for criminal penalties, but contained a specific exemption for co-operatives. In general, the Act prohibits sales that discriminate in price on the sale of goods to equally-situated distributors when the effect of such sales is to reduce competition. The seller may not throw in additional goods or services. Injured parties or the US government may bring an action under the Act. The Anti-trust laws prohibit agreements in restraint of trade, monopolization and attempted monopolization, anticompetitive mergers and tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities. In *Technip S.A vs SMS Holding Pvt Ltd*[^343] court observed that the term covers an understanding as well as an agreement, and an

[^343]: (2005) 5 SCC 465

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added the “rule of reason”: not all big companies, and not all monopolies, are evil; and the courts (not the executive branch) are to make that decision. To be harmful, a trust had to somehow damage the economic environment of its competitors.
informal as well as a formal arrangement which leads to the purchase of shares to acquire control of a company. No written proofs of agreements are required, as writing has been done away with. The definition is designed in such a way as to produce a vast and sweeping coverage for joint and concerted anti-competitive actions. There is no need for an explicit agreement in cases of conspiracy where joint and collaborative action is pervasive in the initiation, execution and fulfillment of the plan. It has been a contentious issue as to what constitutes an agreement to come within the ambit of competition enquiry. Further, there is no need for an explicit agreement in writing but there should be consensus between the parties concerned also referred to as meeting of minds or concurrence of wills. It is sufficient that the parties to the agreement have expressed their joint intention to conduct themselves in the market in a specific manner. Anti-competitive agreements among competitors, such as price fixing and customer and market allocation agreements are typical types of restraints of trade prescribed by the antitrust laws. These type of conspiracies are considered pernicious to competition and are generally prescribed outright by the antitrust laws. Resale price maintenance by manufacturers is another form of agreement in restraint of people working together. Other agreements that may have an impact on competition are generally evaluated using a balancing test, under which legality depends on the overall effect of the agreement.

**US Antitrust laws and Cartels**

The term Cartel can be traced to Kartell from German origins ‘Cartello’ from Italian origins and the French term Cartel. Cartels came into English usage in the 16th Century to denote a written agreement between opposing armies for the exchange of prisoners. By analogy the word Kartell is used by German economists to signify a coalition that bought together hostile political parties. Later on this term came to mean an arrangement of business rivals for the purpose of regulating prices or output in the industry. This term is what the Americans came to refer to as ‘Trusts’ or ‘Combinations’. As per the Oxford English Dictionary the word Cartel was first used in English in 1902 in the Business sense to refer to what were formerly called “producers syndicates” or “trusts” in the sugar or steel industry.

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344 United states vs General Motors 384 US 127
In an economic sense the term Cartel refers to an association of two or more legal firms that unequivocally agree to coordinate their prices or output for the purpose of increasing their joint profits. According to OFT\textsuperscript{345} Cartel means: In its simplest terms, a cartel is an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal. Cartels are of different types internationally. The first type of cartel are called hard core cartels and are essentially made up of private producers who cooperate to control prices or allocate shares in world market. Another type of cartels are private export cartels wherein non state related producers from one country take steps to fix prices or engage in market allocation in export markets, but not in their domestic market. Essentially cartels are agreements to limit output with the object of increasing prices and profits. This is usually carried out in practice by means of price fixing, allocation of production or sharing geographic markets or product markets. Cartels restrict competition, wherein resources are misallocated and consumer welfare is reduced. The main provisions that prohibit cartels in the Sherman Act read as follows:

‘Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.’\textsuperscript{346} The American anti cartel enforcement is among the best examples where heavy penalties are a part of the law including individual criminal sanctions. The criminal sanction for cartel activity is an important feature which helps building an effective competition policy. In early 90s, attempts by the US to investigate cartel activity in other countries proved very difficult and invited criticism as improper application of domestic anti trust law. Indeed, some European countries even passed ‘blocking statutes” in order to prevent their anti-trust authority and investigative

\begin{itemize}
\item \textsuperscript{345} [http://www.oft.gov.uk/advice_and_resources/resource_base/cartels/what-cartel]
\item \textsuperscript{346} United States v. A. Alfred Taubman2323 Cr. No. 01 CR 429 (S.D.N.Y. 2001)\end{itemize}
agencies from cooperating with US enforcement action outside American boarders. Cartel investigation requires international cartel cooperation mechanism to collect evidence. There would be situation when case theories and background information on markets globally are exchanged but which are not covered by confidentiality constraints but which can be significantly helpful for Carterlisation. Such information would be transnational. Cooperation agreements with countries which generally have operating cartel and with countries which are victims of cartel could be entered into. For instance, Brazil has cooperation agreement with Argentina, Portugal, Russia and US. Mutual Legal Assistance Treaty may also be used as cooperation tool which will allow for procedures abroad such as taking testimony or oral statement of persons, executing requests for search and seizure, etc. seeking and organizing International Cooperation and using bilateral or multilateral agreements for gathering evidence are progressive steps towards success in efforts against cartels.

**International Vitamin Cartel**

Vitamin constitutes an important ingredient /product supplier to the food processing industry and the animal feed industry. Also, a small amount of vitamin is supplied to the consumers directly. Food companies blend raw vitamins into bread, rice and juice. The animal food industry buys bulk vitamins to produce healthier and fast growing livestock. An example would be huge chicken farms. Producers of vitamins formed a cartel dividing up the world market for different types of vitamins during the 90s. The conspiracy appears to have begun in 1989, when executives at Roache AG and BASF begun holding talks about price fixing. The cartel operated for over 10 years in a fairy stable manner. There were frequent high level executive meeting and detailed arrangements involved in the administration of the cartel, including careful budgeting, market allocation, and price fixing and so on. The cartel was prosecuted. Roche paid fines of US $ 50 Million and the total fines collected exceeded US $1 billion in the US alone. The overcharge paid by 90 countries importing vitamins were estimated. Damage-wise, 10 European countries suffered an overcharge of about US $ 660 million. India incurred overcharges of more than US

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$25 million. All the 90 importing countries put together suffered overcharges by US $2700 Million during the 90s. The financial impact of the vitamin cartel, or for that matter of other cartels, is much more than the dollar value, if the purchasing power parity ratio is reckoned. In the case of India, for instance, the purchasing power parity ratio is 8.7. The damaging of US$ 25 Million translates into a whopping US $ 220 Million. The poor countries directly or indirectly bear the cost of this unlawful practice in terms of higher prices and reduces choice

**Rule of Reason**

The rule of reason is a doctrine developed by the US Supreme Court in its interpretation of the Sherman Act. The rule, stated and applied in the case of *Standard Oil Co. v. US*, is that only combinations and contracts unreasonably restraining trade are subject to actions under the antitrust laws and that size and possession of monopoly power are not illegal. Some of *Standard Oil*'s critics, including the lone dissenter Justice Harlan, argued that *Standard Oil* and its Rule of Reason was a departure from previous Sherman Act case law, which purportedly had interpreted the language of the Sherman Act to hold that all contracts restraining trade were prohibited, regardless of whether the restraint actually produced no ill effects. These critics emphasized in particular the Court's decision in *United States v. Trans-Missouri Freight Association*[^348] which contains some language suggesting that a mere restriction on the autonomy of traders would suffice to establish that an agreement restrained trade within the meaning of the Act. Others argued that the decision and the principle it announced was entirely consistent with earlier case law. Moreover, the U.S. Supreme Court has reaffirmed Standard Oil's conclusion that analysis under the Rule of Reason should focus on the economic, and not social, consequences of a restraint. The Court also retained the per se rule against tying contracts, although it has raised the threshold showing of market power that plaintiffs must make to satisfy the rule's requirement of economic power.

[^348]: 166 US 290 (1897)
Concept of Abuse of Domaince under US Antitrust Laws

Monopolization and attempted monopolization are offenses that may be committed by an individual firm, even without an agreement with any other enterprise. Unreasonable exclusionary practices that serve to entrench or create monopoly power can therefore be unlawful. Allegations of predatory pricing by large companies can be the basis for a monopolization claim, but it is difficult to establish the required elements of proof. Large companies with huge cash reserves and large lines of credit can stifle competition by engaging in predatory pricing that is, by selling their products and services at a loss for a time, in order to force their smaller competitors out of business. With no competition, they are then free to consolidate control of the industry and charge whatever prices they wish. At this point, there is also little motivation for investing in further technological research, since there are no competitors left to gain an advantage over. High barriers to entry such as large upfront investment, notably named sunk costs, requirements in infrastructure and exclusive agreements with distributors, customers, and wholesalers ensure that it will be difficult for any new competitors to enter the market, and that if any do, the trust will have ample advance warning and time in which to either buy the competitor out, or engage in its own research and return to predatory pricing long enough to force the competitor out of business. The US Courts require proof that there is pricing below cost or below an appropriate measure as well as that there is a dangerous probability of recouping the investment in the below-cost prices. In Cargill, Inc. v. Monfort of Colorado, Inc\textsuperscript{349}, it was observed that predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws.

