COMPETITION LAW AND PROTECTION OF CONSUMER INTEREST

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A RESEARCH PAPER ON

COMPETITION LAW AND PROTECTION OF CONSUMER INTEREST

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1. INTRODUCTION

The modern competition law seeks to protect the process of free market competition in order to ensure efficient allocation of economic resources. It is commonly believed that competition law is ultimately concerned with the interest of the consumers. The Constitution of India provides for the Directive Principles of State Policy and Articles 38 and 39 of the Constitution mandate upon States to secure a social order for the promotion and welfare of the people. This provision recognized the need to eliminate and minimize the inequalities in income, which applied not only to the individuals but also to the groups in different areas. Article 39(c) of the Constitution provides that the States shall strive to secure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Monopolies and Restrictive Trade Practices Act came into existence on 27th December, 1969. The preamble to this enactment provided it to be An Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. Though the primary aim of MRTP Act, 1969 was to prevent economic power concentration, the other objectives remained overall development of the country etc.

It may be observed that consumer’s detriment is generally presumed to be present when the competitive process is thwarted or damaged. Consumer is considered to be King in a free market and the sellers are supposed to be guided by the will of a consumer in such markets. There is a constant need for harmonizing the protection of consumer rights with promoting free markets. In
Awaz v. Reserve Bank of India and DCM Financial Services Ltd. v. Mukesh Rajput, 2008 Bus L R764 (NCDRC), the National Consumer Disputes Redressal Commission, while deciding the issue of interest on credit taken on the basis of credit card in its joint order disposing both cases observed:

“… [E]ven in any free economy/deregulated economy exploitation of the borrower/debtor is prohibited and is considered to be unfair trade practice. Free economy would not mean license to exploit the borrowers/debtors by taking advantage of their basic needs for their livelihood. This cannot be permitted in any civilized society – maybe a de-regulated free market economy. …”

In Ashoka Smokeless Coal Ind. P. Ltd. v. Union of India,¹ the Hon’ble Supreme Court reflecting on consumers’ interest observed:

In a market governed by free economy where competition is the buzzword, producers may fix their own price. It is, however, difficult to give effect to the constitutional obligations of a State and the principles leading to a free economy at the same time. A level playing field is the key factor for invoking the new economy. Such a level playing field can be achieved when there are a number of suppliers and when there are competitors in the market enabling the consumer to exercise choices for the purpose of procurement of goods. If the

¹ (2007) 2 SCC 640.
policy of the open market as to be achieved the benefit of the consumer must be kept uppermost in mind by the State.

Competition law concentrates on maintaining the process of competition between enterprises and tries to remedy behavioral or structural problems in order to re-establish effective competition in the market. Thus it results into higher economic efficiency, greater innovation and enhancement of consumer welfare. Thereby the consumer experiences wider choice and greater availability of goods at affordable prices. On the other side, the consumer protection policy and law are mainly concerned with consumer dealings, making efforts to progress market conditions for effective exercise of consumer choice. Thus, these two streams focus on different objectives and offer different remedies, but both aim at maintaining good performance, competitive markets that encourage consumer welfare.

1.1 DEFINITION OF CONSUMER

In simple words, ‘Consumer’ is a broad label for any individuals or households that use goods and services generated within the economy. But there exists a difference in the way ‘consumer’ is defined in the Consumer Protection Act and the Competition Act.

1.1.1 CONSUMER PROTECTION ACT

Section 2(d) of the Consumer Protection Act defines ‘Consumer’ as

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(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment.

1.1.2 THE COMPETITION ACT

Section 2 (f) of the Competition Act defines ‘Competition’ as

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary
of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

Thus it can be argued that there is a difference as far as the scope of definition of Consumer is concerned in both these Acts. Under the competition law a trader who buys goods for commercial purposes is also considered as a consumer but the same person will not be treated as a consumer under the Consumer Protection Act. Thus the scope with respect to definition of consumer of competition law is larger than the Consumer Protection Act. The Competition Act enables a person who buys goods for resale to challenge anti competitive practices as a consumer. Thus it can be said that under Competition Law if a person hires services even for commercial purpose then as well he comes under the category of a consumer and enjoys consumers’ rights but under Consumer Protection Act the same person will not be considered as a consumer and thus will have no consumer rights. It was held in the case *Laxmi Engineering Works v. P.S.G. Industrial Institute*\(^3\) that a person who exclusively buys goods to use himself comes within the definition of Consumer in the Consumer protection Act, 1986.

