Chapter - IV

ANTI-COMPETITIVE AGREEMENTS UNDER THE COMPETITION ACT, 2002
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4.1 INTRODUCTION:

This Chapter focuses on the analyses of Anti-competitive Agreements under the Competition Act, 2002 in all their dimensions. The researcher has made commensurate focus on the nature and meaning of Anti-Competitive Agreements and how they impact adversely the competitive process at the market and the consumer. Further, a comparative analysis of how such trade practices were dealt under the earlier Indian competition law and the present Competition Act, 2002 was also adequately highlighted with reference to the provisions of both the enactments in the light of the decided case law. The study also makes considerable focus on decided case law absolutely based on the legal regime created under the MRTP ACT-1969. A comparative study of US, UK and EU on the subject under focus has also been made for drawing salutary lessons. Further, the interface between competition and Intellectual Property Rights and the possible potential areas of conflict in between them and the resulting solutions for averting such conflict have also been comprehensively addressed.

One of the principal aims of the Competition Act, 2002 as declared in its preamble is to prevent practices having adverse effect on competition. A duty has also been cast on the Competition Commission to eliminate practices having adverse effect on competition and which further reinforces the objectives set out in the preamble. Though a perfectly competitive market would definitely take care of the

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1. The Preamble to the Competition Act, 2002 declares that it is “An Act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected there with or incidental thereto”.

2. Section 18 of the Competition Act, 2002.
welfare and well being of consumers yet the attaining of such market is just a utopia like the consumer sovereignty. There is a preponderance of evidence suggesting that markets are vulnerable to manipulations and maneuverings of manufacturers and sellers, aimed at profiteering to the detriment of the consumer. Products and services are of wide variety, many of them are complex and the consumer has imperfect product knowledge. The supplier often has an entrenched position in the market vis-à-vis the buyer, who has either a little or no bargaining power in the market. Besides this, the desire of suppliers of goods and services to maintain their profits at predetermined levels may motivate them to resort to various legally assailable trade practices to the detriment of competition and the interest of consumers.

Consumer, therefore, needs and deserves legal protection against certain trade practices that have adverse effect of preventing, distorting, restricting and suppressing competition. Competition law, almost everywhere, prohibits three kinds of activities, namely, anti-competitive agreements, abuse of dominance and anti-competitive mergers.3

4.2 RESTRICTIVE TRADE PRACTICES UNDER THE MRTP ACT, 1969

A perusal of the MRTP Act, 1969 will show that there is neither definition nor even a mention of certain offending trade practices which are restrictive in nature and character. The Act hardly contained any provisions to deal with abuse of dominance, cartels, collusion and price fixing, bid rigging, boycotts and refusal to deal and predatory pricing. Further, the Act is ill-equipped to deal with cross border anti-competitive trade practices arising outside India but having pernicious effects on the Indian economy in the wake of increasing globalization. The Act did contain a definition of restrictive trade practice4 besides enumerating some examples of

4. S.2(e) of the MRPT Act, 1969 defined a restrictive trade practice as a trade practice which has or may have the effect of preventing, distorting, or restricting competition in any manner and in particular: (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of price or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose unjustified costs or restrictions on consumers.
agreements relating to restrictive trade practices, requiring compulsory registration but these provisions have been found to be deficient to meet the changing economic scenario in India caused due to the onset of economic reforms post 1991. The Act also didn’t contain any provisions to address competition concerns that may surface owing to putting in place and operation of the rules based International Trade regime under the aegis of W TO and of which India is a founding member.

In the light of this, the expert group recommended that there is a need for an appropriate competition law to protect fair competition and control, if not eliminate anti-competitive practices in the trade and market.

4.3 ANTI-COMPETITIVE AGREEMENTS UNDER THE COMPETITION ACT, 2002

Anti-Competitive Agreements under the Competition Act, 2002 are in the nature of Restrictive Trade practices under the extant MRTP Act, 1969. Firms enter into agreements, which may have the potential of restricting, distorting, suppressing, reducing, or lessening competition. A scan of the competition laws across the world will demonstrate that they invariably make a distinction between “Horizontal” and “Vertical” agreements between firms. The Horizontal agreements are those among competitors in the same chain of production while the vertical agreements are between different parties in the supply chain. Most competition laws view Vertical agreements generally more leniently than horizontal agreements, as the later in all probabilities would have more severe and serious adverse effects on competition.

The avowed legislative intent behind inserting the provisions relating to Anti-Competitive agreements into the Competition Act, 2002 is to foster competition for promoting the interests and welfare of consumers.

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5. S. 33 of the MRTP Act, 1969 enumerated agreements pertaining to restrictive trade practices that are subject to compulsory registration. These Agreements were required to be registered with Director General within sixty days from the date of such agreements.
7. Supra note 4 & 5.
8. The provisions pertaining to Anti-Competitive agreements have come into force with effect from 20-5-2009.
The Competition Act, 2002 contains a general prohibition of any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India by explicitly construing such agreements as anti-competitive in nature and character. Any agreement in contravention of the general prohibition is declared by the Act as null and void.

The Act also enumerates certain kinds of anti-competitive agreements. It deals with certain actions or decisions made by a group of persons or associations in the form of an understanding, arrangement or agreement either formal or informal, including cartels and further enumerates certain vertical restraints on trade in an illustrative manner. What are prohibited are the agreements or arrangements to control and dominate trade and commerce in a commodity, coupled with the power and intent to eliminate competitors to a substantial extent. What matters under the Act is not the form or the specific means but undoubtedly the impact and effect of such means would be minutely assessed prior to arriving at the conclusion: whether an agreement is or is not an anti-competitive one.

The Anti-competitive agreements under the Competition Act are bifurcated into two categories:

(a) **Horizontal Agreements**

(b) **Vertical Agreements**

### 4.3.1 HORIZONTAL AGREEMENTS

These agreements are between competitors operating at the same level in the economic process, i.e., enterprises engaged and operating in broadly same activity.

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9. Section 3(1) of the Competition Act, 2002
10. Section 3(2) of the Competition Act, 2002
11. Section 3(3)&(4) of the Competition Act, 2002
12. Ibid. Sec.3(3)
13. Ibid. Sec.3(4)
14. S.2(b) of the Competition Act, 2002, defines an agreement as including any arrangement or understanding or action in concert (i) whether or not such arrangement, understanding or action is formal or in writing or (ii) whether or not such arrangement, understanding or action is intended to be enforced by legal proceedings.
These agreements are construed as presumed anti-competitive agreements.

Hence, these agreements are subject to per se rule and therefore, they are presumed to have appreciable adverse effect on competition.

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

i. Directly or indirectly determines purchase or sale price
ii. Limits or controls production, supply, markets, technical development, investment or Provision of services
iii. Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services or number of customers in the market or any other similar way
iv. Directly or indirectly results in 'bid rigging' or collusive bidding shall be presumed to have adverse effect on competition.

However, exemptions have been given to joint ventures agreements promoting efficiency in production, supply, distribution etc, export arrangements and reasonable restrictions forming part of protection or exploitation of intellectual property rights.

AGREEMENT CARRIES WIDEST MEANING AND AMPLITUDE

In order to constitute an agreement, a concerted action on the part of enterprises is a sine qua non. Through the parties to an agreement do not have any

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15. These are agreements between the persons operating at the same level of the economic process and therefore, they are entered into between the competitors.
16. Explanation to s. 3(3) provides 'bid rigging' means any agreement between enterprises or persons referred to in section 3(3) engaged in identical or similar trade of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.
17. Supra note 11.
18. Supra note 9.
intention to create any legally enforceable mutual duties and obligations, yet it shall be considered as an agreement under the Competition Act, 2002. Further, no written proof of such agreement is necessary as mere informal understanding or arrangement would also be construed as an agreement. Hence, the legislative intent and desire is quite apparent so as to give a vast and sweeping coverage for concerted and collaborative anti-competitive practices. Even oral or written or formal or informal understanding would fall within the broad ambit of 'agreement' through the parties to such agreement do not have any intention to enforce it by legal proceedings.