\textsuperscript{349} 479 U.S. 104 (1986),
**Microsoft case**

This certainly one of the most published cases in the history of anti-trust policy's. In May 1998, the US Department of Justice and a group of states filed separate complaints asserting anti-trust violations by Microsoft. The company's alleged anti-competitive practices dealt with business practices related to its internet browser, Internet Explorer (IE) which competed with Netscape Navigator, initially the leading browser. A highly publicized trial found that Microsoft had strong-armed many companies in an attempt to prevent competition from the Netscape browser. In April 2000, the District Court issued its conclusions of law. Microsoft was found liable for three separate violations of anti-trust laws: (I) maintenance of monopolization in the market of Intel-compatible operating systems (OS) for personal computers (PC), (an infringement of section 2 of the Sherman Act); (II) attempted monopolization of the internet browser market (again violation of sec 2 of Sherman Act); (III) tying its windows OS with IE (in violation of section 1). The trial court ordered Microsoft split in two to punish it, and prevent it from future misbehavior; however the Court of Appeals reversed the decision, removed the judge from the case for improperly discussing the case while it was still pending with the media. With the case in front of a new judge, Microsoft and the government settled, with the government dropping the case in return for Microsoft agreeing to cease many of the practices the government challenged. In his defense, CEO Bill Gates argued that Microsoft always worked on behalf of the consumer and that splitting the company would diminish efficiency and slows the pace of software development. Microsoft filed an appeal and the Court of Appeals (CA) issued its decision in June 2001. It ruled that (I) Microsoft was guilty of maintenance of monopolization for some of the business practices it had adopted (II) it was not guilty of attempted monopolization, and (III) found that the tying allegations should be analyzed under rule of reason, rather than under a per se rule as done under District court and remanded the case to the District Court for an assessment on tying. Thus according to the judgment, Microsoft cannot regulate the market by imposing its product and services on people. It can no longer prevent the market from functioning properly and that computer user and therefore entitled to benefit from choice, more innovative products and more competitive prices.
US Antitrust laws and Merger control

The Clayton Act is the primary legislation in the US governing mergers and Acquisitions. The Clayton Act applies to both mergers with immediate anti-competitive effects and those that have a future probability of substantially reducing competition. Section 7 of the Clayton Act prohibits the direct or indirect acquisition by one person of all or any part of the stock or assets of another person where in any line of commerce or in any activity affecting commerce in any section of the United states, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. Both the acquiring and acquired entities must be persons that are engaged in commerce or in any activity affecting commerce. Section 7 is probably the most prominent, substantive provision of the Clayton Act. Whereas the Sherman Act was enacted to prohibit concerted activity which actually restraint trade, this provisions directed at preventing activity in its incipiency which may tend to restraint trade. The merger guidelines issued by the Department of Justice offer an indication of the ways in which mergers and acquisition s will be analyzes by the antitrust division and the Federal Trust Commission although they are not binding upon the courts, they are considered to be persuasive. Section 7A -- contains the ‘premerger notification provision added o the Clayton Act in 1976 to allow the antitrust enforcement agencies the opportunity to examine potential mergers/ acquisition prior to their consummation. It is enforced by the both the department of Justice and Federal Trade Commission. As originally enacted the provision required notification, with certain, enumerated exceptions of all mergers or acquisition transaction by persons in or affecting commerce in which either party had nets sales or assets of $ 10 million and other party had net sales or assets of $ 100 million. The receiving agency had 30 days from the time of notification (15 days in the case of tender offers) to review the proposed transaction which could not be consummated during that time unless the reviewing agency granted an early termination of the waiting period. Prior to the conclusion of that time, the reviewing agency was authorized to seek a second round of information, which extended the original waiting period of 20 days. The focus of the current premerger notification provision is more clearly directed at the consequences of a merger / acquisition transaction notification must occur when the transaction will result in the acquiring party s holding assets or voting securities (1) in excess
of $200 million or (2) between $50 million and $200 million plus the assets or voting securities of the acquired party. The current provision also extends for merger transaction, the period for revision of material submitted in response to a second request for information from 20 to 30 days and establishes based on the size of the proposed transaction, a sliding scale of fee required in order for pre-merger review to begin. The penalty for failure to comply with the premerger notification remains at $10,000 for each day during which [a person received to report] is in violation of the provision. Previously, divestiture was the only remedy available to courts when transaction violated section 7 of the Clayton Act. As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify to the two federal antitrust agencies of their plans in advance\textsuperscript{350}. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future. In addition to these federal statutes, most states have antitrust laws

\textsuperscript{350} The Hart Scott Rodino Act prescribe the threshold limits and it states:

No person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under sub-section (d) 91) of this section and the waiting period described in sub-section (b) (1) of this section has expired, if –

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

2) As a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person---

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

(b) (i) In excess of $50,000,000 (as so adjusted and published) but not in excess of $200,000,000 (as so adjusted and published) and;

(ii) (I) Any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $10,000,000 (as so adjusted and published) or more;

(II) Any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;

(iii) any voting securities or assets of a person with annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more.
that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

**Enforcement of United States Antitrust Law**

In the United States, there are both state and federal antitrust laws. Enforcement of these laws takes three forms: First, the federal government, via both the Antitrust Division of the United States Department of Justice and the Federal Trade Commission, can bring civil lawsuits enforcing the laws. The United States Department of Justice alone may bring criminal antitrust suits under federal antitrust laws. Perhaps the most famous antitrust enforcement actions brought by the federal government were the break-up of AT & T’s local telephone service monopoly in the early 1980s and its actions against Microsoft in the late 1990s. Second, state attorney general may file suits to enforce both state and federal antitrust laws. Third, private civil suits may be brought, in both state and federal court, against violators of state and federal antitrust law. Federal antitrust laws, as well as most state laws, provide for treble damages against antitrust violators in order to encourage private lawsuit enforcement of antitrust law. Thus, if a company is sued for monopolizing a market and the jury concludes the conduct resulted in consumers’ being overcharged $200,000, that amount will automatically be tripled, so the injured consumers will receive $600,000. The United States Supreme Court summarized why Congress authorized private antitrust lawsuits in the case *Hawaii v Standard Oil Co of Calif*[^351], where in it was held that;“Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times

[^351]: 405 U.S. 251, 262 (1972):
the amount of their damages, Congress encouraged these persons to serve as "private attorneys general." Additionally, the federal government also reviews potential mergers to attempt to prevent market concentration. As outlined by the Hart–Scott-Radino Antitrust Improvement Act, larger companies attempting to merge must first notify the Federal Trade Commission and the Department of Justice's Antitrust Division prior to consummating a merger. These agencies then review the proposed merger first by defining what the market is and then determining the market concentration using the Herfindahl–Hirschman Index (HHI) and each company's market share. The government looks to avoid allowing a company to develop market power, which if left unchecked could lead to monopoly power. Competition law has already been substantially internationalized along the lines of the US model by nation states themselves; however the involvement of international organizations has been growing. Increasingly active at all international conferences are the United Nations Conference on Trade and Development (UNCTAD)\(^\text{352}\) and the Organization for Economic Cooperation and Development (OECD)\(^\text{353}\), which is prone to making neo-liberal recommendations about the total application of competition law for public and private industries. Chapter 5 of the post war Havana Charter contained an Antitrust code but this was never incorporated into the WTO's forerunner, the General Agreement on Tariffs and Trade 1947. Office of Fair Trading Director and Professor Richard Whish wrote skeptically that it "seems unlikely at the current stage of its development that the WTO will metamorphose into a global competition authority." International competition agencies are

\(^{352}\) 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. The organization's goals are to "maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis." (from official website). The creation of the conference was based on concerns of developing countries over the international market, multi-national corporations, and great disparity between developed nations and developing nations.

\(^{353}\) 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 reconstruction of Europe after World War II. Later, its membership was extended to non-European 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
also likely to become more efficient and competent with greater co-operation. “At the investigation stage, beneficial co-operation could include assistance in (or joint) evidence-gathering, exchanging information, discussing common issues, one agency deferring to another, and so on. If a case goes forward, co-operation might involve parallel proceedings or one agency deferring to another, joint settlement discussions with a multinational enterprise, co-ordination with respect to remedies sought, and so on.”