### 1.2 INTERPLAY BETWEEN CONSUMER PROTECTION AND COMPETITION LAW

There exists some difference among the Consumer Protection Act and the Competition Act with reference to their respective provisions for consumers.

\(^3\) 1995 CTJ 299 (SC) (CP)
Firstly the definition of consumer varies a little under the two acts. The Competition Act takes a broader view of term ‘consumer’ and also includes a person who buys goods or hires services for commercial use. But under the Consumer Protection Act such a person is not a consumer. Thus there is also a difference in the nature of consumer who may complain. While in Consumer Protection Act the consumer needs to be an end user and must use the goods for his personal purpose whereas under Competition Law consumer might be a commercial entity reusing the goods for commercial purposes.4

Secondly, the Consumer Protection Act provides rights and relief to an individual consumer i.e. a person can claim compensation for the particular instance of failure to provide adequate goods and services in a particular case, whereas the Competition Commission’s powers are more of public interest based i.e. it is the duty of the commission to protect fair competition in the entire market.5

Thirdly the essence of the competition commission is that of a regulator, and not to provide restitutive or equitable relief to individuals who complain.

Fourthly, the Consumer Protection Act only deals with consumption and the consumer’s interest and not with markets as a whole, whereas Competition Law deals with market as a whole.

1.3 CONCEPT OF CONSUMER PROTECTION

Consumer protection laws are designed to ensure fair trade competition and the free flow of truthful information in the marketplace. The laws are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may

4 Farhad Sorabjee, Competition for the Commission, Competition Law Reports, Vol. 1 No.3, July-September 2010
5 Ibid
provide additional protection for the weak and those unable to take care of themselves. Consumer Protection laws are a form of government regulation which aim to protect the rights of consumers. For example, a government may require businesses to disclose detailed information about products—particularly in areas where safety or public health is an issue, such as food. Consumer protection is linked to the idea of "consumer rights" (that consumers have various rights as consumers), and to the formation of consumer organizations which help consumers make better choices in the marketplace. The table below mentions the protection of consumer under various Acts.

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<td>Section 11 states that the authority shall have the following function namely, to lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of each service provided by the service providers so as to protect interest of the consumers of telecommunication service;</td>
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<th>4. Who can file</th>
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**1.4 CONCEPT OF CONSUMER WELFARE**

There exists no settled definition of consumer welfare. However, one can comprehend the notions surrounding consumer welfare by having a look at the United Nations Guidelines for Consumer Protection, adopted by the UN General Assembly in 1985 and amended in 1999. It represents an international regulatory framework for governments to use for the development and
intensification of consumer protection policy and legislation, aimed at promoting consumer welfare.\textsuperscript{6}

The UN Guidelines call upon governments to develop, strengthen or maintain a strong consumer policy, and provide for enhanced protection of consumers by enunciating various steps and measures around eight themes. These eight themes are:

1. Physical safety
2. Economic interests
3. Standards
4. Essential goods and services
5. Redress
6. Education and information
7. Specific areas concerning health
8. Sustainable consumption

These Guidelines have implicitly recognized eight consumer rights which were made explicit in the Charter of Consumers International as follows:

1. Right to safety – This right gives protection against marketing of goods which are hazardous to life and property;

2. Right to be informed – The consumer needs to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practice.

\textsuperscript{66} Pradeep S Mehta and Rajeev Mathur, \textit{Competition Policy and Consumer Welfare}, Academic Foundation New Delhi
3. Right to Choose – The consumers should have access to an authority of goods at competitive prices.