In Registrar of Restrictive Trade Agreements v. W.H Smith and Sons, the court observed, people who combine together to keep up prices do not shout from the house tops. They keep it quiet. They make their own agreements in cellar, where no one can see. They will not put anything into writing not even into words. A nod or wink will do. Parliament as well is aware of this. So it included not only an “agreements” properly so called but any “arrangement” however informal

APPRECIABLE ADVERSE EFFECT ON COMPETITION SHALL BE PRESUMED

The entire concept of appreciable adverse effect on competition is made subjective as it may vary from case to case. The agreements enumerated in Section 3(3) are popularly known as horizontal agreements and they shall be presumed to have appreciable adverse effect on competition while this presumption shall not apply in regard to the vertical agreements. Thus, the legislative intent is to view horizontal agreements more seriously than vertical agreements. According to Section 4 of the Indian Evidence Act wherever it is directed that the court shall presume a fact, it shall regard such fact as proved, unless until the contrary is proved. Thus it is quite

19. Firms entering into cartels mostly indulge in concerted and collaborative restrictive trade practices by entering into informal agreements and in fact, it is very difficult to prove and establish such agreements as the parties to such agreements strive very hard to leave no trace of evidence.
21. The term appreciable adverse effect on competition used in S. 3 (1) has not been delineated in the Act.
22. Agreements envisaged in S. 3 (3) are treated as horizontal in nature while those envisaged in S. 3(4) are regarded as vertical in character. However, the Competition Act, 2002 doesn't specifically use the terms Horizontal & Vertical agreements.
23. The section provides that whenever it is directed by the Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
clear that the presumption as to appreciable adverse effect on competition in regard to
the Horizontal agreements envisaged in Section 3(3) is rebuttable but the burden to
rebut the same would lie upon the person charged with the commission of such trade
practices. Hence, it is quite apparent that they are not ‘deemed’ anti-competitive
practices as there is a clear distinction between presumed and deemed restrictive trade
practices. Court has to assume that the ‘deemed practice’ is a factual position and
apply law accordingly. In case of ‘presumed practice’ the disputant can prove that the
impugned trade practices are not anti-competitive practices but the onus of proof lies
on him. Court has to assume that the ‘deemed position’ is ‘real position’ and apply
law accordingly. Defendant cannot prove that they are not really anti-competitive
practices. In case of ‘presumed practice’, defendant can prove that they are not anti-
competitive practices, but burden of proof is on him.

4.3.2 VERTICAL AGREEMENT

There is another category of agreements which may be hit by the prohibition
against Anti-competitive agreements, if they cause or is likely to cause an appreciable
adverse effect on competition 24 i.e., those agreements that are to be judged by “Rule
of Reason as against rule of per se” and the burden of proof lies on the
investigator/prosecutor. They are--

i) Tie-in agreements. This includes any agreement requiring a purchaser of
goods, as a condition of such purchase, to purchase, some other goods;

ii) Exclusive supply agreement. This includes any agreement restricting in any
manner the purchaser in the course of his trade from acquiring or otherwise
dealing in any goods other those of the seller or any other person;

iii) Exclusive distribution agreement. This includes any agreement to limit,
restrict or withhold the output or supply of any goods or allocate any area or
market for the disposal or sale of the goods;

iv) Refusal to deal. These would include any agreement which restricts or is
likely to restrict by any method the persons or classes of persons to whom
goods are sold or from whom goods are bought;

1 Competition Act, 2002, Section 3(4).
Resale price maintenance. This includes any agreement to sell goods on a condition that the prices to be charged on the re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.\(^5\)

It may be noted here that all the five concepts are carried forward in Competition Act, 2002 from its predecessor i.e. Monopolies and Restrictive Trade Practices Act, 1969. However, the major difference is that under Monopolies and Restrictive Trade Practices Act, 1969, the practices were categorized as ‘Restrictive Trade Practices’ and any enterprise indulging in such practices was subjected to actions under Monopolies and Restrictive Trade Practices Act, 1969, whereas under Competition Act, 2002 such practices will fall under the prohibitory legal framework only when they cause or likely to cause appreciable adverse effect on competition. Thus, an in-built flexibility is provided to foster exploitation of market potential by the enterprises or persons i.e if any one indulges into any of the five actions and this action does not adversely affect competition in the market, one will be outside the rigours of Anti-competitive practices. The effect on Anti-competitive agreement is that they are void.\(^6\)

The matrix of Agreements is provided as below.\(^7\)

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\(^5\) Ibid, Explanation to Section3(4)

\(^6\) Competition Act, 2002; Section 3(2); Void agreements means that they are null and void. No legal action can arise out of such void agreements.

Moreover where CCI has initiated inquiry into Anti Competitive Agreements and it is found that such agreement has appreciable adverse effect on competition; the CCI can pass all or any of the following orders under section 27:

1. Impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement or the cartel at ten percent of the average of the turnover of the cartel for the last proceeding three financial years, whichever is higher;

2. Award compensation to parties in accordance with the provisions contained in section 34;

3. Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the commission;

4. Direct the enterprises concerned to abide by such other or orders as the commission may pass and comply with the directions, including payment of costs, if any;

5. Pass such other order as the commission may deem fit.

4.4 BENCHMARKS FOR ASSESSING APPRECIABLE ADVERSE EFFECT ON COMPETITION

While determining whether an agreement has an appreciable adverse impact on competition or not, the Competition Commission of India—the nodal agency, established under the Act has to look into the following factors prior to arriving at its conclusion.

a) Creation of barriers to new entrants in the market;

b) Driving existing competitors out of the market;

c) Foreclosure of competition by hindering entry into the market;

d) Accrual of benefits to consumers;

e) Improvements in production or distribution of goods or provision of services;

f) Promotion of technical, scientific and economic development by means of production or distribution of goods.\(^{28}\)

The first three factors pertain to negative effects on competition while the remaining three relate to beneficial or positive effects. Thus, in analyzing whether an agreement has an appreciable adverse effect on competition, both the harmful and beneficial effects as envisaged in section 19 (3) of the Competition Act, 2002 are to be considered. ‘Barriers to new entrants’ can be created through an agreement among existing players to set unconscionably high standards. Pushing existing competitors out of the market could happen, if an enterprise enters into an exclusive supply agreement with distributors by compelling the later to cease their trade with other suppliers as a mandatory condition for the continuous enforceability of the distribution ship agreement. Competition may be foreclosed when an enterprise enters into a long term agreement with a supplier of raw material or components by imposing a condition that no supply of raw material should be made to anyone except with the explicit assent of the enterprise. Accrual to consumers may be in the form of lower prices, enhanced quality,\(^{29}\) effective after sales service, efficiency in delivery of services, affording safety to consumers etc. Promotion of technical, scientific and economic development may emanate from agreements germane to research and

\(^{28}\) Section 19(3) of the Competition Act, 2002.

\(^{29}\) Ibid.
development or specialization in production. The approach to determine the appreciable adverse effect on competition is akin to the rule of reason that is common in the competition laws of most countries.

Black's law dictionary defines the rule of reason in antitrust law as a 'judicial doctrine holding that a trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on economic factors.\textsuperscript{10}

In the US, the rule of reason is applied in a more specific way. The principal question to be examined before arriving at a definite conclusion would be: what is the impact of the agreements in increasing market share or power in a manner inimical to consumers' interest and welfare?

In Tata-Engineering (Telco) v. Registrar of Restrictive Trade Agreement,\textsuperscript{11} the TELCO had agreement with its dealers. Some of the clauses in the said agreement were: (1) Dealer will not directly sell the TATA trucks outside the territory assigned to him. (2) Dealer will maintain organization for sale and service within his territory to the satisfaction of TELCO. (3) Dealer will not sell, directly or indirectly, trucks of other manufacturer.

The Apex Court after considering the facts and circumstances of the case observed that any agreement restrains and binds persons or place or prices. Any such agreement would not be \textit{per se} bad. The question is whether the restraint is such as to regulate and thereby promote competition or suppresses competition. It will be bad, if it destroys competition. Hence: (a) facts peculiar to the business (b) condition before and after restraint and (c) probable effects of restraint, have to be considered. The rules laid down by the Supreme Court are popularly known as the 'rule of reason'.

TELCO stated that they had to ensure equitable distribution of trucks so that the trucks reach even remote places like Nagaland, Tripura etc. Otherwise, the trucks will be concentrated in large metro-centers only, where demand is heavy. Prompt and efficient after sales service is vital for the truck user. Dealer has to maintain stock of spares and good service facilities with adequate equipment and trained mechanics.

