COMPETITION LAW IN INDIA, US & UK: A COMPARITIVE ANALYSIS

(Internship Report - November 2012)

Submitted by: Srishti Dutt
Vth Year, B.A.LL.B (Hons.)
National Law University Delhi
I would like to thank the staff and members of the Competition Commission of India without whose help the Report would have been extremely tough to be completed. I would like to thank Dr. Satya Prakash, my supervisor and guide in helping me throughout the duration of my internship. My gratitude also extends towards the library staff of the Competition Commission of India.
Contents

Chapter I  Introduction

Chapter II  Evolution of Competition Law

Chapter III  Competition law in India

Chapter IV  Competition Law : US & UK

Chapter V  Issues raised

Chapter V  Conclusion

Bibliography

Webliography
CHAPTER-I
INTRODUCTION

Overview of the Project

Competition is not defined in law but is generally understood to mean the process of rivalry to attract more customers or enhance profit. Competition law deals with market failures on account of restrictive business practices in the market. The history of competition law is usually traced back to the enactment of Sherman Act in 1890 in the US.\(^1\) This act was directed against the power and predations of the large trusts formed in the wake of the Industrial Revolution where a small control group acquired and held the stock of competitors, usually in asset, and controlled their business. Gradually, competition law came to be recognized as one of the key pillars of a market economy. This recognition led to enactment of competition law in many countries, including developing countries, and the number now stands at around 105.\(^2\) Competition in the market means competing for quality, price and resources, leading to a market oriented towards consumer rights, fair trade, and efficient resource allocation, development of small businesses, incentives for innovation and dispersion of economic power. It is precisely for the benefits emanating out of competitive markets that they have been perceived to promote economic development. This project would aim to analyse enforcement of competition law in three jurisdictions- India, EU and USA giving a comparative breakdown of the antitrust law in these countries along with conclusive suggestions.

Research Question

The research question for this project is that:

- Whether the Competition Act 2002 is best suited for the Indian economy?
- Whether the Competition Act 2002 needs any amendments to the same?

Hypothesis

The hypothesis for the same is yes for the first question and yes for the second question as well.

\(^2\)Competition laws in India-Analysis and Comparirion, accessed at www.indiajuris.com
Scheme of Chapterisation

The first chapter gives an introduction to the topic. The second chapter envisages a brief history of the evolution of competition law in the world. The third chapter gives an overview of the working of the competition act in India. The fourth chapter compares the working of competition regulations in three countries of India, EU and US. The fifth chapter raises certain issues regarding the same. The sixth chapter concludes the project giving the authors examination in detail and suggestions.

Research Methodology

The researcher has followed the doctrinal method of research. Secondary sources of information like various books, articles and websites have been used for the same.
CHAPTER-II
EVOLUTION OF COMPETITION LAW

While the term 'Renaissance' originally referred to a cultural movement that characterized the period from around the 14th to 17th centuries, it has also come to refer to an historic era affecting other aspects of daily life, including that of trade and competition. During this Renaissance period, particularly from the 16th century onward, international trade started booming. While much of this trade and the resultant wealth were illicit, authorities saw the need to regulate trade to engender a spirit of fairness and free competition. The precursor of modern patent laws, known as the Statute of Monopolies, was passed by England's parliament in 1623. Prior to the Statute of Monopolies, patent laws were subject to abuse by authorities. History reveals that Elizabeth I was known to have granted patents for everyday household commodities such as salt and starch, thereby creating monopolies on necessities. In the following years, various attempts were made to break monopolies and set laws to encourage competition and free trade. But those with good intentions often found that traders maintaining monopolies had the kind of wealth that bought themselves a favored position with authorities. Other developments that eventually led to modern competition law included laws relating to restraint of trade. As the term suggests, restraint of trade prevents parties from setting up, or engaging in, similar activities in opposition to one another.