**Issues regarding extra-territorial jurisdiction under Competition Law:**

The application of a State’s antitrust laws to conduct outside that state raises several key issues. First, it must be determined whether the law of a particular country (or subdivision thereof) extends to conduct taking place outside its borders. Second, it must be confirmed whether any domestic court or tribunal has jurisdiction to hear the matter. Third, if the law does have extraterritorial reach and a domestic court or tribunal has jurisdiction to hear the case, practical problems of enforcement will arise, both with respect to the obtaining of evidence and the implementation of any fines or penalties. In the age of globalization it is possible to distinguish six basic approaches towards potential solutions regarding conflicts in competition law: firstly, an agreement on a binding universal antitrust code; second, a combination of minimum standards and a mechanism called international procedural initiative; third, a harmonization of national antitrust laws; fourth, a “plurilateral agreement on competition and trade” as put forward by the EU; fifth, a strengthening of effective networks of peers (notably enforcement agencies); and sixth, a “plurilateral framework” combined with binding “positive comity” and dispute solution instruments.

**Extra territorial application and enforcement of US Competition Law**

World problem needs world solution. The main U.S. antitrust statute, the Sherman Act, is a criminal statute in that violations of it are criminal offences. However, it can also be enforced through private action. Because the Sherman Act dates from 1890 its extraterritoriality reach inevitably became an issue before the EEC even existed. The ‘Effects Doctrine’ propounded on the US courts has provided the central concept around which the discussion of extraterritoriality in competition law is usually conducted. Two
points about US law should be noted at the outset. First, there is a multiplicity of actors in US antitrust law. The federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are not decision makers as is the European Commission as antitrust law is enforced in the ordinary courts. The Sherman, Clayton and FTC Acts all apply to ‘commerce with the foreign nations’. The origin of modern competition policy can be traced back to the end of the 19th century, mainly as a reaction to the formation of trusts in the United States. The Sherman Act debates began in 1888. The United States has two agencies enforcing competition law on the national level. The interrelation of trade and competition is increasingly becoming a subject for the international trading community. The Kodak-Fuji dispute between the United States and Japan exemplifies the problem of conflict in competition law. In this case, the United States attempted to use Section 301 of the Trade Act of 1974 to address the Japanese distribution structure. The United States lost the dispute settlement procedure in the WTO. However, the United States apparently did not attenuate its pressure upon Japan to gain more market access for American film products in the Japanese film market. The case exemplifies the thorny issues pertaining to perceived private restraints and shows how unilateral action may lead targeted countries to feel that their sovereignty is at stake, which may give rise to unpleasant trade disputes. The issues pertaining to trade and competition and a number of pertinent antitrust cases are set out as a starting point. Harmonization, Co-operation and the


356 The ‘trust’ was originally a device by which several corporations engaged in the same general line of business might combine for their mutual advantage, in the direction of eliminating destructive competition, controlling the output of their commodity and regulating and maintaining its price, but at the same time preserving their separate individual existence, and without any consolidation of any manufacturing industry. See; Massimo Motta, “COMPETITION POLICY: THEORY AND PRACTICE”, Cambridge University Press, 2004, p.


principle of “Positive Comity” are assessed with a view to identifying possible solutions. While it is not intended that international competition regulation could or should replace trade rules, consideration is given to whether trade and competition policy share the same objectives. But while the former concentrate on tariff and non-tariff barriers to prima facie access, the latter focus on de facto equality of chances of success. As confirmed by the Kodak-Fuji Panel WTO rules only apply to measures adopted by governments. Private anticompetitive practices would only be of relevance in those rare cases in which a causal link can be established between such practices and measures actually adopted by the government. For the rest, at present, WTO members are under no commitment to adopt or enforce antitrust and competition laws.

**Origin of Effects Doctrine:**

The Effects Doctrine is applicable only when the action taken outside the Country has ‘**direct, substantial, and reasonably foreseeable**’ effects within the Country. Whether this Doctrine is against the spirit of International Law? In International Law there is no standard to determine the ‘direct, substantial, and reasonably foreseeable’ effects within the Country’. Therefore, this Doctrine is not against the spirit of International Law. In the first half-century following the enactment of the Sherman Act the US courts were diffident about applying the rules of extraterritoriality. Sherman Act\(^359\) and FTC Act\(^360\) jurisdiction may be asserted over export trade and purely extraterritorial foreign trade activity only if the defendant’s conduct has a “direct, substantial and reasonably foreseeable or export trade of a person engaged in U.S. export trade. Not surprisingly, the extraterritorial application of US antitrust laws met with hostility from other States. In Timberlane\(^361\) the Ninth Circuit Court of Appeals considered the notion of ‘international comity’ in this context. ‘Comity’ means living peacefully with other nations in mutual respect and accommodating their interests or, as one authority puts it, the ‘rules of politeness, convenience and goodwill

\(^359\) See; Sherman Act, 1890 which is applicable in United States of America.

\(^360\) See; Federal Trade Commission Act, 1914 which is also applicable in United States of America.

\(^361\) Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
observed by States in their mutual intercourse without being legally bound by them\textsuperscript{362}. The so-called effects doctrine has gained more and more support internationally throughout the last 20 or 30 years. Following the initial Alcoa decision of the US Court for the 2\textsuperscript{nd} Circuit\textsuperscript{363}, it has specifically been approved by the US Supreme Court\textsuperscript{364} and, in the 1950s, by the German legislature in what is now § 130 (2) of the German Act against Restraints on Competition\textsuperscript{365}. After a long period of hesitation, Commonwealth countries such as the United Kingdom\textsuperscript{366}, Australia and New Zealand have adopted statutory rules to the same effect and this is also true for many European states including France, Italy, Denmark, and Poland. Sweden and Switzerland. In South-America there is evidence in Argentina, Brazil and Chile of the recognition of the effects doctrine. In practice, the enforcement of the respective competition statutes may differ in the various countries mentioned above. But there is general agreement that the national competition statute applies to anti-competitive conduct if it has direct, substantial and foreseeable domestic effects. Until about 20 years ago there were many countries which held the effects doctrine to be in conflict with public international law and in particular with the principles of territoriality and non-intervention. This objection has faded away

\textsuperscript{362} Oppenheim’s International Law (ed. R.Y. Jennings and A. Watts) (9th edn), I, 34 n.1. Page 27 of 86

\textsuperscript{363} U. S. v. Aluminium Co. of America, 148 F. 2d 416 (2nd Cir. 1945).

\textsuperscript{364} Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 = 125 L. Ed. 2d. 612, 638 (1993).

\textsuperscript{365} Section 130 (2) of the German Act against Restraints on Competition (GWB) reads as follows: “This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act.”. Translation taken from the German Law Archive, available at: <www.iuscomp.org/gla/>.

\textsuperscript{366} Sec. 2 subsec. 3 of the Competition Act 1998 reads as follows: “Subsection (1) [the prohibition of anticompetitive behavior] applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom”. This provision represents a codification of the case law of the ECJ as to the geographical scope of the EC competition rule, see Wish, Competition Law (4th ed. 2003) 441 et seq.
Case Laws:

In Hartford Fire Insurance\(^{367}\) in 1993 the Supreme Court recognized the claims of Comity\(^{368}\) but took a robust approach to applying the effects doctrine. Re-insurers based in London were alleged to have agreed with parties in the USA to boycott certain types of insurers, which meant that some types of insurance cover were not available in the USA\(^{369}\). The Supreme Court, by majority, held that the Sherman Act could be applied to the acts of the British insurers. Justice Souter, delivering the majority opinion, said 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\(^{370}\).

The effects doctrine was applied in Nippon Paper\(^{371}\), the Antitrust Division of the Department of Justice commenced criminal proceedings under the Sherman Act against a Japanese company for a cartel fixing the price at which fax paper should be sold in the USA. The conspirators were all Japanese and all the activities of the cartel—the meetings, monitoring, and the sales of distributors with instructions about the resale price in the USA— took place in Japan. This was the first case in which extraterritorial criminal jurisdiction had been taken under the Sherman Act. It showed that the USA had lost none of its enthusiasm for the application of its antitrust laws beyond its borders\(^{372}\).


\(^{368}\) ‘Comity’ means living peacefully with other nations in mutual respect and accommodating their interests or, as one authority puts it, the ‘rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them.

\(^{369}\) This stemmed from re-insurers’ worries about certain long term risks, such as those arising from environmental pollution, where the claims could come up decades later.