\textsuperscript{10} Black's Law Dictionary, 7th ed. p 1033.

\textsuperscript{11} (1977) 2 SCC 55.

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This would cost Rs. 5 lakhs. The dealer would not be able to maintain those facilities if he is not sure of business from that area. Consumer interest demands that he gets good after sales service. Sales tax rates vary from State to State. If there is no territorial restriction, business will be concentrated in the States where sales tax rate is lower. After sales services need specialization which would not be possible if the dealer deals in trucks of other makes. Thus, ultimately, consumers will suffer. If territorial restrictions are removed, consumers in remote areas would suffer and in fact, competition would suffer as in remote area, Telco trucks would not be available. Supreme Court accepted these contentions and declared that restrictions imposed by TELCO do not amount to restrictive trade practice. It was held that the restrictions ensure equitable distribution of vehicles and efficient after-sales service to consumers and therefore, they are construed as reasonable in nature.

Apart from the general provisions, the Competition Act, 2002 assumes that certain agreements as having appreciable adverse effect on competition. Horizontal Agreements are presumed to have appreciable adverse effect on competition in which case the burden of proof shifts on the enterprise or person against which the charge is leveled.

In re Tata Iron & Steel Limited, and Indian Tube Company Limited, the Commission held that dumping goods on distributors and pressurizing them to lift more than the minimum quantity stipulated in the distribution agreement, had the effect of distorting competition and therefore, the provision of section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969 would be attracted. In this case the Commission also held that the trade practice of linkage of discriminatory discounts with off take has to be tested by rule of reason. Therefore, when viewed on the basis of the facts of the case in the light of the definition of restrictive trade practice as given in section 2(o) of the MRTP Act, 1969, it did not lead to distortion of competition to any material degree and was covered by the gateways in section 38(1) (b) and (h) of the MRTP Act, 1969 read with the balancing clause in section 38 (1) of the MRTP Act. The benefit of the said gateway was made available as (i) the

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32. Section 3(1) of the Competition Act, 2002
33. The Raghavan Committee observed in para 4.3.8 that the presumption stating that such horizontal agreements and membership of cartels lead to unreasonable restrictions on competition and may therefore, presumed to have appreciable adverse effect on competition. The rule of per se illegality is rooted in the provisions of the US law
range of variation in discount was limited, and (ii) such of the distributors who lifted
high quantities and got higher discounts had to incur heavier burden in terms of
financial obligations compared to small distributors.

4.5 TO WHOM DOES THE PROVISION OF ANTI-COMPETITIVE
AGREEMENTS APPLY?

As is made clear, the provisions of Anti-competitive agreements apply to any
enterprise or person. 'Enterprise and 'person' are clearly defined under Competition
Act, 2002.\textsuperscript{35} Enterprises engaged in sovereign functions relating to Atomic energy,
Space research, Defense and Currency are excluded from the purview of the Act.
Therefore, none of the trade practices adopted and pursued by these enterprises can be
impeached under the Act though such practices are anti-competitive in nature as these
they are explicitly given immunity from the operation of the competition law.\textsuperscript{36} All
the commercial activities of the Union and States and their statutory bodies are within
the ambit of the Act and therefore, they are amenable to the jurisdiction of the
Competition Commission.

\textsuperscript{35} The Competition Act, 2002; S. 2 (b) defines the term ‘enterprise’ ‘enterprise’ means a person or a
department of the Government, who or which is, or has been, engaged in any activity, relating to the
production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of
services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or
dealing with shares, debentures or other securities of any other body corporate, either directly or
through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary
is located at the same place where the enterprise is located or at a different places, but does not include
any activity of the Government relatable to the sovereign functions of the Government including all
activities carried on by the departments of the Central Government dealing with atomic energy,
currency, defence and space.

Explanation - For the purposes of this clause,-
(a) ‘activity’ includes profession or occupation;
(b) “article” includes a new article and “service” includes a new service;
(c) “Unit” or “division”, in relation to an enterprise, includes
(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control
of any article or goods;
(ii) “goods” means as defined in the Sale of Goods Act, 1930 (3 of 1930) and includes-
(A) Products manufactured, processed or mined;
(B) Debentures, stocks and shares after allotment;
(C) In relation to goods supplied, distributed or controlled in India, goods imported into India;

The term person is defined in 2 (f) as follows “Person” includes
an individual; a Hindu undivided family; a company; a firm, an association of persons or a body of
individuals, whether incorporated or not, in India or outside India; any corporation established by or
under any Central, State or Provincial Act or a Government company as defined in section 617 of the
Companies Act, 1956 (1 of 1956); any body corporate incorporated b or under the laws of a country
outside India. A co-operative society registered under any law relating to cooperative societies; A local
authority; Every artificial juridical person, not falling within any of the proceeding sub-clauses;

\textsuperscript{36} Ibid.
Further, the Competition Act, 2002 also excludes certain agreements from the purview of the Anti-competitive agreements. The scheme of the Competition Act, 2002 specifically excludes exclusive export arrangements and this comes in line with the India’s export promotion objectives. The objective of the Competition Act, 2002 is not to impede or hamper any economic development process and on the contrary to foster and promote it. The Competition Act, 2002 however lays down two exceptions to the applicability of the provisions relating to Anti-competitive agreements:

1. Intellectual Property Protection with Reasonable conditions: The Competition Act, 2002 recognizes that the bundle of rights that are subsumed in Intellectual property Rights should not be disturbed in the interests of creativity and intellectual/innovative power of the human mind. Further, the Act seeks to protect under section 3(5) (i) only the IPRs that are registered in India and not any other IPR subject to jurisdiction of any other regime. The Competition Act, 2002 does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. Although ‘reasonable conditions’ have neither been defined nor explained in the Competition Act, 2002, but unreasonable conditions pertaining to IPRs, by implication shall fall within the purview of anti-competitive agreements defined in section 3 of the Act. Some unreasonable conditions that may accompany Intellectual Property Rights licenses that are likely to limit competition, and attract the provisions of the Competitions Act, 2002 include

- Patent pooling
- Tie-in arrangements
- Prohibiting licensees to use competing technology
- An agreement to continue paying royalty even after the patent has expired, and fixing the prices at which licenses should sell.

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37 Competition Act, 2002; Section 3 (5) Nothing contained in section 3 shall restrict-
(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under ---
(a) the Copyright Act, 1957;
(b) the patents Act, 1970;
(c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;
(e) the Designs Act, 2000;
(f) the Semi-conductor Integrated Circuits Layout Designs Act, 2000;
Similarly, licensing arrangements likely to affect adversely the prices, quantities, quality of variety of goods and services will fall within the contours of the Indian Competition law as long as they are not reasonable with reference to the bundle of rights that go with the IPRs.

However, the Competition Act, 2002 is tacit on the remedies, if unreasonable conditions accompany IPR licenses and limit competition. Compulsory licensing and parallel imports are key remedies of great importance and a competition law cannot remain silent in this regard. The researcher is of the considered opinion that Competition law is a useful tool to check anti-competitive practices like licensing agreements and restrain marketing and product development. Hence, the Competition Commission of India should be empowered to deal with cases of abuse of IPRs.

2. Export Cartels: Export cartels are outside the purview of the Competition Act, 2002. A justification of this exemption is that most countries do not desire any shackles in their export efforts, as the problem lies elsewhere.

4.6 REGULATION OF CARTELS:

According to Adam Smith (1776), “People of the same trade seldom meet together, even for merriment and diversion but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty or justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary”.

Cartels' are included in the category of agreements, which are presumed to have appreciable adverse effect on competition. A Cartel is a horizontal agreement to fix prices, allocate customers or territories, restrict output or rig bids. A Cartel is regarded as the most pernicious and egregious form of violation of competition law.

since it unequivocally damages competition and causes loss to the country and to consumers. Cartels pose a great threat to competition and ultimately tend to destroy free trade. In the European Union, Maria Monti, the former Commissioner for Competition, once described cartels as cancers on the open market economy and the Supreme Court in the US has referred to cartels as the supreme evil of antitrust. In the US, in particular it is customary to hear cartels described as nothing other than theft. Owing to the seriousness of cartels they are subject to the per se rule in many jurisdictions. Accordingly, a cartel is considered to be inherently anti-competitive and injurious to the public without any need to determine whether it has actually injured competition. It is usually a civil offence but in many jurisdictions it is treated as a criminal offence subject to prison term for the individuals involved in the crime. This is the case for example in the US, Canada, Japan, Iceland, Korea, Norway, the Slovak Republic, Germany and since recently in the United Kingdom. The harm caused by cartelization is greater in the developing world as compared to developed nations, because the formal lack effective competitive regimes. Further, the affected consumers from the developed world are not able to legally claim any compensation from the international prosecution.