Modern day competition law is generally accepted to have had its foundations in the Sherman Act (1890) and the Clayton Act (1914) – both instituted in the United States. At the time, European countries had various forms of rules and laws to regulate monopolies and competition, but further developments, particularly after World War II and the fall of the Berlin wall in 1990, have elements of the Sherman and Clayton Acts as their foundation. With the rapid development of international trade going into the 21st century, competition and anti-trust laws have had to keep pace. It was following WWI that other countries started to implement competition policies along the lines of those introduced by the United States. Competition regulators were formed to ensure that competition and antitrust policies and laws were adhered to. Following the 2nd World War, the Allies introduced regulations to break up

---

3 www.britannica.com
5 www.ftc.gov
6 ibid
cartels and monopolies that had formed during the war years. At the time, this was mainly aimed at Germany and Japan. In the case of Germany, it was feared that large industry cartels were manipulated in a manner that gave total economic control of the country to the Nazi regime. With Japan, big business was a hotbed of nepotism resulting in multi-industry conglomerates that controlled the Japanese economy. However, the surrender of both Germany and Japan to the Allied forces at the end of WWII allowed for tighter controls to be enforced, and these controls were based on the principle of those being used in the U.S. In the U.S., the term 'antitrust' is more commonly used when referring to laws preventing the formation of cartels, also referred to as 'business trusts'. Although antitrust laws are generally separate from consumer protection laws, they do offer consumers a measure of protection from unscrupulous suppliers who seek to monopolize a market sector. Mergers and acquisitions undergo a rigorous screening process in line with antitrust and competition laws before being given the go ahead.

Since attaining Independence in 1947, India, for the better part of half a century thereafter, adopted and followed policies comprising what are known as Command-and-Control laws, rules, regulations and executive orders. The competition law of India, namely, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was one such. It was in 1991 that widespread economic reforms were undertaken and consequently the march from Command-and-Control economy to an economy based more on free market principles commenced its stride. As is true of many countries, economic liberalisation has taken root in India and the need for an effective competition regime has also been recognised. Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Pegging on the

---

7 Supra n.5  
9 Supra n.5  
10 Pradeep S. Mehta, “Competition & Regulation in India”, accessed at www.cuts-ccier.org  
11 38. State to secure a social order for the promotion of welfare of the people.-  
(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.  
(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.  
12 39. Certain principles of policy to be followed by the State:-  
The State shall, in particular, direct its policy towards securing-  
(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;  
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;  
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;  
(d) that there is equal pay for equal work for both men and women;
Directive Principles, the first Indian competition law was enacted in 1969 and was christened the Monopolies and Restrictive Trade Practices, 1969 (MRTP Act). Articles 38\(^{13}\) and 39\(^{14}\) of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing.

1. That the ownership and control of material resources of the community are so distributed as best to subserve the common good; and

2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.\(^{15}\)

In October 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May 2000. The draft competition law was drafted and presented to the Government in November 2000. After some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002.\(^{16}\)

---

\(^{13}\) Supra n.11
\(^{14}\) Supra n.12
\(^{15}\) www.advocatekhoj.com
\(^{16}\) Vijay Kumar Singh, “Competition Law & Policy in India: The Journey in a Decade”, accessed at www.nujslawreview.org
CHAPTER-III

COMPETITION LAW IN INDIA

The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, and adjudicatory and to a limited extent even advisory jurisdiction. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

Primarily, there are three main elements which are intended to be controlled by implementation of the provisions of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition.

The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India which has been established by Central Government. Hence the commission is required to take care of such situation so that there could not be created market failure thereby causing harm to market. To achieve its objectives, CCI endeavours to do the following:

1. Make the markets work for the benefit and welfare of consumers.

2. Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.

3. Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.

4. Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.
5. Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

The Act covers essentially four areas of competition contained in its substantive provisions namely:

- Anti - Competitive Agreements(Section 3)
- Abuse of Dominance(Section 4)
- Combinations Regulation(Section 5 and 6)
- Competition Advocacy(Section 49)

**Anti Competitive Agreements in India:**

The present Act is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite pari materia to the Indian legislation. In United Kingdom, the Office of Fair Trading (OFT) is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in United States deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries are progressive, applied rigorously and more effectively. The deterrence objective in these anti-trust legislations is clear from the provisions relating to criminal sanctions for individual violations, high upper limit for imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies.

**SECTION 3- ANTI COMPETITIVE AGREEMENTS**\(^{17}\) -- (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect

\(^{17}\) CA,2002
of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an AAEC within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations 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—

(a) directly or indirectly determines purchase or sale prices

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) 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;

(d) directly or indirectly results in bid rigging or collusive bidding,

Shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.-For the purposes of this sub-section, —bid rigging‖ means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading 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.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

(a) tie-in arrangement;

(b) exclusive supply agreement;
(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

(m) “practice” includes any practice relating to the carrying on of any trade by a person or an enterprise

(o) “price”, in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing.

The term anti-competitive agreements as such has not been defined by the Act, however, Section 3 prescribes certain practices which will be anti-competitive and the Act has also provided a wide definition of agreement under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India.

Section 3(2) simply declares agreement under section 3(1) void. Section 3(3) deals with certain specific anti competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deal with restraints imposed through agreements among enterprises in different stages of production or supply etc. for example agreement amongst manufacturer and supplier. Section 3 (5) provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.

Competition laws in all over the world usually places anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements. Horizontal agreements are generally viewed more seriously than the vertical agreements. Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between —horizontall and —vertical agreements between firms.
The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser-seller relationship. The Act have not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3(4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti-competitive agreements.

**Abuse of Dominant Position**

Section 4(1) of the Indian Competition Act states, “No Enterprise shall abuse its dominant position”. 18

There are primarily three stages in determining whether an enterprise has abused its dominant position. The first stage is defining the relevant market. The second is determining whether the concerned undertaking/enterprise/firm is in a dominant position/ has a substantial degree of market power/ has monopoly power in that relevant market. The third stage is the determination of whether the undertaking in a dominant position/ having substantial market power/monopoly power has engaged in conducts specifically prohibited by the statute or amounting to abuse of dominant position/monopoly or attempt to monopolize under the applicable law. 19

The Indian Competition Act, 2002 expressly provides in Section 19 (5) that the Competition Commission shall have due regard to the relevant product market and the relevant geographical market in determining whether a market constitutes a relevant market for the purposes of the Act. 20 The definition of relevant market provided by Section 2(r) of the Act also states that the relevant market means the market that may be determined by the Commission with reference to the relevant product market or the relevant geographical

18 Supra n.17
19 www.oft.gov
20 ibid
market or with reference to both. “relevant product market” and “relevant geographic market” have been specifically defined in the Indian Competition Act.\textsuperscript{21} Section 2 (t) defines the relevant product market as a market comprising all those products or services which are regarded as interchangeable or substitutable by the customer, by reason of the characteristics of the product or service, the prices and the intended use.\textsuperscript{22} Section 2 (s) defines the relevant geographic market as a market comprising the area in which the conditions of competition for supply of goods or provision of services are sufficiently homogeneous and can be distinguished from the conditions prevailing in neighbourhood areas.\textsuperscript{23}

The Indian Competition Act contains a definition of dominant position that takes into account whether the concerned enterprise is in such a position of economic strength that it can operate independently of competitive forces or can affect the relevant market in its favour. Explanation (a) to Section 4 of the Indian Competition Act defines dominant position as “dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to:\textsuperscript{24}

(i) operate independently of competitive forces prevailing in the relevant market or
(ii) affect its competitors or consumers or the relevant market in its favour.