4. Right to be heard – The consumers interests should receive due consideration at appropriate forums,

5. Right to seek redressal – There should be redressal system against unfair trade practices or unscrupulous exploitation of consumers.

6. Right to consumer education – Creation of consumer awareness is a must to serve the purpose of the law to secure the interests of consumers

7. Right to representation

8. Right to healthy environment

9. These eight consumer rights can be used as the touchstones for assessing the consumer welfare implications of competition policy and law, and to see how they help or hinder the promotion of these rights.
2. EFFECT OF ANTI-COMPETITIVE AGREEMENTS ON CONSUMERS

2.1 ANTI-COMPETITIVE PRACTICES AND CONSUMER PROTECTION

The Competition Act, 2002 has been enacted to promote competition in India. The ultimate aim of competition law is to protect consumer welfare as competition in a market ensures that market players are looking to find the most efficient means of production (resulting in good quality services and goods at lower prices). However, unlike the previous Indian competition law, the Monopolies and Restrictive Trade Practices Act (commonly called the MRPT Act), the Competition Act 2002 does not apply to all “unfair trade practices”. So, while many consumer disputes would have come under the MRTP Act, the new Competition Act will not always apply to such cases.\(^7\)

The Competition Act basically does three things. It prohibits:

1. Anti competitive agreements

2. The abuse of dominant positions

3. Combinations (i.e. large mergers, acquisitions and amalgamations) which hamper competition.

2.1.1 AFFECT OF ANTI-COMPETITIVE AGREEMENTS ON CONSUMERS

An agreement which attempts to control the market (through measures like fixing prices, controlling volumes of production so that prices rise artificially, blocking certain

distributors/suppliers, etc.) is an anti competitive agreement. Provision of Section 3 (1) casts a duty on enterprises to examine the proposals for agreement or arrangement from its long term effect on competition in the market. The term ‘Appreciable Adverse Affect on Competition’ has not been defined under the Act. An anti competitive agreement must result in an Appreciable Adverse Effect on Competition (AAEC) to be prohibited.⁸

For example, where an agreement between two business enterprises results in higher prices for consumers or in lower quality of goods, it will result in an AAEC and such an agreement is prohibited.

In Allied Tube case⁹, the US Supreme Court found that a subgroup of the standard setting organization effectively “captured” the whole group and harmed competition by excluding an innovative product. In this case, an association that published a code of standards for electrical equipment required the use of steel conduit in high-rise buildings, but a new entrant into the market proposed to use plastic conduit. The new product was allegedly cheaper to install, more pliable, and less susceptible to short-circuit, thus benefiting the consumers.

The incumbent steel conduit manufacturers agreed to use the association’s procedures to exclude the plastic product from the code by sending new members to the association’s annual meeting whose sole function was to vote against the new product. As a result, the potential entrant’s ability to market the plastic conduit was significantly impaired and consumers were denied the benefit of a potentially significant product innovation.

There are two types of anti competitive agreements:

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⁸ Abir Roy and Jayant Kumar, *Competition Law in India*, Eastern Law House, New Delhi, 2008, p. 54
I. **HORIZONTAL AGREEMENTS, WHICH ARE AGREEMENTS BETWEEN COMPETITORS**

These agreements are usually considered to be more dangerous in comparison with agreements between non-competitors since it is relatively easy for two competitors collectively manipulate a market by agreeing. Eg. Cartels, Bid Rigging

II. **VERTICAL AGREEMENTS, WHICH ARE AGREEMENTS BETWEEN NON-COMPETITORS**

These are slightly less dangerous agreements, since the scope for competitors not on the same level to create a bad effect on competition in any one market is not so easy. Eg. Tying

2.1.1 (I) **CARTELS AND ITS EFFECT ON CONSUMERS**

In simple terms a cartel is an association of manufacturers or suppliers that maintain prices at a high level and restrict competition.