Cartels are broadly divided into private and public in nature. In the public cartel a government is involved to enforce the cartel agreement, and the government's sovereignty shields such cartels from legal actions. Contrariwise, private cartels are subject to legal liability under the antitrust laws now found in nearly every nation of the world. In fact, private international cartels are found to have raised prices

20. Black's Law Dictionary(7th Edn.), delineates the 'per se rule' as the Judicial principle that a trade practice violates the Sherman Act simply if the practice is a restraint of trade, regardless of whether it actually harms anyone.
21. Section 190 of the UK's Enterprise Act, 2002 provides that a person guilty of a cartel offence under S.188 is liable on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or both; on summary conviction, to imprisonment for a term not exceeding six months or to fine not exceeding the statutory maximum or to both.
23. Ibid.
between 15 and 40 percent\textsuperscript{44} and are estimated to have inflicted billions of dollars of overcharges per year on customers in developing economies.\textsuperscript{45}

A single international cartel, which lasted ten years in the vitamins industry, was estimated to have inflicted nearly two and three quarter billion dollars of overcharges on vitamins imports by 90 countries. Moreover, the same study found that jurisdictions in Asia, Latin America, and Western Europe with active cartel enforcement regimes tended to suffer much smaller overcharges than those jurisdictions that do not.\textsuperscript{46}

Thus, it is quite apparent that cartels have serious adverse effects on the economy as well as on the interests of consumers.

4.6.1. FACTORS CONducIVE TO FORMATION OF CARTELS

Economic theory points to certain conditions that are conducive to the formation of cartels. These include homogeneity of the product, high concentration in the market, and high entry barriers. Other facilitating conditions include a large number of buyers, relative equality of production costs amongst firms and relatively stable or predictable demand conditions. Weak competition regimes coupled with slack enforcement also embolden individuals operating at the helm of affairs of business entities to indulge in cartelization.

4.6.2 INTRICACIES IN BUSTING CARTELS

Firms that participate in cartels are usually fully aware of the unlawfulness of their conduct. They know, therefore, that they should avoid the creation of incriminating documents that would be discovered by a competition authority when conducting surprise inspections and raids. They will often arrange to meet in


jurisdictions where they are unlikely to be scrutinized by the competition authorities and further they may use code names and resort to other practices to avoid detection. Even in the case of explicit agreement the parties to such agreement are likely to be highly secretive and mostly it would be a result of a covert meeting. Hence, it becomes very difficult for the competition authority to compile evidence that will satisfy a court to the required standard of proof that there has been illegal behaviour of cartelization. However, the experience of the developed countries proves that the leniency and whistle blowing programmes have been found to be salutary in busting cartels. Unfortunately, the Indian Competition Act, 2002 doesn’t contain any provision extending protection to whistle blowers though it contains leniency provisions and which is undeniably a drawback.

4.6.3 REGULATION OF CARTELS UNDER THE MRTP ACT, 1969

There is worldwide recognition and consensus that Cartels harm consumers and damage economies.\(^4\) In India too, cartels have been alleged in various sectors, namely cement, steel, tyres, trucking, etc. India is also believed to be a victim of overseas cartel in soda ash, bulk vitamins, petrol etc. The Monopolies Restrictive and Trade Practices Act, 1969 was found to be severely deficient in dealing with domestic as well as cross border cartels originating outside the shores of India but having adverse effects on the domestic economy. The Act even did not contain any explicit definition of the term ‘cartel’ and which evidently demonstrates absence of legislative will behind the enactment to combat cartelization.

The Apex Court in Hari Das Exports v. All India Float Glass Mfrs, Association & Co,\(^4\) observed that the “Competition law in the form of MRTP as it stands today does not contain any provision, which can give it jurisdiction to interfere merely with cartel formation. Formation of cartel which takes place outside India is outside the territorial jurisdiction of the MRTP”

\(^4\) Hard Core Cartel: Third Report on the implementation of the 1998 recommendation at OECD 2006. Estimates in the United States suggest that some hard core cartels can result in price increases of up to 60 or 70 percent. Based on a review of a large number of cartels, it is estimated that the average overcharge is somewhere in the 20-30 percent range with higher overcharges for international cartels than for domestic cartels.

The ratio laid down by the Apex court had totally crippled the Monopolies and Restrictive Trade Practices Commission from taking even any semblance of preventive action against cross border anti-competitive practices which will have adverse consequences on the Indian economy as well as on the consumer welfare.

The Supreme Court further held that the reading of the Section. 1(2), Section 2 (c) and Section 14 of the MRTP Act, 1969, together can leave no manner of doubt that the MRTP Act has no extra territorial operation and the MRTP Commission can exercise jurisdiction over goods when they are actually imported into India.⁴⁹

The business houses are affected most by cartels as the cost of procuring inputs is enhanced or choice is restricted making them uncompetitive, unviable or be satisfied with less profits. It is in these backdrops that “Cartels” are considered as most serious competition infringements and supreme evil of antitrust. The 1998 OECD Recommendation proclaimed that Cartels are “the most rigorous violations of Competition Law”. Further, developing countries are affected more either due to absence of competition regime or inadequate capacity to detect, discover and prosecute domestic as well as overseas cartel.⁵₀

About the object of forming cartels the Supreme Court of India has given an insightful judgment in Union of India v. Hindustan Development Corporation,⁵¹ as “it amounts to an unfair trade practice which is not in the public interest”. Pradeep S. Mehta (2009), a noted competition law expert has rightly observed that the MRTP Act, 1969 and its implementation thus far show it is ineffective in dealing with cartels.⁵²

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⁴⁹ The feeble competition regime established under the Monopolies and Restrictive Trade Practices, 1969 has been evidently found to be visible from the fact that the MRTP Commission had miserably failed in successfully prosecuting any of the international cartels that had been operative in India to the detriment of Indian consumers though these cartels have been successfully busted and prosecuted in the developed countries.


⁵¹ [1993] 3 SCC 499

4.6.4 CARTEL REGULATION UNDER THE COMPETITION ACT, 2002

The term 'Cartel' is explicitly defined in the Competition Act, 2002 as:

"Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of service" 53.

The three ingredients to constitute 'Cartel' are:

i) an agreement which includes arrangement or understanding whether formal or informal;

ii) agreements is amongst producers, sellers, distributors, traders, or service providers i.e., parties who are engaged in identical or similar trade of goods or provision of service, and

iii) agreement aims at limiting, controlling or attempt to control the production, distribution, sale or price of, or trade in goods or production of services.

An obvious question arises as to why a 'Cartel' is presumed to have "Appreciable Adverse Effect on Competition." In case of cartel, competitors agree not to compete on price, product, customers etc., and further, they agree to collude to the detriment of consumers. Simply and plainly stated, any competition law seeks to promote, maintain and sustain competition in market, which is benign and beneficial to various stakeholders in society. Thus, it is quite obvious that in the case of a Cartel, direct competitors agree to forego competition and opt for collusion, resulting in the deprivation of benefits of competition to the consumers and rival business houses. The parties to the cartel make it as secretive and opaque as possible so as to ensure that it is not detected by the law enforcing authorities. Therefore, it becomes very difficult, if not impossible to bust a cartel. All these compulsions seem to have persuaded the law makers to prescribe that 'Cartel' is presumed to have 'appreciable adverse effect on competition'

53. The Competition Act. 2002: Section 2(c)
The Competition Act, 2002 contains leniency provisions, which provide for a reduced penalty on a participant in a cartel, who makes a full and true disclosure.54

The logic behind the leniency provisions is that a cartel is a hard nut to crack and such provisions would be helpful in motivating at least some parties to break away from cartel by letting the lid off from it. The leniency provisions have been found to be quite effective in the United States of America in letting lid on cartels and therefore, have been adopted in most of the countries having competition regimes. The European Commission has also adopted and endorsed the efficacy of the same. The principal reason for this, that more often than not, cartels do not have a formal or a written agreement.55 Hence, very often it becomes highly intricate for the law enforcing authorities to secure vital information about the existence of a cartel. Leniency programme by itself would not be much helpful in busting cartels unless and until it is coupled with incentives to the persons spilling beans on cartels and protection to whistle blowers. Further, to create deterrent effect against cartelization the individuals participating in cartels must be prosecuted and punished by treating the very act of overt and covert participation in cartel as a criminal offence entailing imprisonment apart from disqualification from holding managerial positions in corporate bodies for a protracted period. The Competition Act, 2002 sadly doesn’t

54. Section 46 of the Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007 provides that the Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than livable under this Act or the rules or the regulations:
Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure Provided further that penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.
Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.
Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,
(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
(b) had given false evidence; or
(c) the disclosure made is not vital,
and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed
contain any of these provisions and therefore, one may be tempted to say that the Act is not that much harsh on cartels.