the Indian Act states under Section 19 (4) that the Commission may have regard to certain factors for determining whether an enterprise is in a dominant position including market share of the enterprise, size and resources of the enterprise; size and importance of competitors; economic power of the enterprise including commercial advantages over competitors, vertical integration of the enterprises or sale or service network of such enterprise; dependence of consumers on such enterprise, monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage by way of the contribution to the economic development by the enterprise enjoying a dominant position having or likely to have an appreciable adverse

\textsuperscript{21} Supra n.17
\textsuperscript{22} ibid
\textsuperscript{23} ibid
\textsuperscript{24} www.competitionbureau.gc.ca
effect on competition; or any other factor which the commission may consider relevant for the inquiry.\textsuperscript{25}

The market share that a particular undertaking has in the relevant market is one of the most important factors to be taken into account to determine whether it is in a dominant position and under the laws of some jurisdictions, the existence of a market share of or above a specified level gives rise to a presumption of existence of a dominant position (although rebuttable)

the Indian Act also does not define abuse of dominance. According to Section 4 (2) of the Indian Competition Act, “There shall be an abuse of dominant position under sub-section:\textsuperscript{26}

(1), if an enterprise.—-

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service,

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefore; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

\textsuperscript{25} Supra n.17
\textsuperscript{26} ibid
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market”.

One difference between the UK Act, 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.

**Combinations:**

One of the most significant provisions of CA, Section 5, which defines 'combination' by providing threshold limits in terms of assets and turnover is yet to be notified. There is no clarity as to when it will be made effective. At present, any acquisition, merger or amalgamation falling within the ambit of the thresholds constitutes a combination. Section 5 states that:

27 The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if-

(a) any acquisition where-

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,-

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or

---

27 Supra n.17
(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,- (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if-

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,-

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,- (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or

(c) any merger or amalgamation in which-

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,- (A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case
may be, have or would have,- (A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars.

**Regulation of Combinations under Section 6**

Essentially, a transaction must satisfy two conditions before Section 6 is triggered:\(^{28}\)

(i) it must involve total assets or turnover, with separate criteria for domestic and international entities; and

(ii) it must have a territorial nexus with India.

Under the originally enacted CA 2002, the reporting of a combination was optional. However, the act now mandates notification within 30 days of the decision of the parties' boards of directors or of execution of any agreement or other document for effecting the combination. The general industry perception is that a memorandum of understanding or a letter of intent will qualify as an 'agreement'. However, these are generally executed to spell out a basic understanding among the transacting parties and to enable the acquirer to conduct due diligence, based on which further negotiations are carried out. Going forward, execution of such a document shall trigger merger filings. This will increase compliance costs at a premature stage when it is uncertain whether the transaction will close. It will also add to the bulk of notification applications submitted to the Competition Commission. It remains to be seen whether the Competition Commission will have adequate internal capacity to handle and dispose of such applications efficiently. If it does not have the resources, the delay will potentially have a cascading effect and affect the ability of parties to close on time. Therefore, it would be prudent to insert a clause in all future transaction documents stating that closing will be subject to any prior regulatory clearance that may be required from the Competition Commission.

---

\(^{28}\) www.indiacorplaw.blogspot.com
CHAPTER-IV

COMPETITION LAW: US & UK

US

**Sherman Act, 1890**

Sherman Act declared illegal all contracts, combinations or conspiracies in restraint of trade or commerce among the states or territories or with foreign nations. The basic requirement is that there should be an agreement or mutual commitment to engage in a common course of anticompetitive conduct.

**Monopolize and Conspiracy to monopolize:**

Section 2\(^{29}\) of the Sherman Act outlawed (a) Monopolization (b) attempt to monopolize (c) conspiracies to monopolize

This section has two basic elements

1.) Possession of monopoly power in relevant market

2.) The willful acquisition or maintenance of the power.

A person is not guilty of monopolization unless he has monopoly power i.e. power to control prices and exclude competition. Therefore offence of monopolization requires monopoly power and intention to monopolize, but there is no monopolization if the defendant’s monopoly power grows as a consequence of superior product, business acumen or historical accident.