Consumer protection laws are federal and state statutes governing sales and credit practices involving consumer goods. Such statutes prohibit and regulate deceptive or unconscionable advertising and sales practices, product quality, credit financing and reporting, debt collection, leases, and other aspects of consumer transactions. The goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals such as buying goods or borrowing money, on an even par with companies or citizens who regularly engage in business\textsuperscript{373}. The Federal Trade Commission (FTC), the largest federal agency that handles consumer complaints, regulates unfair or deceptive trade practices. Even local trade practices deemed unfair or deceptive may fall within the jurisdiction of FTC laws and regulations when they have an adverse effect on interstate commerce. In addition, every state has enacted consumer protection statutes, which are modeled after the Federal Trade Commission Act.\textsuperscript{374} These acts allow state attorneys, along with general and private consumers, to commence lawsuits over false or deceptive advertisements, or other unfair and injurious consumer practices. Many of the state statutes explicitly provide that courts turn to the federal act and interpretations of the FTC for guidance in construing state laws. The FTC standard for unfair consumer acts or practices has changed with time. In 1964, the agency instituted criteria for determining unfairness when it enacted its cigarette advertising and labeling rule. A practice was deemed unfair when it (1) offended public policy as defined by statutes, Common Law, or otherwise; (2) was immoral, unethical, oppressive, or unscrupulous; and (3) substantially injured consumers. The FTC changed the standard in 1980. Now, substantial injury of consumers is the most heavily weighed element, and it alone may constitute an unfair practice. Such an unfair practice is illegal pursuant to the Federal Trade Commission Act unless the consumer

\textsuperscript{373} In 1972, Congress established the Consumer Product Safety Commission (CPSC). It is the job of the CPSC to protect consumers from faulty or dangerous products by enacting mandatory safety standards for those products. The CPSC has the authority to ban products from the marketplace or to recall products (when a product is recalled, it is removed from the shelves or sales lots, and consumers may be able to return it to the manufacturer or place of purchase for repair, replacement, or a refund). Still, the agency has trouble protecting consumers from hazardous products of which it is unaware.

\textsuperscript{374} (15 U.S.C.A. § 45(a)(1)).
injury is outweighed by benefits to consumers or competition, or consumers could not reasonably have avoided such injury. The FTC may still consider the public policy criterion, but only in determining whether substantial injury exists. Finally, the FTC no longer considers whether conduct was immoral, unethical, oppressive, or unscrupulous. The FTC has also developed, over time, its definition of deceptive acts or practices. Historically, an act was deceptive if it had the tendency or capacity to deceive, and the FTC considered the act's effect on the ignorant or credulous consumer. A formal policy statement made by the FTC in 1988 changed this definition: currently, a practice is deceptive if it will likely mislead a consumer, acting reasonably under the circumstances, to that consumer's detriment. False Advertisement is often the cause of consumer complaints. At common law, a consumer had the right to bring an action against a false advertiser for Fraud, upon proving that the advertiser made false representations about the product, that these representations were made with the advertiser's knowledge of or negligent failure to discover the falsehoods, and that the consumer relied on the false advertisement and was harmed as a result. For example, the FTC can issue a cease and desist order, forcing a manufacturer to stop advertising, or compelling the advertiser to make corrections or disclosures informing the public of the misrepresentations.

**Consumer remedies under US Consumer Protection Act**

Laws protecting consumers vary in the remedies they provide to consumers for violations. Many federal laws merely provide for public agencies to enforce consumer regulations by investigating and resolving consumer complaints. For example, in the case of a false advertisement, a common remedy is the FTC-ordered removal of the offensive advertisements from the media. In other circumstances, consumers may be entitled to money damages, costs, and attorneys' fees; these remedies can be effective in a case involving a breach of warranty. Depending on the amount of damages alleged, consumers may bring such actions in small-claims courts, which tend to be speedier and less expensive than trial courts. The Alternative Dispute Resolution (ADR) is another option for consumers. Some states pass consumer protection statutes that require some form of ADR—usually Arbitration or mediation—before a consumer can seek help from the courts.
Finally, when a large number of consumers have been harmed in the same way as a result of the same practice, they may join in a Class Action, a single lawsuit in which one or more named representatives of the consumer group sue to redress the injuries sustained by all members of the group.

**Enforcement of extraterritorial jurisdiction under Indian Competition Law in the absence of any Agreement or MOU**

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

**Basis of extraterritorial jurisdiction**

**Subject-matter jurisdiction** and **enforcement jurisdiction** are two elements of extraterritorial jurisdiction. In this example if any conduct taken in USA affects the conduct inside India, it has subject matter jurisdiction. On the basis of subject-matter jurisdiction the Central Government can declare that summons to be served on any officer in USA or in criminal cases process can be started under Criminal Procedure Code. The Competition

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375 Upto 06-03-2010 India has not signed any MOU or has not entered into any bilateral Agreement with regard to Competition law. But for future it is expected to do so.

376 Central can declare it by notification in the Official Gazette.

377 See; Order V, Rule 26A. **Summonses to be sent to officer to foreign countries** “Where the Central Government has, by notification in the Official Gazette, declared in respect of any foreign territory that summonses to be served on defendants actually and voluntarily residing or carrying on business or personally working for gain in that foreign territory may be sent to an officer of the Government of the foreign territory specified by the Central Government, the summonses may be sent to such officer, through the Ministry of the Government of India dealing with foreign affairs or in such other manner as may be specified by the Central Government; and if such officer returns any such summons with an endorsement purporting to have been made by him that the summons has been served on the defendant, such endorsement shall be deemed to be evidence of service."

378 See; Section 105B of Code of Criminal Procedure, 1973.................105B. Assistance in securing transfer of persons
Commission should under Section 32 read with Order V, Rule 26A. **But only mentioning extraterritorial jurisdiction under Section 32 is not sufficient unless subject matter jurisdiction is actually enforced.** For this purpose the second element of extraterritorial jurisdiction i.e. ‘**Enforcement jurisdiction**’ comes into play. ‘Enforcement jurisdiction can be exercised by a State in following situation:

1. If there is any MOU or

2. If there is any Bilateral Agreement or

3. If there is any Multilateral Agreement or;

4. If there is any international principle recognized by States.

In this hypothetical case the ‘Effects Doctrine’ may be taken into account as it well recognized Principle in USA recognized by US Supreme Court in 1945 as well as by other

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(1) Where a court in India, in relation to a criminal matter, desires that a warrant for arrest of any person to **attend or produce a document or other thing issued by it shall be executed in any place in a contracting, State, it shall send such warrant in duplicate in such form to such Court, Judge or Magistrate, through such authority, as the Central Government may, by notification, specify in this behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

(2) **Not withstanding anything contained in this Code, if, in the course of an investigation or any inquiry into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that the attendance of a Person who is in any place in a contracting State is required in connection with such investigation or inquiry and the court is satisfied that such attendance is so required, it shall issue a summons or warrant, in duplicate, against the said person to such court, Judge or Magistrate, in such form as the Central Government by notification, specify in this behalf, to cause the same to be served or executed.**

(3) Where a court in India, in relation to a criminal matter, has received a warrant for arrest of any person requiring him to attend or attend and produce a document or other thing in that court or before any other investigating agency, issued by a court, Judge or Magistrate in a contracting State, the same shall be executed as if it is the warrant received by it from another court in India for execution within its local limits.

(4) Where a person transferred to a contracting State pursuant to sub-section (3) is a prisoner, in India, the court in India or the Central Government may impose such conditions as that court or Government deems fit.

(5) Where the person transferred to India pursuant to sub-section (1), or sub-section (2) is a prisoner in a contracting State, the court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.
States. After 1945 in several cases\(^{379}\) in the absence of any Agreement US Supreme Court exercised extraterritorial jurisdiction with regard to competition law\(^{380}\). Initially it was resisted\(^{381}\) by other States but it has been recognized by most of the States. Although only the humble request can be made by the Competition Commission of India and the US Authority can accept this request but it cannot be bound in the absence of any Bilateral or Multilateral Agreement.