4.6.5 CASE LAW ON CARTEL

United States v. Trenton Potteries Co. et al.56:

This was one of the early cases that was decided by the US Supreme Court. The complaint, under the Sherman Act, was that the respondents, controlling 82 percent of the business of manufacturing and distributing in the US vitreous pottery of the type described, combined to fix prices and to limit sales in interstate commerce to jobbers. One of the arguments on behalf of the respondents was that where the prices fixed were reasonable, the practice could not be deemed to be an unreasonable restraint on commerce. The Court emphasized that the reasonableness or otherwise of the restraint of commerce was a distinct, and the only issue, and the reasonableness of the stipulated prices, under an agreement that was shown as an unreasonable restraint of commerce did not affect the basic issue, viz, whether an agreement was in restraint of commerce.

Auction Houses57

Christie's and Sotheby's - the well known auction houses, were found to be involved in a collusive agreement fixing trading terms. The purpose of the cartel agreement was to reduce the fierce competition between the two leading auction houses that had developed during the 1980s and 1990s. The Commission fined Sotheby's 20.4 million that is 6 percent of its worldwide turnover.

Vitamins Cartel58

Leading producers of vitamins including Roche AG and BASF of Germany, Rhone-Poulenc of France, Takeda Chemical of Japan formed a cartel dividing up the

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56. 273 US392 (1927)
57. EC Press Release DN: IP/02/1583 dated: 30/10/2002 Commission rules against collusive behaviour of Christie's and Sotheby's
world market and price fixing for different types of vitamins during the 1990s. The cartel operated for over 10 years. It was prosecuted with the help of Rhone-Poulenc, which defected from cartel by letting lid on it and cooperated with US authorities. Roche paid fines of US $1 billion in the US alone. The overcharges paid by 90 countries importing vitamins were estimated to the tune of US $2700 million during the 1990s. The analysis also disclosed that jurisdictions with weak cartel enforcement regime suffered the more. In terms of monetary loss India incurred overcharges of more than US$ 25 million.59

Lysine Cartel60

Lysine is an amino acid that stimulates growth and results in leaner muscle development in dogs, poultry and fish. It is also mixed with corns and is an input for feed products. Between 1992 and 1995, five producers belonging to Japan, Korea and were controlling more than 97% of the global capacity engaged in price fixing, allocation of sales quota and monitoring of volume agreements. The DoJ undertook searches with the cooperation of FBI and on the basis of subpoenaed documents together with tape recording of meeting of the conspirators could make out a strong case of colluding on lysine prices around the world for three years.

Soda ash cartel61

In September, 1996, American Natural Soda Ash Corporation (ANSAC) comprising of six American producers of soda ash attempted to ship a consignment of soda ash at cartelize price to India. Based on the ANSAC membership agreement, the Monopolies and Restrictive Trade Practices Commission held it as a prima facie cartel and granted interim injunction in exercise of its powers in terms of Section 14 of the MRTP Act. The Supreme Court, however, overturned the order of the Commission

59. Despite the fact that India had been a victim of the Vitamins cartel yet no action of semblance was ever initiated against any of the perpetrators of the cartel owing to weak competition regime established under the Monopolies and Restrictive Trade Practice s Act, 1969 and which imperatively highlights the importance of an effective competitive regime to curb and combat cartels.

inter alia, on the ground that the MRTP Act did not give it any extra territorial operation.

Trucking cartel

Eliminating competition in the market by fixing the freight rates without liberty to the members of the truck operator union to negotiate freight rates individually is common in the trucking industry. The M.R.T.P. Commission passed 'Cease & Desist' order against Bharatpur Truck Operators Union. In the absence of any penalty provision in the MRTP Act, 1969, however, no fine could be imposed. Determination of the existence of a cartel by cogent evidence is a Herculean job. The law embodied in the Competition Act, 2002 in regard to the curbing of anti-competitive practices such as cartels, predatory pricing, collusive tendering and conspiratorial price fixations have provided ample teeth to the Competition Commission and the Appellate Authority and hopefully they can curb such practices ruthlessly.

Cartels have undoubtedly pernicious effects on competition and consumer welfare. Therefore, there should be effective and efficacious sanctions against them to create deterrent effect against such behaviour. However, the provisions of the Competition Act, 2002 in regard to the curbing of anti-competitive practices such as cartels, predatory pricing, collusive tendering and conspiratorial price fixations are inadequate to curb and combat such legally assailable trade practices. Criminal

62. Supra no 31; see also S.S. Kumar "Cartels and Price Fixation: Worst Type of Anti-Competitive Practices", Executive Chartered Secretary, July 2006, vol 3, no, p 661
63. This is because not only the element of meeting of mind is essentially necessary but also, as laid down by the Supreme Court in Haridas Exports v. All India Float Glass Manufacturers Association 2002 CTJ 353 (SC) (MRIP), the mere formation of cartel by itself will not give rise to an action. Something more must have to be proved to demonstrate the detrimental effect thereof. These hurdles came in the way of a palpably existent cartel of cement manufacturers' Cement manufacturers' Association with 44 cement manufacturers were arraigned in an Enquiry initiated by the MRIP Commission against them. It was alleged that the manufacturers had formed a cartel which was responsible for increasing the prices of cement in all parts of the country. The Commission immediately granted an injunction which, when contested, had to be revoked because the assumptions relied upon did not stand proved. Such being the level of evidence needed to unearth and expose a cartel, one can safely say that far more has to be done in this direction.
64. This prohibition of even those agreements that have as their object the restriction of competition, but have not materialised, is a rational one. It would be an odd situation if the undertakings were allowed to conspire ineffectually to break the law and be condemned only when they are successful. If that were the case, many a price cartels would not have been brought to book. Economists point out that greater the number of members in a cartel, greater is the possibility to cheat, see eg. Stigler, A Theory of Oligopoly, Journal of Political Economy, Vol 72, 1964,p.44.
prosecution coupled with barring of individuals from assuming directorship and other managerial positions for taking part in cartels has been found to be very effective in curbing and combating cartelization and the experience of the U.S and other countries also conclusively establishes this fact but this salutary lesson has not been incorporated in the Indian Competition law. Though leniency programme has been explicitly recognized under the Indian Competition law but lack of incentives to the persons invoking such provisions may make it less attractive and effective. The Act also doesn’t contain any provision extending protection to whistle blowers and which is definitely a shortcoming warranting incorporation of such provision at the earliest. Cartel busting imperatively demands specialist skills, expertise and dexterity which differs from the skill required for an investigation and prosecution of the rest of the provisions of competition law. In case of cartels the focus lies on proving the existence of the arrangement itself rather than demonstrating its impact on the market in economic terms. That is the principal reason why the number of Competition Authorities have set-up special cartel cells equipped with expertise in organizing search and raids, interviewing witnesses, covert surveillance, besides successful leniency programme. The Competition Commission of India should also contemplate on similar lines. Further, the Commission should be empowered with the power of intrusive surveillance. What is conspicuously lacking in the Act is the provisions treating hardcore cartel as crimes entailing criminal prosecution and incarceration of the individuals designing, executing and participating in such cartels. Further, such persons must be barred from assuming office of directorship of corporate bodies for a protracted period to create deterrent effect against the very act of cartelization. Furthermore, the Competition Commission of India should be armed with necessary powers like the power to conduct dust to dawn raids, market surveillance. Infrastructural support has to be provided to the investigators in full strength. The victims of cartel should be empowered to claim compensation from the perpetrators of such cartelization and such compensation should be borne by the individual responsible for such cartel. Protection to the whistle blowers has to be assured. Apart