The competition act has included monopolization but it has not included conspiracy to monopolize. Sherman Act proscribes even attempt to monopolize.\(^{30}\) The difference between actual monopolization and attempt to monopolization is that in actual monopolization general intent to do act is required but in attempt to monopolize specific intent, which can be

\(^{29}\) *Section 2. Monopolizing trade a felony; penalty*

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, 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.

\(^{30}\) www.corporate.findlaw.com
established by evidence of unfair tactics on part of defendant, is required. To establish conspiracy to monopolize three basic things are to be proved:\textsuperscript{31}

(a) proof of conspiracy  
(b) specific intent to monopolize  
(c) An overt act in furtherance of conspiracy and there is no need to establish the market power.

Price Fixing

Competition Act has included the term association of price i.e. price fixing but it hasn’t elaborated the vertical and the horizontal price fixing. If a manufacturer, by using his dominant position, fixes the price with retailer then it is vertical price fixing but if manufacturer fixes price with other manufacturer then it is horizontal price fixing. Vertical price fixing is also known as price maintenance e.g. Agreement between a film distributor and exhibitor is illegal. A patentee cannot control its resale price through price maintenance agreements. Generally prices are fixed when they are agreed upon.

Section 1\textsuperscript{32} of Sherman Act also mentions that dissemination or exchange of price information does not itself establish a violation of section 1 rather price information coupled with criminal intent to fix the price violates section 1 of Sherman act. However a combination or conspiracy within section 1 is established where an agreement exists between competitors to furnish price information upon request.

Tying Agreement

The Competition Act, 2002 has not elaborated the various sorts of tying agreement. It has only defined tie-in agreements as "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods."\textsuperscript{33} But in the Sherman Act it has been very well explained. Sherman Act defines Tying Agreements as an agreement by a party to sell one product but only on the condition that the buyer also

\textsuperscript{31} Supra n.36
\textsuperscript{32} Section 1. Trusts, etc., in restraint of trade illegal; penalty
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{33} Refer to explanation section 3, CA 2002
purchase a different product or agree that he will not buy that product from another supplier.\textsuperscript{34} Tying agreements are not illegal per se. An illegal tying agreement takes place when a seller requires a buyer to purchase another, less desired or cheaper product, in addition to the desired product, so that the competition in the tied product would be lessened. Sherman act also pointed out that there should be separateness of products which are tied because if the products are identical and market is same then there is no unlawful tying agreement.

**Group Boycott**

Sherman Act has a special category under refusal to deal called as Group Boycott. Under the Competition Act, 2002 refusal to deal is defined in section 3(4)(d) as "refusal to deal" includes 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.\textsuperscript{35} However Sherman Act has explained various conditions of Group Boycott. In case of Horizontal restraints per se rule is applicable but in case of Vertical restraints majority court view is that per se rule is not applicable. There are many sorts of Group Boycott:\textsuperscript{36}

- Group Boycott of competitor i.e. joint effort by a firm with dominant market position to disadvantage competitors violates section 1 of Sherman Act.

- An agreement among competitors to stop selling to certain customers is illegal.

- Boycott by physicians, doctors, advocates of a particular customer is unlawful.

- Customer boycott of supplier may or may not, on the basis of circumstances, violate Sherman Act.

**Amalgamation**

Competition Act has used the word amalgamation many times but it hasn’t explained much about it. As per the Sherman Act an Amalgamation is unlawful in two ways firstly if the amalgamation eliminates substantial competition and secondly if it created a monopoly.\textsuperscript{37} Basically there are two types of amalgamation horizontal and vertical. In Horizontal amalgamation for example two companies are major competitive factors in a relevant market

\textsuperscript{34} Supra n.36  
\textsuperscript{35} The Competition Act, 2002  
\textsuperscript{36} www.justice.gov  
\textsuperscript{37} ibid
a merger or consolidation between them violates the Sherman Act if such action ends competition. However if a company is losing money and has decided to wind up then its horizontal amalgamation is not illegal. In vertical amalgamation it is not illegal unless its illegality turns on:\(^38\)

(a) The purpose or intent with which it was conceived

(b) The power it creates in the relevant market.