A hard-core cartel as defined in the OECD Recommendation is: *...an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.*

A market with an elastic demand, firms colluding on price might not be of much help because the customers will not tolerate the price above the competitive level and will source from the other suppliers. For the existing competitors who are not a part of the cartelists will tend to increase their output if the cartelists increase their price, thus it would facilitate new entry into

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the market. The economic theory tells us that cartels will be inherently unstable since there will always be an incentive to cheat. It is likely to be stable where the benefits to cheat are small.\textsuperscript{11}

Special skills are required for cartel busting which are different from the skills required for investigation and prosecution of other infringements of competition law. The focus is on proving the existence of an arrangement itself rather than establishing its impact on the market in economic terms. This is because not only the meeting of mind is essentially necessary but also, as laid down by the Supreme Court in \textit{Haridas Exports v. All India Float Glass Manufacturers Assosiation}\textsuperscript{12} the mere formation of cartel will not give rise to an action. Something more must have to be proved to demonstrate the detrimental effect.

Now these cartels both negatively affect the economy as well as consumers. As the players involved in cartels fix prices and eliminate competition, the consumers are at a loss; moreover it becomes difficult for other new players to enter the market due to formation of cartels.

Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the Commission. Cartels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition they cause serious harm to our economies and consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies.\textsuperscript{13} Cartels, therefore, by their very nature eliminate or restrict competition.

Companies participating in a cartel produce less and earn higher profits. Society and consumers

\begin{itemize}
\item \textsuperscript{11} Mark Jephcott, \textit{Horizontal Agreements and EU Competition Law}, Oxford University Press, New York, 2005, at p.4-5
\item \textsuperscript{12} (2002) CTJ 353 (SC) MRTP
\item \textsuperscript{13} Retrieved from http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf, Retrieved on 16\textsuperscript{th} July 2011
\end{itemize}
pay the bill. Resources are misallocated and consumer welfare is reduced. It is therefore for good reasons that cartels are almost universally condemned. Of all restrictions of competition, cartels contradict most radically the principle of a market economy based on competition, which constitutes the very foundation of the Community. Even those who sometimes criticize competition law as being a form of interventionism into the free play of market forces, accept the prohibition of cartels as inevitable.

2.1.1 (II) TYING AND ITS EFFECT ON CONSUMERS

A tying agreement is an agreement by party to sell one product but only on condition that buyer also purchases a different product, or at least agrees that he will not purchase the product from any other supplier.\textsuperscript{14} It is not mandatory that the tying and the tied product should be similar in character.\textsuperscript{15}

The basic idea is that consumers are harmed by being forced to buy an undesired good (the tied good) in order to purchase a good they actually want (the tying good), and so would prefer that the goods be sold separately. The company doing this bundling may have a significantly large market share so that it may impose the tie on consumers, despite the forces of market competition. The tie may also harm other companies in the market for the tied good, or who sell only single components.

One effect of tying can be that low quality products achieve a higher market share than would otherwise be the case. For example there is a discount for customers who lease a telephone line, get satellite television and get broadband access from the same company. This discourages

\textsuperscript{14} Abir Roy and Jayant Kumar, \textit{Competition Law in India}, Eastern Law House, New Delhi

\textsuperscript{15} \textit{In re, Anand Gas}, RTP Enquiry 43/1983
customers from getting broadband from another company even though the reliability of the service may be superior, as the loss of the discount can mean a substantial increase in total cost.

Tying certainly has a negative effect on both the economy as well as the consumers. As the consumers are restricted to buy goods from a single producer, this assures the producer a fixed and assured consumer base and income. Thus they stop competing. Now as a result they deteriorate the quality of their products as they are assured of their customer base. They further increase their prices as the consumers are compelled to buy their products and further take advantage of their position which is by virtue of the tied in agreement. As a result the other producers in the market, who might deserve, slowly get eliminated. Thus a tied in agreement gives an undue advantage to a single produces who can misuse it to disadvantage of the consumers and the economy.