63 The Indian Competition Act, 2002 merely treats cartel as a civil offence and which is a clear lacuna in the Act.
64 Intrusive surveillance involves the presence of an individual in the residential or hotel accommodation or installation of device in a vehicle to see what is happening within the premises or vehicle and these do not constitute element of trespass. The UK’s Enterprise Act, 2002, empowers the OFT with such power.
from this, there should be sustained efforts on the part of the Competition Authority to generate awareness about the pernicious effects of cartels as it is a prelude to the strengthening of the private enforcement of the Competition Law. Private enforcement of competition law plays a very pivotal role in not only making the law more effective but also in empowering the victims of anti-competitive agreements and market abusive practices to claim compensation from the perpetrators of such practices. Unfortunately, the Indian Competition law is apparently lacking in this area and therefore, private enforcement of law should be explicitly recognized under the Act.

4.6.6 COMPARITIVE LAW:

LAW RELATING TO ANTI-COMPETITIVE AGREEMENTS IN EUROPEAN UNION

Article 81 and 82 of Treaty of Rome is the law regulating Anti competitive agreement in the European Community. EC Treaty prohibits agreements between undertakings that may affect trade between member States and which have as their object or effect of prevention, restriction or distortion of competition within the common market and lists the following as prohibited as incompatible with the common market:

Price fixing agreements:
1. Those that limit or control production, markets, technical development, or investment or share markets or sources of supply.
2. Agreements that impose dissimilar conditions to equivalent transactions, placing trading parties at a disadvantage and
3. Agreements that place the other party to the contracts under supplementary obligations commercially unrelated to the subject of the contract.

The European Community law mentions exemption provision. It exempts certain categories of agreements. An agreement is exempted if it contributes to improve in the production or distribution of goods, or to promoting technical or

67 European Economic Community: Article 81
68 Ibid: Article 81(3)
economic progress, while allowing consumers a fair share of the resulting benefit. This is subject to the proviso that the agreement also does not impose unrelated restrictions on the undertakings concerned and also does not enable the undertaking to eliminate competition in respect of a substantial part of the products in question. The basic principle is that agreements falling under (a) to (d)\textsuperscript{69} are automatically void, unless they are specifically exempted.\textsuperscript{70} It should be noted that the qualifying conditions to be satisfied for claiming exemption are cumulative. The European Economic Community has granted a number of 'block exemptions' to agreements in various sectors so that it is unnecessary for individuals to apply for exemption.\textsuperscript{71}

**LAW RELATING TO ANTI-COMPETITIVE AGREEMENTS IN UNITED KINGDOM:**

The principle domestic law relating to competition in the United Kingdom is the Competition Act, 1998. The Enterprise Act, 2002 is complementary to the Competition Act. Section 2 of the UK Competition Act, 1998 deals with anti-competitive agreements, decisions and concerted parties.\textsuperscript{72} It prohibits 'agreements between undertakings, decision by association of undertakings or concerted parties that:

\begin{enumerate}
  \item[a)] may affect trade within UK,
  \item[b)] have as their object or effect the prevention, restriction or distortion of competition within the UK,\textsuperscript{73}
\end{enumerate}

The Act grants individual exemptions,\textsuperscript{74} block exemptions\textsuperscript{75} A parallel exemption may be available where the agreements have been exempted under European Community Treaty.\textsuperscript{76}

\textsuperscript{69} Id, Article 81(1).
\textsuperscript{70} Id, Article 81(3); See Maher M Dabbah, EC and UK Competition Law 1\textsuperscript{st} ed. 2004 pp.134-136.
\textsuperscript{71} Supra n. 12, p. 59
\textsuperscript{72} UK Competition Act, 1998; Subsection (2) 2 provides that “sub-section (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 developments or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties”.
\textsuperscript{73} UK Competition Act, 1998; Section 2(1)
\textsuperscript{74} The UK’s Competition Act, 1998; Section 4.
\textsuperscript{75} Ibid, Section 6
Relationship between UK and EC Law is that Competition Act, 1998 prohibits anti-competitive behaviour that affects trade in the UK. Articles 81 and 82 prohibit anti-competitive behavior that affects trade in the European Union. Since 1st May 2004, the OFT has had the power to apply and enforce Articles 81 and 82 in the UK. When doing this, the OFT must follow the case law of the European Court. While applying the Act, section 60 of the Act requires the OFT to act consistently with EC Law.77

LAW RELATING TO ANTI-COMPETITIVE AGREEMENTS IN UNITED STATES:

In the United States, Sections 1 and 2 of the Sherman Anti Trust Act, 1890 and Section 2 of the Clayton Act, 1914 are the key Anti trust provisions. Clayton Act, 1914 also deals with the acquisition of stock or assets of another.78 The substance of provision in the Sherman Act, 189079 is that every contract or conspiracy, in restraint of trade or commerce among several States, or with foreign nations is declared to be illegal.80 Sherman Act, 1890 declared that monopolizing or conspiring with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, is an offence.81 Clayton Act prohibits as unlawful any price discrimination, the effect of which discrimination may be substantially to lessen or tend to create a monopoly in any line of commerce.82 However, it is to be noted that much of the US laws relating to Antitrust is judge made law and the landmark decision had added flesh and blood to the board provisions of the law. In 2005 and early 2006, the Division obtained large fines in domestic and international price-fixing cases and worked to advance anti-cartel cooperation overseas. Since individual

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77 Under European Community Treaty; Article 81(3).
79 Clayton Act, 1914; Section 7.
80 Sherman Act, 1890; Section 1.
81 Section 1 of the Sherman Anti Trust Act, 1890 provides that 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.
82 Sherman Act, 1890; Section 2 of the Sherman Act provides that every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony....
83 Clayton Act.1914; Section 2.
84 Division is the main adjudicatory body in the United States. Division is constituted under the Competition Law of the United States to deal with the cases of Anti trust.
incarceration has a greater deterrent effect than fines alone, the Division continued to emphasize prison terms for executives who participate in cartels. The Division also intensified its advocacy of individual accountability regimes and worked to secure extradition for antitrust offenses. The Division filed numerous criminal cases in the past 12 months against both domestic and international cartels, including several cases that led to record fines and record numbers of prison sentences for individuals.

CASE STUDY:

Brown Shoe Co. v. US. In this case Supreme Court pointed out that within the board product market, well defined sub markets may exist which in themselves may constitute product markets for anti trust purposes. It stated that the boundaries of such a sub market may be determined by examining such practical indicia as industry to public recognition of the sub market as a separate economic entity, the products peculiar characteristics and uses, unique production facilities, distinct customers and prices, sensitivity to price charges and specialized vendors. Through reaching out to identify sub-markets is not expressly provided under the Indian Act, 'consumer preference' under section 19(7) (c) of the Sherman Act, 1890 would permit, where necessary, ascertaining a sub market.

In Ford Motor Co. v. United States, Ford acquired the assets of Autolite, an independent manufacturer of spark plugs and other automotive parts and a supplier to Ford. Ford was a major customer in an oligopolistic industry. It was held that the acquisition was likely to substantially lessen competition in automotive spark plugs as the acquisition by the buyer of a substantial share of the total industry output 'foreclosed access to independent spark plug manufacturers. The US Supreme Court held that Ford's position of a buyer of spark plugs as an original equipment

15. 365 US 320 (1961)
16. 405 US 562 (1972)
manufacturer would 'maintain the virtually insurmountable barriers to entry to the aftermarket'.