**United Kingdom's Competition Law**

**Introduction**

The UK Competition Act, 1998 is the recent Act, which came into force on March 1\(^{st}\) 2000. It is more closely in tune with the competition law of European Commission. It has prohibitions that are in line with Articles 81 and 82 of the Treaty of Rome. One key difference is that mergers are required to be compulsorily notified under the European Commission Law but not under the UK law. The relevant law regarding competition in UK is contained in two statutes:

(1) The Competition Act 1998 and

(2) The Enterprise Act 2002

The United Kingdom Competition law has undergone a great deal of change. The Competition Act prohibits agreements, business practices and behavior that have or intended to have a damaging effect on competition in UK. The 1998 Act sets out two key prohibitions against anti-competitive agreements and cartels, and abuse of dominance, known as the Chapter I and Chapter II, prohibitions respectively. This has greatly expanded the scope for the competition authorities to intervene to prevent anti-competitive

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\(^{380}\) Such jurisdiction was exercised on the basis of ‘Effects Doctrine’.

behavior. The 1998 Act also gave the authorities greater teeth in the form of the powers to impose penalties of up to 10 percent of turnover and new powers of investigation, including the power to conduct unannounced Dawn raids. The 2002 Act updated two other aspects of the UK Competition regime: merger control and market investigations. The merger control framework in the UK does not require the merging parties to seek clearance prior to completing the merger. When a merger is found potentially to affect competition following a first-phase review by the Office of Fair Trading, a different body, the Competition Commission carries out the second phase of review. (Discussed in detail in the later part)

The Chapter 1 of the Competition Act 1998 prohibits anti-competitive agreements which have an appreciable effect on competition. This chapter includes collusion by competitors on consumers, markets, prices, or output. The Competition Commission provides the carrot and stick approach while enforcing the Act. The stick is the substantial fine for anticompetitive behavior while the carrot refers to the leniency program which provides incentives for those whistleblowers that cooperate with the authorities to have their fines reduced as much as 100 per cent. The Enterprise Act came into force in 2003 and provides a bigger stick with greater penalties to combat anti-competitive behavior. The measures adopted by the Enterprise Act to control anti-competitive behavior include a criminal cartel offence carrying sentence up to five years imprisonment. It is directed at individuals as well as operates against companies involved in cartel agreements. The Act also disqualifies company directors for breach of UK or EU competition law. The most essential part of the Act is the increased powers to investigate anti-competitive behavior. In the UK, anti-competitive behavior is prohibited under Chapters I and II of the Competition Act 1998 and may be prohibited under Articles 81 and 82 of the EC Treaty. These laws prohibit anti-competitive agreements between businesses and the abuse of a dominant position by a business. Businesses that infringe competition law may face substantial financial penalties of up to ten per cent of their worldwide turnover. Cartels are a particularly damaging form of anti-competitive activity. Their purpose is to increase prices by removing or reducing competition and as a result they directly affect the purchasers of the goods or services, whether they are public or private businesses or individuals. Cartels also have a damaging

effect on the wider economy as they remove the incentive for businesses to operate efficiently and to innovate. Section 2 of the Competition Act 1998, deals with Agreements preventing, restricting or distorting competition and it reads as follows:

(1) Subject to section 3\textsuperscript{383}, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

\textsuperscript{383} Section 3 of the Competition Act 1998 deals with Excluded agreements:

(1) The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of—

(a) Schedule 1 (mergers and concentrations);
(b) Schedule 2 (competition scrutiny under other enactments);
(c) Schedule 3 (planning obligations and other general exclusions); or
(d) Schedule 4 (professional rules).

(2) The Secretary of State may at any time by order amend Schedule 1, with respect to the Chapter I prohibition, by—

(a) providing for one or more additional exclusions; or
(b) amending or removing any provision (whether or not it has been added by an order under this Subsection).

(3) The Secretary of State may at any time by order amend Schedule 3, with respect to the Chapter I prohibition, by—

(a) providing for one or more additional exclusions; or
(b) amending or removing any provision—

(i) added by an order under this subsection; or
(ii) included in paragraph 1, 2, 8 or 9 of Schedule 3.

(4) The power under subsection (3) to provide for an additional exclusion may be exercised only if it appears to the Secretary of State that agreements which fall within the additional exclusion—

(a) do not in general have an adverse effect on competition, or
(b) are, in general, best considered under Chapter II or the [1973 c. 41.] Fair Trading Act 1973.
(a) May affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which—

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make 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.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(6) Subsection (5) does not apply where the context otherwise requires.

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(5) An order under subsection (2)(a) or (3)(a) may include provision (similar to that made with respect to any other exclusion provided by the relevant Schedule) for the exclusion concerned to cease to apply to a particular agreement.

(6) Schedule 3 also gives the Secretary of State power to exclude agreements from the Chapter I
(7) In this section “the United Kingdom” means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

(8) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter I prohibition”.

The Enterprises Act 2002 established The Competition Appeal Tribunal, as a fully independent judicial body having the power to review administrative decisions taken in competition cases by the UK authorities. The Tribunal is a specialist court which has among its member’s economists, accountants and business people, as well as lawyers. In relation to the application of the prohibitions set out in the 1998 Act and the EC Treaty, the Tribunal has a full appeal jurisdiction, and in appropriate case, takes its own decision on the application of the law. The Tribunal also hears, on a judicial reviews basis, challenges to decisions taken by the OFT or the Competition Commission in relation to mergers or market investigations. Thus, the changes introduced by the 1998 and 2002 Acts were designed, in particular, to rationalize the control of anti-competitive agreements and abuse of dominance, to harmonize with the EC law; to strengthens the powers of competition authorities; to distance competition law enforcement from the possibility of political influence; and to replace tests based on “public interest” with clearer, more economic, concepts of competition. The relevant authorities also gained significant additional financial resources and staff, in order to support the new enforcement powers granted under the two Acts.

**Harmful Effects caused by Cartels**

The damage caused by cartels to the economy and consumer welfare is substantial and has been underestimated for a long time. It is important to realize how harmful cartel activity is. The OECD in its recent Report on Hard Core Cartels have reported an average increase from price fixing to be around ten per cent of the selling price and the corresponding

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385 The Tribunal’s power to review merger decisions is set out in section 120 of the 2002 Act and its power to review decisions relating to market investigations is set out in section 179 of the 2002 Act.
386 See OECD 2000
reduction of output to be as high as twenty per cent. In 2001 the Director General of the British Chambers of Commerce voiced his support for the then to be proposed criminal penalties against corporate executives which aptly describes the inherent harm caused by cartels as follows\textsuperscript{387}:

"If there is a guiding principle that dictates the way we do business in the UK it is that it should be conducted fairly. Anti competitive practices create weak markets, protect the inefficient, deprive us of choice, stifle innovation and support bad practice. They defraud customers and break the will of those business people who work hard to pursue their ambitions. It is a right that managers should also face sanctions, because they can gain significantly if the companies they work for make excess profits – it feeds through into executive bonuses and share options. Those operating a cartel are engaging in theft and should face a similar action”.

Also the OECD in its third hard core cartel report issued in 2005 recommended that governments consider the introduction and imposition of criminal sanctions against individuals to enhance deterrence. A number of jurisdictions which includes Canada, Ireland, United Kingdom, Japan, and Australia already have or in the process of adopting laws providing for Criminal sanctions. The American anti cartel enforcement as mentioned above is among the best examples where heavy penalties are a part of the law including individual criminal sanctions. The criminal sanction for cartel activity is an important feature which helps building an effective competition policy.

**UK Competition Act and Abuse of Dominance**

Abuse of Dominance” has not been defined in the UK Competition Act. As is the case with the Treaty of the European Communities, the UK Act lays down the conducts which if engaged in by dominant undertakings would amount to the abuse of dominance. The definition of abuse of dominance as laid down by the ECJ in the Hoffman case has been cited and followed by the English Competition Appeal Tribunals [Pharmaceutical Holdings v. Director General of Fair Trading\textsuperscript{388}. The treaty of the EC does not contain an express definition of abuse of dominance but merely lists certain conducts which, if engaged in by a

\textsuperscript{387} Ibid 11
\textsuperscript{388} [2002] CAT 1
dominant undertaking will amount to abuse of dominance. In Hoffmann-La Roche & Co. AG v Commission of the European Communities, it was observed that, “The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”. The Section 18 (2) of the Competition Act of the UK seems to be based on Article 82 of the EC treaty. It states that, “Conduct may, in particular, constitute such an abuse if it consists in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) 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 the contracts.