2.1.2 EFFECT OF DOMINANT POSITION ON CONSUMERS

The extent of domination can be defined as the position of strength enjoyed by an undertaking that enables it to operate independently of the competitive pressures in the relevant market and also to effect relevant market, competitors and consumers by its actions.\textsuperscript{16} The Competition Law does not prohibit dominance but abuse of Dominant Position.\textsuperscript{17}

Section 4(1)\textsuperscript{18} of the Competition Act, 2002, specifically states that no enterprise shall abuse its dominant position and Section 4(2)\textsuperscript{19} of the Competition Act specifies the practices by dominant

\textsuperscript{16} Abir Roy, Jayant Kumar, \textit{Competition Law in India on the Anvil}, Vol. 42 May (I) Corporate Law Advisor, pp 8-23
\textsuperscript{17} Sri Neeraj Malhotra v. North Delhi Power Limited, BSES Rajdhani Power Limited and BSES Yamuna Power Limited, MANU/CO/0026/2011
\textsuperscript{18} 4(1)No enterprise or group shall abuse its dominant position.
\textsuperscript{19} 4(2) There shall be an abuse of dominant position if an
enterprises or group of enterprises as abuses such as directly or indirectly imposing unfair or discriminatory conditions or price in purchase or sale of goods and services, limits and restricts production of goods or provision of services or technical and scientific development related to goods etc. Further it has been suggested that even if the market share is lower, a dominant position may be inferred if there are high barriers to entry that guard the market share.20

The abuse of its position by a dominating firm directly affects the consumer due to malpractices like predatory pricing and creation of barriers to the new entrants, thus eliminating competition. This leads to a situation of monopoly and oligopoly where the consumer gets vulnerable to be exploited. Now where there is no competition in the market and the dominant firm has no fear to lose its stand in the market it will start controlling the market, the demand and supply, the prices etc and all this will eventually lead to harming the consumers.

2.1.3 EFFECT OF PREDATORY PRICING ON CONSUMERS

The “predatory pricing” under the Act means “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors”.21 The predatory firm after driving other competitors from the market raises their price above the

21 [Explanation (b) of Section 4]
competing levels to earn supra-competitive profits and recoup the losses incurred during the predatory period. This anti-competitive practice undermines the competition in the market and is not in the interest of the consumers.\textsuperscript{22} The US Supreme Court in \textit{Utah Pie v. Continental Banking Co.} \textsuperscript{23} considered the price below the full cost as predatory.

Predatory Pricing is Anti-Competitive in nature and aims at eliminating competition in the market. Both of these initially benefit the consumers by offering goods and services at lower prices and when the players using such anti-competitive measures are able to eliminate competition i.e. the smaller players in the market, they start exploiting the consumers. As they have succeeded in eliminating competition and they attain dominant position in the market, they begin to abuse it. They do this by hiking the prices and deteriorating the quality of the goods, thus, all in all affecting the consumers in the long run.

The predatory pricing and dumping by Chinese players are hurting the Indian mid size and small size Industries. A survey by Federation of Indian Chambers of Commerce and Industry (FICCI) revealed that the Chinese products are 10 to 70 percent cheaper as compared to Indian goods and this fact is hurting the Indian Small and Medium sized industries. A range of Industries including processed food, light engineering, building materials and heavy engineering, chemicals and textiles were affected by the Chinese pricing. The Indian companies already suffer a disadvantage due to unfavorable labor laws and poor infrastructure and in addition to this the Chinese pricing will completely wipe them out. Their aim is to hurt the Indian industries by their comparatively lower prices and further wipe them out and then dominate the market and abuse their position by hiking the prices and lowering the quality of the goods. Now the consumers will be initially benefited as they are being offered lower prices. Now the consumers will go for the

\textsuperscript{22} Einer Elhauge and Damien Geradin, \textit{Competition Law and economics}, Hart Publishing, pp314
\textsuperscript{23} 386, US 685 (1967)
cheaper and better goods and this will lead to elimination of the Indian Industries gradually. Now
the Chinese Industries will dominate the market and increase their prices which will be
unfavorable for the consumers and deteriorate their quality. Thus ultimately the consumers will
be affected.