Standard Oil Company of New Jersey, v. U. S. The charge was that the defendants were engaged in conspiring 'to restrain the trade and commerce in petroleum, commonly called 'crude oil' and in other products of petroleum, among the several states and territories of the U.S and the District of Columbia and with foreign nations and to monopolize the said commerce. The conspiracy was said to be for the purpose of fixing the price of crude and refined oil and the products thereof, limiting its production, controlling its transportation and thereby restraining trade and commerce among the several states and monopolizing the said commerce. The combination was the acquisition by Standard Oil Company of New Jersey of the majority of the stock of a large number of companies in the oil industry. The US Supreme Court held that the ownership of the stock of the New Jersey Corporation constituted a combination in violation of section 1, and an attempt to create a monopoly or to monopolize under section 2, both of the Sherman Act, and commanded the dissolution of the combination, the decree was clearly appropriate.

Standard Oil Co. of California v. United States, It was a case where Standard Oil, like its competitors, had entered into agreements with its retailers that they would buy all their requirements of gasoline and petroleum products only from this company. The U.S Supreme Court held that this requirement under the agreement violated section 3 of the Clayton Act, as it restricted access for its retailers of other channels of procuring petrol and petroleum products and that therefore, competition had been foreclosed in a substantial share of the line of commerce.

Natural Gas Pipeline Company and executives, The indictment, filed in the U.S. District Court in Denver, charges that B&H Maintenance & Construction Inc. (B&H) and two of its executives of marketing and business development, conspired with each other and another corporation and individual to submit non-competitive and rigged bids to BP America Production Company. According to the indictment, between

83 221 US 1 (1910)
84 337 US 293 (1949)
approximately June 2005 and December 2005, the defendants rigged bids for the
collection of pipelines to transport natural gas from wells in the Upper San Juan
Basin in Colorado. In addition, the indictment charges were that one of the executive
tampered witness. On March 13, 2007, Federal Grand Jury indicted a Eunice, N.M.-
based Construction Company and two of its executives for participating in a bid-
rigging conspiracy involving natural gas pipeline construction projects in Colorado,
the Department of Justice announced.

4.7 CROSS BORDER ANTI-COMPETITIVE TRADE PRACTICES

There has been increasingly global nature of the World economy and the
thinning out of national economic boundaries. 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 situated 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 provided the anti-
competitive act has an effect in the country. This doctrine is also referred to as the
'effects doctrine' or the principle of extra-territoriality.

The Competition Act, 2002 explicitly recognizes this doctrine by importing the
same from the American jurisdiction. Economic and industrial globalization has
brought about increasing integration of national economies across the World. Thus,
anti-competitive practices also will have increasingly global dimensions. A number of
trends have contributed to the accelerated globalization of industry and the integration

90. Section 32 of the Competition Act, 2002 as amended by the Competition(Amendment) Act, 2007
provided that The Commission shall, notwithstanding that,

(a) an agreement referred to in section 3 has been entered into outside India; or
(b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or
combination is outside India.

Have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of
the Act into such agreement or abuse of dominant position or combination if such agreement of
dominant position or combination has, or is likely to have, an appreciable adverse effect on
competition in the relevant market in India and pass such orders as it may deem fit in accordance with
the provisions of this Act.

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of international economies. For instance, the growing similarity in available infrastructure, distribution channels, and marketing approaches has enabled companies to introduce products and brands to a universal marketplace. Fluid global capital markets, falling tariff barriers, and technological innovation have led to an increasing ability for global competitors to reach international markets that were once beyond their grasp and reach.

In addition, technological advancements and e-commerce have enabled firms to significantly improve the efficiency of operations, innovations in supply chain management, and increasing vertical and horizontal integration and industry concentration.

4.7.1 CROSS-BORDER COMPETITION ISSUES IN INDIA:

As countries integrate more and more into the global economy, they become more prone to the Anti-competitive practices operating on a global scale, or originating outside the shores of the country but having effects on their domestic economies. Several international cartels created by producers and distributors of industrialized nations which have been exposed in 1990s showed the anti-competitive effects on a number of countries, hampering growth of domestic firms in developing countries. India-being a part and parcel of the global economy is no exception to it. When competition authorities from highly developed countries/blocks like the European Union face difficulties in handling cases with a cross border dimension, it is clear that authorities in developing countries face even greater and more uphill problems in taking such cross border anti-competitive trade practices.

During the 1990s, there was a wave of mega mergers, with firms merging with or acquiring controlling stakes in, other firms, often in other countries. Large companies merge and consequently their subsidiaries and associates end up in new combinations. Moreover, developing counties may also be affected by Mergers and
Acquisitions activities that take place outside their territory, without any local presence.91

Mergers and Acquisitions are primarily a domestic Competition Law issue. In some cases, however, Mergers and Acquisitions affect international trade. An enterprise may acquire a foreign competitive firm to block the importation of competing products. If it happens there is an impact on international trade apart from affecting domestic competition.

For example, Gillette (a U.S. Razor manufacturer) acquired stocks of Braun (a German razor manufacturer), a potential competitor of Gillette. The effect of this acquisition was to control exports of Braun to the U.S market. The U.S Justice Department proceeded against this acquisition and this deemed to be a violation of Section 7 of the Clayton Act.92

There was a need to look into the issue of tackling cross-broader Anti-competitive practices that affect countries. The decline of Communism and the consequent introduction of market reforms in transitional developing economies have given rise to the emergence of multilateral global trade agreements and rules based international trade regime under the aegis of the W T O. These trends have triggered significant changes in the structure of entire industries. With the emergence of the global marketplace, governments have promoted global competition through the increase in international trade, while developing legal systems to ensure industrial competitiveness. Antitrust laws, or Competition Laws, as they are known throughout much of the World, are designed to promote competition and protect against market concentration to the extent that monopoly power may emerge.

Both competition policy and the WTO regime aim at establishing and maintaining a free market where the optimal allocation of economic resources is achieved through the price mechanism and competition among enterprises. Therefore, competition policy and the WTO share the same objective, namely, an economic system based on a market economy. Indeed, competition policy is an integral

principle of the WTO regime, even though there is no WTO agreement on Competition policy. Therefore, the liberalization of trade progresses through trade negotiations sponsored by the GATT/WTO regime, it becomes increasingly necessary to take measures to take control of Anti-competitive conduct of private enterprises that will counteract the results of liberalization. In the light of this, the introduction of competition policy onto WTO regime is a necessity of the effectiveness of the regimes to be maintained.

Although a comprehensive agreement on competition policy is yet to come into the WTO regime, there are several provisions in the existing WTO agreements that deal with competition matters. There are some Anti-competitive practices in international trade which affect countries and they can be broadly classified into four groups:

1. Market power in global or export markets;
2. Barriers to import competition;
3. Foreign investment; and
4. Intellectual Property Rights

4.7.2. INTERNATIONAL CARTELS:

International Cartels have attracted much attention in recent years. Competition agencies in the European Union and the United States have successfully prosecuted over 40 such cartels that operated in their jurisdiction during the 1990s, and slapped heavy fines on several companies involved in such cartels.

Most countries exempt export cartels from their antitrust laws, as long as they do not have any Anti-competitive effect on the domestic market. In India, similar exceptions exist in both the outgoing MRTP Act, 1969 and the new Competition Act, 2002.

4.7.3. **CROSS-BORDER PREDATORY PRICING:**

Cross-border predatory pricing can also lead to market distortions. Due to some striking similarities, cross-border predatory pricing is very often equated with dumping. Therefore, an action is taken under anti-dumping which is different from that underlying Competition Law because under anti-dumping law it seeks to protect competitors, and not competition. Through, in most developing countries, due to the small size of the markets and low levels of the markets contestability, there would be more convergence between anti-dumping and anti-predation actions. Ironically, until recently, the main users of anti-dumping laws were developed countries. On the other hand, increasingly, developing countries too are taking recourse to these laws.

4.7.4 **BARRIERS TO IMPORT COMPETITION:**

Import cartels formed by domestic importers, or buyers and similar arrangements (such as boycotts of, or collective refusals to deal with, foreign competitors), may be a threat to maintaining competition in a market. In principle, a national competition law may generally be able to tackle such market access barriers to foreign supplies and suppliers. Import cartels, whose functions are solely to attempt to exercise monopoly power, in order to get a better price from foreign suppliers, may be viewed more favorably from a national efficiency and welfare perspective, than such cartels which exercise market power domestically. But, it may be difficult to make such a distinction or separate the two types of activities.