One difference between the UK Act, the EC Law and the Indian Act is that according to the UK and EC laws, the conducts specified may amount to abuse dominant position whereas according to the Indian Act the conducts specified shall amount to abuse of dominance”. While the Indian Act specifically enumerates ‘practices resulting in denial of market access’ and ‘using dominant position in one market to enter into or protect, other relevant markets’ as conducts amounting to the abuse of dominance, they have not been mentioned in the UK and EU laws. “Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a comparative disadvantage”, is mentioned in the UK and EU law but has not been included in the Indian Act. The traditional theory of predatory pricing is that the predator, already a dominant firm
sets prices so low for a sufficient period of time that its competitors leave the market and others are deterred from entering and the losses incurred due to the low prices, which like any investment, will be recovered by future gains. In Tetra Pak International SA v Commission of the European Communities\textsuperscript{389} it was observed that in AKZO this Court did indeed sanction the existence of two different methods of analysis for determining whether an undertaking has practiced predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown”. It was also observed that “Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated.” Section 19 (1) of the UK Competition Act provides the exemptions from chapter II provisions i.e. pertaining to the abuse of dominance. It states “the Chapter II prohibition does not apply in any of the cases in which it is excluded by or as a result of:

(a) Schedule 1 (mergers and concentrations); or

(b) Schedule 3 (general exclusions)”. Sub section (2) of this provision states that “the Secretary of State may at any time by order amend Schedule 1, with respect to the Chapter II prohibition, by-

(a) providing for one or more additional exclusions; or

(b) amending or removing any provision (whether or not it has been added by an order under this subsection)”. The Act sets out a number of specific exclusions from the prohibition under Chapter II (abuse of dominance) for certain categories of conduct

a). To the extent that the conduct would result in a merger or joint venture within the merger provisions of the Enterprise Act, 2002

\textsuperscript{389} [1996] ECR I 5951,
b). Which would result in a concentration with a community dimension and thereby be subject to the EC Regulation
c). Which is carried out by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly, in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to the undertaking.
d). To the extent to which the conduct is engaged in order to comply with a legal requirement
e). which is necessary to avoid conflict with international obligations and the conduct is the subject of an order by the secretary of state.
f). Which is necessary for compelling reasons of public policy and the conduct is subject of an order by the Secretary of State

Thus, In the United Kingdom, the main factors to be considered in the determination of whether an undertaking is in a dominant position includes market shares, barriers to entry and the conduct of the Predatory Pricing. In *AKZO Chemie BV vs Commission* wherein the applicants, the Dutch Company and its UK subsidiary were found to have pursued a course of conduct intending to damage a competitor and to force him out of the market. The ECJ concluded that the dominant firm had engaged in predatory pricing as they were charging below the average variable cost and that there were signs of recouping the losses by the dominant firm and that occupies an important place in the whole idea of predatory pricing.

**Enforcement authority under UK**

The Competition Commission is a non–departmental public body responsible for investigating mergers, markets and other inquiries related to regulated industries under competition law in the United Kingdom. It is a competition regulator under the Department for Business, Innovation and Skills (formerly the Department for Business, Enterprise and Regulatory Reform). The Competition Commission replaced the Monopolies and Mergers Commission on 1 April 1999. It was created by the *Competition

Act of 1998, although the majority of its powers are governed by the Enterprise Act 2002. The Enterprise Act 2002 gave the Competition Commission wider powers and greater independence than the MMC had previously, so that it now makes decisions on inquiries rather than giving recommendations to Government and is also responsible for taking appropriate actions and measures (known as remedies) following inquiries which have identified competition problems. These powers can include blocking mergers, requiring companies to sell off assets and making changes to the way particular markets operate. However, the Government can still intervene on mergers that involve specified public interest criteria such as media plurality, national security and financial stability. As stated above, The Competition Commission replaced the Monopolies and Mergers Commission on 1 April 1999. It was created by the Competition Act of 1998, although the majority of its powers are governed by the Enterprise Act 2002. The Enterprise Act 2002 gave the Competition Commission wider powers and taking appropriate actions and measures (known as remedies) following inquiries which have identified competition problems. The Competition Commission cannot instigate investigations itself - an inquiry commences following the referral of a particular case to the Competition Commission, most often by the Office of Fair Trading (OFT) or by other sectoral regulators.

The Office of Fair Trading (OFT) is a non-ministerial government department of the United Kingdom, established by the Fair Trading Act 1973, which enforces both consumer protection and competition law, acting as the UK’s economic regulator. The OFT’s goal is to make markets work well for consumers, ensuring vigorous competition between fair-dealing businesses and prohibiting unfair practices such as rogue trading, scams and cartels. Its role was modified and its powers changed with the Enterprise Act 2002. The majority of the OFT’s work consists of analyzing markets, enforcing consumer and competition law, merger control, licensing and supervisory work (of consumer credit, estate agency, anti-money laundering supervision), advocacy, delivering information, education programmes and campaigns to business and consumers, and advice through Consumer Direct. The OFT investigates markets to see whether they are working well for consumers. Where appropriate, studies will lead to market investigation references to the Competition Commission, to enforcement action, consumer awareness campaigns or to
recommendations to government, which will be published. The OFT structure is divided by market sector - Services, Goods, Consumer and Infrastructure - with officials specializing in the different legal and regulatory regimes working closely together in each of these market sectors. Each group typically considers potential breaches of competition law, review competition undertakings and performs market studies in their sector of the economy. These market sector groups sit alongside two other OFT groups - mergers, and cartels and criminal enforcement. Based on expanded powers granted under the Enterprise Act 2002, the OFT explores how different market sectors operate, in order to help markets work well. They may research one particular market in detail or, for example, how codes of practice or professional rules operate across different markets in a range of businesses. The results of the research, which are published, help the OFT to assess what action, if any, needs to be taken to protect consumers' interests. They may recommend stronger enforcement, or a change in the regulations, or suggest an awareness raising campaign for consumers (but will not always recommend intervention and when this is the case, will ensure that any non-intervention decision is well-informed and open to public scrutiny).

In 2006, the OFT restructured in response to Treasury proposals for splitting the department into separate consumer and competition regulators. The OFT argued that to protect consumers effectively, it had to be able to use both consumer law and competition law approaches in a holistic fashion. Moving away from division by legislative area, the OFT created divisions based on market sector. These officials are supported by a dedicated economics branch also including statisticians and financial analysts (the Office of the Chief Economist), a legal specialist, and a policy advisory branch. Further, The OFT has been criticized for being ineffective and for many of its investigations leading to no action, in contrast to the more vigorous approach of US( United States Department of Justice Antitrust Division ) and European Union (DG COMP of the European Commission) regulators. Criticism has been levied, among others, in the cases of:

- Supermarkets

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392 The OFT is situated at Fleet Street, near to Blackfriars station, United Kingdom.
• Oil companies retail sales / petrol - in October 2008 the UK Prime Minister Gordon Brown threatened oil companies with an OFT investigation unless lower oil prices were passed to consumers; this was despite several OFT investigations in the past giving the industry a clean bill of health\(^{393}\).

The National Audit Office issued a report in March 2009 on the OFT's competition enforcement work\(^{394}\) which indicated progress in 7 out of 10 objectives, but also concluded: ...So whilst the OFT has improved the value for money it provides, there remains scope for further improvement. According to the same report, in 2007-08 the OFT estimated that its competition enforcement work led to direct savings to consumers worth £77m per year and that its market studies work had saved consumers £98m in 2007-08; the OFT costs for these areas of work in the same year were approximately £26million of its £78m expenditure in 2007-08.

**European Union Competition Law**

**Introduction**

The European Economic Community was established by the Treaty of Rome in 1957. The United Kingdom joined the European Community (EC) with the European Community Act 1972, and through that became subject to EC Competition law. Since the Maastricht Treaty of 1992, the EC was renamed the European Union (EU). Competition law falls under the social and economic pillar of the treaties. So where a British company is carrying out unfair business practices, is involved in a cartel or is attempting to merge in a way which would disrupt competition across UK borders, the Commission of the European Union will


\(^{394}\) National Audit Office: The Office of Fair Trading - Progress Report on Maintaining Competition in Markets
have enforcement powers and exclusively EU law will apply. At the heart of the treaty is the establishment of a common market and economic and monetary union, and the implementation of common polices to promote development of the community. The main aim of the competition policy is the protection of Consumers and competition, as opposed to the protection of Competitors. In order to achieve the above mentioned aims, it is important that the internal market of the community should not be distorted, and that the principle of an open market with free competition should be adhered to. Thus, single market integration is a key principle of competition policy. The Treaty is concerned with other aspects of the promotion of competition within Europe. thus, the elimination of obstacles to the free movement of goods, services, persons and capital are given high priority. Just as in the United States, the freedom to do business in the European Union is subjected to many restrictions. Articles 81 and 82 of the Treaty of Rome serves as a principal Competition Law of the European Commission. These key Articles set the frame work within which business activities are subjected to intervention by the European Commission. The Treaty does not contain any specific provisions relating to mergers. Historically, mergers were dealt with the application of Articles 81 and 82. However, this was considered to be an inadequate way of governing merger and so, in 1989, the EC Merger Regulation (ECMR) was introduced. The current rules are contained in Council Regulation (EC).

**Article 81 EC Treaty**

The Article 81 of the Treaty establishing the European Community prohibits cartels and other agreements that could disrupt free competition in the European Economic Area's common market. Article 81(1) EC then gives examples of "hard core" restrictive practices such as price fixing or market sharing and 81(2) EC confirms that any agreements are automatically void. Article 81(3) EC creates exemptions, if the collusion is for distributional or technological innovation, gives consumers a "fair share" of the benefit and does not

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395 Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Greece, Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom etc are the members of EU

396 The agreement need not to be in writing or oral. The notion of a "concerted practice" has been interpreted by the European Courts very widely. The agreement, decision, or concerted practices must affect trade between Member States; Conduct in only one Member State may also infringe Article 81(1) if it has an appreciable effect on trade between Member States.
include unreasonable restraints (or disproportionate, in ECJ terminology) that risk eliminating competition anywhere. The following shall be prohibited as incompatible with the common market:

1) 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, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a Competitive disadvantage;
   (e) make 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.

2) Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   a. any agreement or category of agreements between undertakings,
   b. any decision or category of decisions by associations of undertakings,
   c. any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to
the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a
substantial part of the products in question

The Article 81 which particularly applicable to cartel investigation, the Commission now
has a dedicated Cartel Unit with specialists in anti-cartel work. As part of the commission's
drive to flush out cartel s, it introduced ‘Leniency Notice’, which has been amended; the
present notice has been a significant factor in encouraging whistle –blowing and thus the
detection and punishment of cartel behavior throughout Europe.

Article 82 EC Treaty

The Article 82 of the EC Treaty addresses a different type of anti-competitive behavior,
namely the abuse by one or more undertaking of a dominant market position. Whilst
dominance in a market is not of itself unlawful, a dominant undertaking will infringe Article
82 if it abuses its dominant position and there is an effect on trade between EC members
states. Unlike US Antitrust, E C law has never been used to punish the existence of
dominant firms, but merely imposes a special responsibility to conduct oneself appropriately. In determining whether a dominant position exits, the Commission will
consider a number of factors, including the market share of the undertaking s and its
competitors and its consumer's market power as well as other characteristics of the market.
A company with a high market share or which may be considered to have a position of joint
or collective dominance in an oligopolistic market must take particular care in its behavior.
Furthermore, also under Article 82 EC, the European Council was empowered to enact a
regulation to control mergers between firms, currently the latest known by the abbreviation
of ECMR "Reg. 139/2004". The general test is whether a concentration (i.e. merger or
acquisition) with a community dimension (i.e. affects a number of EU member states) might
significantly impede effective competition. Again, the similarity to the Clayton Acts's
substantial lessening of competition. Finally, Articles 86 and 87 EC regulate the state's role
in the market. Article 86(2) EC states clearly that nothing in the rules cannot be used to
obstruct a member state's right to deliver public services, but that otherwise public enterprises must play by the same rules on collusion and abuse of dominance as everyone else. Article 87 EC, similar to Article 81 EC, lays down a general rule that the state may not aid or subsidise private parties in distortion of free competition, but then grants exceptions for things like charities, natural disasters or regional development.

**Enforcement of Article 81 and 82 of EC Treaty**

The Commission and National Competition Authorities have joint competition to apply and enforce Article 81 and 82. In addition, the Court of First Instance, the European Court of Justice and national courts have jurisdiction to determine the applicability of Article 81 and 82. Agreements that infringe Article 81(1) are void and unenforceable unless they qualify for an exemption under Article 81(3)( details above mentioned). The Commission is required to act in constant liaison with competent authorities of the member states and prior to taking any decision, in granting negative clearance, exemptions or renewal, amendment or revocation of any exemptions. In making any investigation of a violation of Article 81 and Article 82, the official authorized by the Commission are empowered; (a) to examine the books and other business records (b) to take copies of or extracts from the books or other business records (c) to ask for oral explanation on the spot; and (d) to enter any premises; land and means of transport of understanding. Moreover the Commission has the power to impose the following sanctions for violation of Article 81 and 82:

- Fines of up to 10 percent of an infringing firms previous years group turnover:
- Orders requiring an undertaking to terminate infringements; and
- Interim measures.

Furthermore, private parties may bring a cause of action for damages or injunctive relief relating to alleged infringement of the EU competition rules, although issues relating to standing, procedure and the amount of damages are governed by national law.
International Organizations on Trade and competition

The Legal world has become a global village and the vast proliferation of laws –national and international – as well as treaties and conventions on a wide range of subjects must receive at least a nodding acquaintance from a true votary of the law. One of the controversial areas of competition law has been its extra-territorial reach. As the world economy becomes more globalized, an anti-competitive act of a firm may have effect not only in the country where it is located, but even in other countries, where it has business activities. In most countries, the legal view taken is that the domestic competition law captures such acts even if the guilty enterprise is not located in the country. This is where the international Organisation comes into picture. The researcher attempts to analyze the working of International Organizations in field of international trade and Commerce.

The Organization for Economic Co-operation and Development (OECD)

The Organization for Economic Co-operation and Development (OECD) is a Paris based international economic organization of 30 countries. Most OECD members are high-

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397 An international organization is an organization with an international membership, scope, or presence. There are two main types:

a) International Governmental Organization and

b) International non-Governmental Organization.

For further clarification see; The Penguin Dictionary of International Relations divides modern international organizations into two "basic types, the 'public' variety known as intergovernmental organizations (IGOs) and the 'private' variety, the international non-governmental organization (INGOs)." (Evans, Graham, and Richard Newnham. Penguin Dictionary of International Relations. Penguin, 1998, p. 270.)

398 There are currently 30 full members of the OECD. Of these, Mexico, Poland and Turkey (marked with *) are described as upper middle-income economies by the World Bank. The remaining 27 members are described as high-income economies.[16] Founding members (1961): Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey*, United Kingdom, United States Admitted later (listed chronologically with year of admission): Japan (1964), Finland (1969), Australia (1971), New Zealand (1973), Mexico* (1994), Czech Republic (1995), Hungary (1996), Poland* (1996), Republic of Korea (1996), Slovakia (2000) The European Commission participates in the work of the OECD alongside the EU Member States.
income economies\textsuperscript{399} with a high Human Development Index (HDI)\textsuperscript{400} 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\textsuperscript{401} for the reconstruction of Europe after World War II. Later, its membership was extended to non-European 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. The Organization for Economic Co-operation and Development (`the OECD`) is active in matters of competition policy.\textsuperscript{402} In 1995 it published a Revised Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade\textsuperscript{403} which provides further notification, consultation and cooperation in competition law cases involving the legitimate interest of foreign Governments; this Recommendation replaced an earlier one of 1986. In 2003, the OECD established a working group headed by Japan's Ambassador to the OECD Seiichiro Noboru to work out a strategy for the enlargement and co-operation with non-members. The working group proposed that the selection of candidate countries to be based on four criteria: "like-mindedness", "significant player", "mutual benefit" and "global considerations". The working group's recommendations were presented at the OECD Ministerial Council Meeting on 13 and 14 May 2004. Based on these recommendations work, the meeting adopted an agreement on operationalization of the

\textsuperscript{399} A high-income economy is defined by the World Bank as a country with a Gross National Income per capita of $11,906 or more in 2008, for further clarification see; 

\textsuperscript{400} The Human Development Index (HDI) is a composite statistic used as an index to rank countries by level of "human development" and separate developed (high development), developing (middle development), and underdeveloped (low development) countries. The statistic is composed from statistics for Life Expectancy, Education, and GDP collected at the national level using the particular formula.

\textsuperscript{401} Robert Marjolin (27 July 1911 - 15 April 1986) was a French economist and politician involved in the formation of the European Economic Community.

\textsuperscript{402} See; Richard Whish, "COMPETITION LAW", Fifth edition, Oxford University Press, 2003, p. 447.

\textsuperscript{403} See; OECD document C(95) 130 (final), 27 July 1995.
proposed guidelines and on the drafting of a list of countries suitable as potential candidates for member\textsuperscript{404}. As a result of this work, on 16 May 2007\textsuperscript{405}, the OECD Ministerial Council decided to open accession discussions with Chile, Estonia, Israel, the Russian Federation and Slovenia and to strengthen co-operation with Brazil, China, India, Indonesia and South Africa through a process of enhanced engagement\textsuperscript{406}. OECD officially invited Chile as a new member country on 15 December 2009, and the accession agreement was signed on 11 January 2010. Chile is the first country in South America to join the organization. Chile will formally become a member after the ratification of the National Congress and deposition of an instrument of accession (ratification letter) with the depositary Government (Government of France).

Thus the OECD promotes policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in Member as well as nonmember countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, nondiscriminatory basis in accordance with international obligations  

\textsuperscript{404} See; Slovenia and the OECD”. Ministry of Foreign Affairs of Slovenia. \url{http://www.mzz.gov.si/en/economy_and_business/slovenia_and_the_oecd/} last accessed on 2010-01-16.