**Clayton Act**

After the Sherman Act to supplement the Sherman Act there was another act enacted in 1914 named as Federal Antitrust Laws: Clayton Act.

**Mergers**

This act has defined vertical and horizontal mergers. Vertical merger is a merger of buyer and seller and Horizontal merger is a merger which is of direct competitors. A merger which is neither vertical nor horizontal is conglomerate merger.\(^39\) Competition Act has not mentioned about the conglomerate mergers. As per the Clayton Act a pure Conglomerate merger is one in which there is no relationship between the acquiring and the acquired firm.

**Amalgamations**

Clayton Act has also defined the horizontal and vertical, amalgamations, product extension mergers and joint ventures. Amalgamations between firms performing similar functions in the production or sale of comparable goods and services are known as the Horizontal Amalgamation.\(^40\) Now Clayton Act has also mentioned about the burden of proof in Horizontal Amalgamation. It points out that by showing that a horizontal acquisition will lead to undue concentration in the market for a particular product in a particular market; the government establishes a presumption that the transaction will lessen the competition. The burden of producing evidence to rebut this presumption then lies with the defendants. Clayton Act does not outlaw all vertical amalgamations but it forbids those whose effect may be substantially to lessen competition or tend to create monopoly in any line of commerce in any


\(^39\) Herbert Hovenkamp, “Clayton Act”, accessed via www.enotes.com

\(^40\) Supra n.5
section of the country. The acquisition of the largest producer, in product extension mergers, by a firm dominant in positioning producing other products violates the Clayton Act because it reduces the competitive structure of the industry by raising entry barriers and dissuading the smaller firms from aggressive competition and because it eliminates the potential competition of the acquiring firm.

Competition Act, 2002 holds that joint ventures are legal as far as they increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. In Clayton Act it is given consideration whether the joint venture eliminated the potential competition of the corporation that might have remained at the edge of the market continually threatening to enter.

**Intention**

Competition Act, 2002 has not given any place to intention or motive whereas both Sherman Act and Clayton Act has mentioned about the intention of the parties. As per Sherman Act good intentions of parties is no defence to a charge of violating the act and thus will not validate an otherwise anticompetitive practice. Similarly according to Clayton Act it is not required to show that lessening of competition or a monopoly was intended.

**UK**

**The Fair Trading Act, 1973**

This act was passed in England with a view to provide an environment for free competition. This act basically focused on the restriction of monopoly.

There is monopoly when a person or group of persons to secure the sole exercise of any known trade throughout the country. However there are certain monopolies authorized by the statute e.g. Post office with respect to carrying of letters. If there is an agreement which gives control of trade to an individual or group of individuals then it creates a monopoly calculated to enhance prices to an unreasonable extent. It is no monopoly if the control is lawfully obtained by particular persons on particular places or kinds of articles for which a substitute is available.

41 ibid  
42 www.cci.gov.in  
43 Supra n.42
The Competition Act, 1998

The competition Act of 1998 repealed the Fair Trading Act, 1973. This act was divided into two parts firstly as the Chapter 1 prohibitions and secondly as the Chapter 2 prohibitions.

Chapter 1 prohibitions prohibits the agreements which fix prices, control production, share market or sources of supply, apply dissimilar conditions to equivalent transactions and make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which by nature of commercial usage have no connection with the subject of such contracts. All such agreements are unlawful.44

Chapter 2 prohibitions:45 “Any undertaking which amounts to the abuse of dominant position is prohibited if it consists in:

# Imposing unfair purchase or selling prices

# Limiting production, market or technical development

# Applying dissimilar conditions to equivalent transactions with other trading parties.

# Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations having no connection with the subject of contracts.”