Another way of local firm’s gang-up against foreign competitors it by preventing or hindering market access. For example, local firms will lobby their governments to disallow foreign manufacturers from marketing their goods. Other examples are when local firms lobby their governments to, either initiate unfair anti-dumping action or raise import tariffs against the foreign suppliers.\(^95\)

\(^95\) If WTO members encourage private conformity assessment bodies to discriminate against foreign enterprises, this constitutes a violation of the Agreements on Technical Barriers to Trade (TBT) Agreements (Art.8.1) and in many jurisdictions, a violation of their national competition laws. 104
4.7.5. FOREIGN INVESTMENT:

Foreign Direct Investment may increase competition in local markets, particularly investment of Greenfield type. However, there is a possibility that takeovers of domestic firms may take the markets increasingly concentrated, to the extent of having one or a small number of dominant players. Moreover a single instance of cross border acquisition may seem to have no effect on competition. But from a narrow national market perspective, it may lead to a lessening of effective competition in the market, if the acquirer has been a major exporter to the country. Such acquisition may be aimed at regional or global consolidation by TNCs.

In most developing countries, it has been seen that majority of the FDI (Foreign Direct Investment) comes in through acquisitions, rather than through fresh Greenfield investments.

4.7.6. INTELLECTUAL PROPERTY RIGHTS (IPR):

Intellectual Property Rights may generate or contribute towards a position of market power. The IP holders typically engage in licensing agreements with firms in different countries. The territorial nature of property rights, in such agreements, means that frequently the national law enables them to be used by rights holders in order to prevent parallel imports. In many cases, it has also been observed that cartels were built around patent cross licensing schemes.

Thus, many aspects of mergers and acquisitions may have a significant impact on international trade. On the other hand, many Mergers and Acquisitions have no trade effect and belong to the realm of domestic regulation. In addition, Mergers and Acquisitions may be important corporate strategy and governmental policy for industrial reorganizations. Therefore, the regulation of Mergers and Acquisitions is primarily the matter of domestic policy of national governments and municipal laws. However, in situations in which the trade impact of merger and acquisitions is clear, international review may be warranted.

*Art.40 the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Properties) authorizes Members to enact legislation prohibiting restrictive conditions attached to licensing agreements regarding intellectual property*
The primary purpose of competition law is to maximize the economic welfare of consumers by, among other things eliminating barriers to market entrance and eliminating the abuse of market dominance by cartel behavior and monopolistic strategies. Although these laws were originally designed to govern domestic economic activity, the "effects test" reflected the need to regulate economic activity injurious to domestic consumers but originating or taking place outside of national borders. In addition, the globalization of business has blurred the lines between domestic and international business, thus creating the need for extraterritorial jurisdiction as well as convergence within separate bodies of competition law. This is especially true with the significant liberalization of international trade within the past decade.

One overriding reason justifying the adoption of an international competition law regime is to reduce the controversy that can arise between conflicting rulings by overlapping jurisdictions. Another compelling reason is to reduce the significant public and private compliance costs imposed by duplicative and overlapping merger control jurisdiction. Since a single transaction can potentially be exposed to many merger control regimes, compliance costs can be substantial in terms of meeting international pre-merger notification requirements and remedying concerns expressed by the various independent antitrust enforcement agencies. In addition, governments must invest substantial resources in monitoring merger activity, enacting effective legislation, and enforcing policies. An international body of competition law governing merger control and an independent enforcement agency would be significantly more economically efficient.97

Clearly, a global standard is premature and it is questionable whether such a standard will ever become a reality. This is due to the constant evolution of antitrust law to meet the needs of the economic conditions prevalent at any one particular time, which is dependent on the state of the economy, the shifts in industrial concentration, the strength of the political democracy, and the power of the judiciary. Nonetheless, as national economies become increasingly global and as firms shift from multi-domestic to multinational and eventually global in strategic focus, competition laws

will naturally converge. Although the application of antitrust laws will never escape national political pressure, the pressure from the globalization of industry will create increasing pressure for transparency, due process, and a reduction in transaction and compliance costs, which will lead to the inevitable convergence of competition laws and the increasing possibility that a global standard may yet see the light of day.

4.8. CONFLICT OF JURISDICTIONS:

Extraterritorial application of domestic competition law has created conflicts of jurisdictions and tensions among the nations concerned. Although there is a possibility of such conflicts and tensions with regard to the application of competition laws of other jurisdiction such as the European Community, Following are the some of cases in which conflicts of jurisdiction raised.

The Swiss Watch case

The Swiss government had a policy of promoting the watch industry as one of its key industries and, for this purpose enacted "The Watch Law", which authorized agreements among enterprises in the watch industry to engage in the control of production and sale of watches. U.S companies joined the industry agreements in Swiss through their subsidiaries in Swiss. The industry agreements concluded among Swiss watch companies within the country within the framework of this included control of watch production in the United States and countries other than Swiss.

The US Justice Department initiated an anti-trust law suit against US and foreign watch companies, including Swiss watch companies. The Swiss government reacted to this lawsuit strongly and argued that the US government's legal challenge to the industry agreements was an infringement of Swiss sovereignty. The US Justice Department requested that a decree be entered which would order the defendants to cancel industry agreements controlling production of watches "any where outside Switzerland." Again the government of Switzerland protested that the scope of the decree was too broad and threatened that it would bring a petition to the international Court of Justice and challenge the jurisdiction of US law.

A compromise was made among the parties to the dispute to the effect that the scope of decree is limited to the territory of the United States, and an outright conflict was avoided. This case represents clash between US competition policy and Swiss industrial policy as well as a clash of legal jurisdictions. Often a nation promotes industries through industrial policy, and this may include private measures to control production and sale of products.

The GE/Honeywell Case

In this case, the European Community prohibited a proposed merger between two American companies, GE (General Electric) and Honeywell, which was to take place in the US. GE was a leading producer of Jet engines for large commercial and regional aircrafts. Honeywell was a leading supplier of non-avionics products as well as engines power, corporate jets and engine starters, an important input in manufacture of inputs. The US Anti-trust Agencies, the Department of Justice [DOJ] and Federal Trade Commission, approved this merger. However, the European Community considered that this merger would create or strengthen the dominant position of GE and would severally reduce competition in the aerospace industry and result ultimately in higher price for customers.

GE and Honeywell notified their merger agreement to the European Commission on 5 February 2001, and the Commission initiated an investigation to see if, after the merger, GE would have a dominant position in the markets for jet engines for large commercial and large regional aircrafts. There was a proposal on the part of GE and Honeywell to restructure the merger plan, but the Commission rejected this proposal. The Commission concluded that the strong market position of GE, combined with its financial strength and vertical integration, assured the dominance of GE in the relevant markets. For this reason, the commission refused to approve the merger.

A high-ranking official of the US Justice Department stated that this merger would have been pro-competitive and beneficial to consumers. He is reported to have

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said that this difference in attitude between the European Commission and authorities in the US "reflects a significant point of divergence".

This recent case is an important example of extra territorial application of the competition law of European Communities and policy conflict between the US and EC with regard to the merger control.100

4.9. CONCLUSION

Efforts have been made in the past several decades to clarify and establish a set of principles that would govern extraterritorial application of competition law. However, until now, there are no firmly established principles of international law that would effectively resolve the issues arising from extraterritorial application of competition law. Efforts will continue to establish jurisdictional principles. It is not certain; however, that any such attempt will produce a set of principles which would be accepted by the majority of nations and which would resolve which issues. It seems that the promotion of international cooperation in the field of competition law and policy will mitigate, if not eliminate, the severity of conflicts that may arise from the application of domestic competition law extraterritorially.

Competition authorities attempted to liberalize trade through unilateral application of domestic competition laws. At the same time, a unilateral extraterritorial application of Competition Laws is an imperfect and incomplete way of coping with international anti-competitive conduct that extends beyond national boundaries. A better way would be to construct an international programme for a cooperative scheme through which competition authorities of trading nations can rally their efforts to combat anti-competitive conducts which occur in international arena. This suggests that the inclusion of competition policy in a WTO framework as an important agenda item for future WTO negotiations for facilitating consultative and coordinated approach among the comity of nations in dealing effectively with anti-competitive practices and avoiding conflict of Jurisdiction in the application of domestic Competition Laws.

Chapter - V

ABUSE OF DOMINANT POSITION UNDER COMPETITION ACT, 2002