\textsuperscript{405} Extract from the Council Resolution on Enlargement and Enhanced Engagement adopted by Council at Ministerial level on 16 May 2007

The United Nations Conference on Trade and Development (UNCTAD)

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 Nation General Assembly dealing with trade, investment, and development issues. The organization's goals are to "maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis." (from official website). The creation of the conference was based on concerns of developing countries over the international market, multi-national corporations, and great disparity between developed nations and developing nations. The United Nations Conference on Trade and Development was established in 1964 in order to provide a forum where the developing countries could discuss the problems relating to their economic development. UNCTAD grew from the view that existing institutions like GATT and IMF were not properly organized to handle the particular problems of developing countries. UNCTAD has 193 members. The United Nations Conference on Trade and development (‘UNCTAD’) has taken an interest in the development of competition policy for many years. In 1980 it adopted a voluntary, non-binding code. The primary objective of the UNCTAD is to formulate policies relating to all aspects of development including trade, aid, transport, finance and technology. The Conference ordinarily meets once in four years. The first conference took place in Geneva in 1964, second in New Delhi in 1968, the third in Santiago in 1972, fourth in Nairobi in 1976, the fifth in Manila in 1979, the sixth in Belgrade in 1983, the seventh in Geneva in 1987, the eighth in Cartagena(Colombia) in 1992 and the ninth at Johannesburg (South Africa) in 1996. The Conference has its permanent secretariat in Geneva. One of the principal achievements of UNCTAD has been to conceive and implement the Generalized System of Preferences (GSP). It was argued in UNCTAD, that in order to promote exports of manufactured goods from developing countries, it would be necessary to offer special tariff concessions to such exports. Accepting this argument, the developed countries formulated the GSP Scheme under which


manufacturers' exports and some agricultural goods from the developing countries enter duty-free or at reduced rates in the developed countries. Since imports of such items from other developed countries are subject to the normal rates of duties, imports of the same items from developing countries would enjoy a competitive advantage.

**World Trade Organization (WTO)**

The WTO\(^4^0^9\) fosters trade liberalization, based on the broad policy objective of efficiency. Competition laws derive from that same objective, so an international competition law\(^4^1^0\) supported by the WTO is more likely to form a coherent strategy with existing trade laws. Indeed, competition laws would buttress WTO rules on market access and market distortions by preventing them from being undermined by private market access barriers and private market distortions. There is a Ministerial Conference composed of representatives of all the members Laws can also be implemented under the WTO framework in a flexible manner. International competition law could be created through a plurilateral agreement under Annex 4 of the Agreement establishing the WTO. This type of agreement would only bind countries who signed the plurilateral agreement. This would permit a gradual implementation of international competition law\(^4^1^1\).

**Competition elements in WTO agreements**

Another advantage of implementing an international competition law within the framework of the WTO is that a number of WTO Agreements already cover some competition-related matters.

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\(^{4^0^9}\) World Trade Organization (WTO) was established on 1 January 1996.


1 General Agreement on Tariffs and Trade

Article II:4 of GATT applies to import monopolies that are established, maintained or authorized by a contracting party. It prohibits such monopolies from engaging in conduct that provides protection for a particular product that exceeds, on average, the amount of protection specifically provided for that product in the 360 Schedule to GATT. Article II:4 recognizes that certain practices arising out of market structures such as monopoly power are relevant in assessing whether market access commitments are being maintained. Article III imposes the national treatment obligation, focusing on the maintenance of competitive conditions regardless of any effect on international trade. “Article III 2 first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects.”

2 General Agreements on Trade in Services

The General Agreement on Trade in Services (GATS) contains a number of general competition-related provisions that bind all members. Article VII prevents the use of licensing, certification or similar requirements to create barriers to entry for foreign providers. Article VIII requires that all Members ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with the Most-Favoured-Nation obligation in Article II of the GATS. Article IX recognizes that “certain business practices of service suppliers, other than those falling under Article 8, may restrain competition and thereby restrict trade in services” and requires that in such cases, member countries consult,

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share relevant non confidential information and seek to eliminate the anti-competitive practices\textsuperscript{415}.

3 Agreements on Trade-Related Intellectual Property Rights

The Agreement on Trade-Related Intellectual Property Rights (TRIPs) also contains a number of provisions that relate to the use of intellectual property rights in an anticompetitive manner\textsuperscript{416}. Article 8 acknowledges that “appropriate measures … may be needed to prevent … the resort to practices which unreasonably restrain trade”. Article 40(1) recognizes that some intellectual property-related licensing practices or conditions that restrain competition may have an adverse effect on trade. Further, Article 40(2) states that nothing in TRIPs prevents members from declaring that certain practices or conditions relating to intellectual property rights constitute an abuse of those rights and represent a breach of their competition laws. Where abuse occurs, Members may adopt appropriate measures to prevent or control such practices, such as imposing “exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing”.

Overcoming the Obstacles

Policy differences; WTO members broadly agree that competition law should enhance competition between firms, by limiting anti-competitive private and government measures, with the objective of promoting economic efficiency, consumer welfare and economic development. However, WTO members differ as to whether competition law should have other non-efficiency objectives\textsuperscript{417}. Certain countries believe that competition law should also consider issues of fairness, opportunities for small and middle-sized businesses, pluralism, diffusion of power and employment. Indeed, while these differences remain, WTO


competition rules should concentrate on minimum standards that preserve local laws as much as possible.

**Anti-dumping and competition policy**

Some commentators have suggested that international trade laws sanctioning antidumping duties create a further barrier to the effective establishment or implementation of international competition policy. Dumping refers to the practice of importing goods for less than their “normal value”—meaning either the price at which they are sold in their domestic market or their cost of manufacture. Under GATT Article VI, if the price difference causes, or threatens to cause, material injury to “an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry”, a special anti-dumping duty to remove some or all of the disparity may be imposed. Unless the dumping conduct is a form of predatory pricing, designed to destroy local competition, take over the market, and then raise prices, it benefits consumers.

Indeed, a recent study found that 90 percent of successful anti-dumping petitions in America, the European Union and Canada in the 1980s were not justified on competition grounds. Rather than posing an unworkable obstacle to international competition law, this analysis suggests that international competition law can and should replace antidumping and countervailing duties. A number of WTO members support this view, including Japan, Korea and Hong Kong. Indeed, this replacement has already taken place between Australia and New Zealand in the 1998 review of the Australia-New Zealand

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418 Other differences also exist. For example, WTO Members differ as to the level at which competition rules are most appropriately promulgated and enforced.
Closer Economic Relations Trade Agreement. It has also taken place amongst members of the European Union. While the United States and the European Union currently do not favour abolishing anti-dumping or countervailing duties from international trade.

**International Competition Network (ICN)**

The International Competition Network is an informal, virtual network that seeks to facilitate cooperation between competition law authorities globally. It was established in October 2001 after the publication of a Final Report of the International Competition Policy Advisory Committee to the US Attorney General and Assistant Attorney General for Antitrust (or the ICPAC report, for short). The Report examined three particular issues: multi-jurisdictional mergers, the interface of trade and competition policies and anti-cartel enforcement and international cooperation. Competition law experts in the US recommended that increased collaboration with overseas authorities could contribute to the coordination of enforcement and sharing of information on competition policy globally.

According to the Memorandum on its web sites, the ICN is project oriented, consensus based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through results oriented agenda and structure. Membership is open to national and multinational organizations responsible for

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427 See; http://www.internationalcompetitionnetwork.org. Page 65 of 86

the enforcement of the competition law. The ICN’s work is complementary to that of UNCTAD\textsuperscript{429}, the OECD\textsuperscript{430} and the WTO\textsuperscript{431}. Its first annual conference was held in Naples, Italy in September 2002, with representatives from 59 countries and NGOs. The second conference was held at June 2003 in Merida, Mexico. Working groups review different policy areas, such as mergers, or competition advocacy\textsuperscript{432}.

\textbf{Conclusion}

In a developing economy like ours though the legislators have tried twice to frame laws which would provide suitable conditions for a fair and perfect competition but still the present act requires some alterations. It is still incomplete and is silent on various aspects. Some changes in the present act and some new things are very much important and need to be inculcated as it would help in eliminating some serious economic problems like price fixing. Lastly much can be borrowed from the Sherman act and Clayton act and other acts of European nations as they have very perfect piece of legislations on the competition laws. Further the contribution of the International Organizations to international Competition Regulation is quite appreciable and could be advisable for the developing and transitory countries to take valuable advice of the International Organizations while drafting or amending their existing Competition legislation.

\textsuperscript{429} http://www.uncad.org
\textsuperscript{430} http://www.oecd.org
\textsuperscript{431} http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm
\textsuperscript{432} See; http://en.wikipedia.org/wiki/International_Competition_Network last accessed on 04-03-2010.)
Chapter VII Conclusion and Suggestions

Conclusion

Suggestions