Investigation under this act Director General of fair trading may conduct an investigation if he has reasonable grounds to believe that Chapter 1 and 2 prohibitions are infringed. However no such power is given to director of CCI.

The concept of privileged communication as provided under Section 30 of the U.K Competition Act is also not included in the Indian Competition Act. This non inclusion can affect the right of the undertakings or legal or natural persons who are undergoing investigation.

In India we have sectoral regulators as well as Competition law enforcement authorities, now it raises a serious concern as to the fact of handling of affairs of cross sectoral issues. For example undertaking may be regulated by one agency on a certain aspect and by CCI on the competition aspects. In such situations businesses are afraid that in such instances there may be conflicting directions from different regulators. There are also fear that they need to

44 www-legislation.gov.uk
45 ibid
comply with double regulations will result in increased business costs. In India there is no framework for coordination between the sectoral regulations and the Competition Commission of India. On the other hand in U.K a number of sectoral regulators have power to apply the Competition Act concurrently with other legislations. The Competition Act 1998 (Concurrency) Regulations 2000 have been made for the purpose of coordinating the exercise of the concurrent powers and the procedures to be followed.\textsuperscript{46} For example in U.K they have concurrence party, where all regulators and the competition authority sit and decide on the best agency to deal with the case.

\textsuperscript{46} Supra n.52
CHAPTER-V

ISSUES RAISED

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

In its purest form, the “per se” rule inquires to whether the defendants engaged in a “contract, combination or conspiracy” and whether the agreement falls into a recognized “per se” category such as price fixing or market division. Once such an agreement is proved, the anticompetitive effect is presumed under the “per se” rule. At that point, all defenses i.e. attempts to demonstrate “reasonableness”, are precluded. One way to look at the “per se” rule, therefore, is a rule of evidence, as opposed to one of substantive antitrust law. When sufficient indicia of anticompetitive potential are present, they can give rise to an irrebuttable presumption of unreasonableness. The “per se” rule reflects a judgment that costs of identifying exceptions to the general rule so far outweigh the costs of occasionally condemning conduct that might upon further inspection prove to be acceptable, that is it is preferable not to entertain defenses to the conduct at all. Hence “per se” rules have long been justified on the ground that certain kinds of conduct are so likely to prove to be unreasonably anticompetitive that time spent considering defenses would be time wasted. From the point of view of administrative convenience and judicial efficacy, the search for the exceptional case— the truly “reasonable” instances of such conduct—are not worth the cost of investigation. Finally, it was argued that “per se” rules provided unambiguous guidance to courts and the business community.

Section 3 (3) undertakes presumption through the words “shall be presumed to have AAEC”. On one side where certain jurisdictions have expressly criminalised cartels and applied the per se rule with regard to bid, rigging, price fixing etc the question remains whether this can be done with regard to anti competitive practices in India where rule of reason is enforced.
Section 4 CA talks about abuse of dominance position. In contrast the Sherman Act talks about monopolization and the attempt to monopolize. Attempt to monopolize is difficult to prove as intention plays a primal part. Where developed countries are treating such anti-competitive behaviour as a felony, the question remains can the same be applied to India. For this, certain legislations like the Competition Act, Indian Penal Code, Evidence Act etc. Have to be harmonised successfully.

Sectoral overlaps may happen in case of conflict between CCI & other regulators. For e.g. - under the Electricity Act, 2003, the power is with the Central Electricity Regulatory Commission to issue directions to a licensee or generating company if it enters into any agreement or abuse of their dominant position or enter into a combination, likely to cause an adverse effect on competition in electricity industry. this has been an ongoing debate since the advent of the Competition Act. However the question still remains unanswered.