2.1.4 EFFECT OF MERGERS AND COMBINATIONS ON CONSUMERS

Regulation of combination or regulating merger control is the most striking feature of the new
competition law. Powers of former commission in respect of merger control were limited. It
could not of its own begin examination in a merger transaction. The power to do so rested with
the Government. On receipt of any proposal of combination, the government after examining the
matter at its level may either dispose off, the same or may send the same to the commission for
opinion. The opinion so given to the Government would be Recommendatory in nature and not
binding upon it.

The Competition Act, 2002, does not define combination but states the conditions when a
combination between persons and enterprises takes place. Section 5 of the Act refers to the
acquisition of enterprises, by one or more persons or merger or amalgamation, in the manner set
out therein, which would be a combination.24 Under Section 2(l)25 the term ‘person’ would
include an individual, a company and certain other entities.

24 T. Ramappa, Competition Law in India- Policy issues and Developments, Oxford University Press, New Delhi, 2006
25 “person” includes—
(i) an individual;
(ii) a Hindu undivided family;
(iii) a company;
(iv) a firm;
(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
Combination of two firms can have an adverse affect on the market. If two major market players combine, they can start controlling the prices and eliminate the small industries easily. Ultimately it will be the consumers who will be affected.

Say for example Coca Cola and Pepsico the two biggest players in India in the soft drink industry combine then this combination will eliminate the competition in the market and the Industry will be in a position to control the prices of the goods and thus this will harm the consumers and the economy of the country. The company formed after combination will try and eliminate the smaller industries and this will ultimately lead to full market control which will hamper economic growth and harm the consumers. Thus it is the duty of the Competition Commission of India to check on such combinations.

Let us assume Kingfisher Airways and Jet Airways merge. Now Kingfisher and Jet are the biggest Airline companies in India and their post merger share would be 60 percent.\(^{26}\) As a result of the agreement the competition will die between the companies, and the degree of competition between the firms decides the extent of harm to competition due to unilateral defects. The competitive harms due to unilateral effects are likely to be more prominent in case of merger between firms selling homogenous products or services or even between firms selling close substitutable products or services. In fact, the degree of closeness of competition between the merging firms decides the extent of harm to competition due to unilateral effects. A merger

between firms that are each other’s close competitors or whose products are close substitutes is more harmful than merger between firms whose products are distant substitutes. As it eliminates the competitive constraint which exists between the parties prior to the merger thereby reducing the effective competition in the market which is always detrimental to the consumers interest. In this unilateral effects theory of competitive harm, the ability of the merged entity to increase prices does not depend upon a cooperative response from the remaining competing firms and hence, it is so called as unilateral effects or non-coordinated effects. According to this theory, such a horizontal merger gives rise to a situation of a “single firm dominance” which also has a direct relation to market shares held by the merging parties prior and subsequent to the merger.27

“Merger” will, of course, be justified on the ground of achieving efficiency, which in economic terms, means lowering of marginal costs of operation of both airlines, coupled with the global economic crisis leading to difficulty in raising the capital, the rising aviation fuel bill and their outstanding dues to oil companies. Defence for the unilateral effects theory of harm is the likely efficiency gains for the merged entity that is where the merger gives rise to reductions in marginal costs for one or both of the merging firms, this can offset the incentive to increase price.

Merger among small players to give competition to a large sized player is always considered pro-competitive and efficiency enhancing for such marginal players. But a Merger between a large and a small player, as happened in the airlines sector in India, does raise competition concerns as it makes an already big player bigger and such merged entity is likely to have a tendency to abuse its dominance for increasing its profits by indulging in any of the anti-competitive practices, such as, imposing unfair or discriminatory conditions, limiting or restricting services to
the selected few, denying market access to other players or to even enter into other product or services markets through their dominant position in one product or services market.