The Combination Regulations do not provide for an ability to withdraw a filing, once made, should the conditions affecting the combination change. Considering that the time involved in getting a clearance from CCI may span up to 7 months, there is likelihood that the information submitted along with the forms may become outdated or irrelevant at the time of actual grant of clearance. There also remains possibility of change in market conditions /circumstances requiring parties to the combination withdraw their application. Thus, when due to external factors a combination does not come under the purview of the Competition act any further can it be possible that it could be allowed to withdraw its application. The law remains silent on that.
CHAPTER VI

CONCLUSION

Competition Law is a complex mixture of a country's law, economics and administrative action intended to favour competition in the economy. Since competition is seen as critical to economic development, competition law seeks to protect this competitiveness in the economy. The underlying theory behind competition law is the positive effect of competition in an economy's market, acting as a safeguard against misuse of economic power. The link between competition law and economic development emphasized over and over again seems rather undeniable and the need for competition law seems like the order of the day. The operation of competition law by prevention of anti-competitive agreements, prohibiting abuse of dominant position by firms and regulation of combinations which might adversely affect competition in the economy, thus seems crucial for India. It is therefore keeping that in mind that the Indian Parliament enacted the Competition Act, 2002. The preamble and the statement of objects and reasons of the Act, also evidence that the broad economic development objectives were a consideration to adopting the Act.

During the past years, the number of jurisdictions with a competition law has exploded from approximately 25, of which few were seriously enforced, to some 100 today. With economic activity increasingly transcending national borders, and jurisdictions applying competition laws to firms and conduct outside their borders, achieving at least a reasonable degree of coherence and convergence in the application of competition laws is important for both competition agencies and firms.

Even though the Indian competition law is modelled along the lines of EC law, the Commission is in no way bound to interpret similar provisions in the Indian law in the manner interpreted under the EC law. The Commission on the other hand is bound by the Preamble of the Act to interpret it in a fashion that promotes economic development of the country. This is because the conditions that exist in India are remarkably different than those that exist in the EC and to come to the level where there can be talk of similar interpretation of laws in the two jurisdictions, similar development level would necessarily be a condition precedent. A few amendments that could be added to Competition Act can be as follows:

- Abbreviated rule of reason can be developed especially with regard to cartel cases
• Outer limit of 210 days is given to the CCI under the CA 2002. However the CCI aims at clearing at notices within 180 days. This may lead to unnecessary delays and back logs.

• Threshold limits for triggering CA are very high especially with regard to a country like India where small industries are prevalent. Hence, it should be taken into consideration that there might be many small enterprises entering into mergers which may have AAEC but may not trigger the combination regulations under section 5.

• Leniency provisions have been prevalent in India since the beginning of the act but there has been no instance of anyone coming to claim them. The penalties under the act should be hiked in this case so that a deterrent effect is created and leniency provisions are made attractive.

While the basic principles of competition law remain the same the objectives or the results cannot be the same for all jurisdictions. In essence, a progressive realisation of competition policy goals would be the answer to an effective competition law regime in developing countries. While the implementation of competition law even at the early stages of economic development is not bad per se its blind implementation following the path of the developed countries can kill its very objectives. Thus, competition law is a complex creation of lawmakers which the Indian Government and the Competition Commission should take time to understand in light of the special needs and requirements of the Indian economy and implement it accordingly.
BIBLIOGRAPHY

BOOKS

SM Dugar, “GUIDE TO COMPETITION LAW” 5th Edn 2010, Vol 1, Lexis Nexis Butterwoths Wadhwa Nagpur;

Richard Wish, “COMPETITION LAW”; 6 Edn, Oxford University Press;

Ramappa T., Competition Law in India, (Oxford India Paperbacks, New Delhi, 2009)


Singh, Rahul, ‘The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with the Sectoral Regulators’.

ARTICLES


WEBLIOGRAPHY

http://www.oft.gov.uk/

http://www.cci.gov.in/

http://ec.europa.eu/comm/competition/index_en.html

http://www.internationalcompetitionnetwork.org/

http://www.wto.org/

http://www.competition-commission.org.uk/

http://www.oecd.org/home/