Thus it becomes the duty of the Competition Commission to look into matters relating to mergers and combinations and assure that there is no combination which hampers the competition in the market which has a negative effect on the consumers and gives way to anti-competitive practices. Though a combination might lead to reduction in running costs of a company and leads to economic development in some way but consumer welfare should be kept in mind as it is one of the primary aims of competition law in India. The commission should take consumer welfare seriously and maintain a balance between consumer welfare and economic growth as both are its important objectives.
3. CONSUMER PROTECTION

3.1 UNDER COMPETITION LAW

Section 18 of the Competition Act mentions that it is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Thus here we can see that apart from promoting competition in the market it is also the duty of the Commission to protect the consumers from anti – competitive practices. An enquiry can be initiated by a consumer or a consumer association by giving information to the commission accompanied by the required fees. Inquiry can also be initiated by any enterprise in the same manner. Further CCI can initiate inquiry on its own motion or on reference made to it by the central or state government or a statutory authority.  

CCI while determining whether an agreement falls under the category of an anti-competitive agreement (Section 19(3)) will have due regard to factors like creation of barriers to new entrants in the market, driving existing competitors out of the market, accrual of benefits to consumers etc. Thus here we see that CCI will consider the total benefits of a consumer before

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28 19(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
(a) [receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
(b) a reference made to it by the Central Government or a State Government or a statutory authority

29 19(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—
(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 or provision of services.
tagging an agreement an anti-competitive. This surely will protect the consumer, due to the fact that his interests are being considered by the CCI in its course of action. The modus operandi of proving that an agreement is anti-competitive is given below\(^{30}\) -

\(^{30}\) Abir Roy and Jayant Kumar, *Competition Law in India*, Eastern Law House, New Delhi
Are you an enterprise or a person as defined under section 2?

Have you entered into an agreement with any person or enterprise?

Does your agreement fall under any one of the categories specifically enlisted under section 3(4)?

Does your trade practice fall under any of the presumptive provisions of section 3(3)?

Does this agreement cause or likely to cause an appreciable adverse affect on competition within India?

Does your trade practice fall under proviso to sub-sec (3) of section 3.

Anti-Competitive Agreement under section 3.
Further to this the Competition Commission while inquiring whether a firm in misusing its dominant status shall under Section 16(4)\(^{31}\) give due regard to all or any of the factors like market share, size and resources of the enterprise and its competitors, comparison of economic powers of the enterprise and its competitors, dependence of consumers etc. Here as well we can see that there exists a consideration for consumers in determination of a firm’s dominant position by CCI. The intent of the person is relevant to the analysis as to whether the conduct is exclusionary or predatory\(^{32}\) and it has also been noticed that the conduct would be found predatory or exclusionary on the examination of the action of the undertaking concerned in the light of consumer interest i.e. as to whether it has impaired competition in an unnecessary restrictive way. Thus the competition law is designed as such to benefit the consumers along with economic growth, and the CCI as well has powers to determine anti-competitive practices, abuse of dominant position and mergers keeping the welfare of consumers in mind.

\(^{31}\)19(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—
(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) 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;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;
(l) 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 effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry

\(^{32}\) *Aspen Skiing Co. v Aspen Highlands Skiing Corp.* 472 US 585 (1985)
Competitive Authorities generally have the responsibility to intervene when they expect a merger to have an anti-competitive outcome. The basic merger analysis relies on understanding the effects that a merger may have on the expected state of competition in the market. Although certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anti-competitive that each is illegal per se without inquiry into the harm it has actually caused, other combinations such as mergers, JV’s and various vertical agreements, hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively and thus are judged under a rule of reason, i.e. an inquiry into a market power and market structure designed to assess the combination’s actual effect. Under section 20 (4)\textsuperscript{33} of the Competition Act the CCI would for the purpose of determining whether a combination would have the effect for or is likely to adversely affect competition would give regard to factors like extent of competition in market, level of combination in the market, barriers of entry etc.

\textsuperscript{33}20(4) For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:—
(a) actual and potential level of competition through imports in the market;
(b) extent of barriers to entry into the market;
(c) level of combination in the market;
(d) degree of countervailing power in the market;
(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
(f) extent of effective competition likely to sustain in a market;
(g) extent to which substitutes are available or are likely to be available in the market;
(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
(j) nature and extent of vertical integration in the market;
(k) possibility of a failing business;
(l) nature and extent of innovation;
(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.
The manner in which the analysis of merger and whether the same is anti-competitive is contemplated in India is depicted in a flowchart below:

Section 27 of the Competition Act empowers the Commission to pass cease and desist order, impose penalty, award compensation to parties, direct modification of agreements or pass

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34 Abir Roy and Jayant Kumar, *Competition Law in India*, Eastern Law House, New Delhi

35 Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) Impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

(c) [Omitted by Competition (Amendment) Act, 2007]
any such other order as it may deem fit, when after inquiry the Commission finds that any agreement is in contravention of section 3 or section 4. CCI can order such enterprises which have entered such an agreement to immediately discontinue it and has the powers as well to impose fine to the tune of 10 percent of the average turnovers of the last three years and the enterprises are bound to abide by the order of the CCI. Moreover the CCI has the power to grant interim relief award compensation and to grant any other appropriate relief; to levy penalty for contravention of its orders; making of false statements or omission to furnish material information, etc. CCI can pass final orders as well as interim orders. CCI can rectify its orders but cannot review its orders. Appeal against orders of CCI shall lie with Competition Appellate Tribunal. When during an enquiry before the Commission, the Commission is satisfied that an act in contravention of section 3(1) or section 4(1) or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order grant a temporary injunction restraining any party from carrying on such act until the conclusion of such inquiry or until further orders without giving notice to the opposite party, where it deems necessary.

Section 41(2) of the Act, 2002 confers upon the Director General, in the discharge of his duties, the powers as are vested in a Civil Court under the Civil Procedure Code, 1908. By virtue of this section, the Director General is empowered to summon, demand production of documents, 

(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
(f) [Omitted by Competition (Amendment) Act, 2007]
(g) pass such other order or issue such directions as it may deem fit.

36 41(2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36.
receive evidence on affidavit and issue commissions for the examination of witnesses or documents. The Director General or any person investigating under his authority has the powers as are vested in the Inspector in terms of sections 240 and 240A of the [Indian] Companies Act, 1956. Thus, the Director General or any person investing under his authority also has the power to demand production of documents and evidence which are in the custody of a body corporate and power to search and seize with the approval of the First Class Magistrate having jurisdiction where he has reasonable grounds to believe that books, papers or documents may be destroyed.  

Further no civil court has the jurisdiction to entertain any suit or preceding which CCI is empowered by or under the Act to carry out. Also, no injunction can be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. CCI is not bound by the procedure laid down by Code of Civil Procedure, 1908 and must only follow the principles of natural justice. CCI, thus, has the power to regulate its own procedure. If any party to such agreement is outside India; or if any enterprise abuses its dominant position is outside India; or a combination has taken place outside India; or any party to combination is outside India; or any other matter or practice or action arising out of such agreement or dominant position which causes an appreciable adverse effect on competition in the relevant market in India.

3.2 UNDER CONSUMER PROTECTION ACT 1986

The Indian Consumer Protection Act, 1986 was enacted “to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers” disputes and for matters connected therewith”\(^{38}\). The obvious objective is to protect consumers from exploitation. The Act was last amended in 2002, which came into effect on 15th March, 2003. It applies to all goods and services unless specifically exempted by the Government. Until now no sector has been specifically exempted and, therefore, it is universally applicable. The basic purpose of the Act is to provide relief to four categories of persons, viz.

- consumers, who have purchased goods for consideration, if they suffer from any defect;
- consumers from whom the trader has charged a price in excess of the price displayed on the goods or package thereof or price list exhibited, or as agreed between the parties or the one fixed under any law;
- consumers who have suffered loss or damage as a result of any unfair trade practice or unscrupulous exploitation by the trader; and consumers of service for consideration, if it suffers from deficiency in any respect.”\(^{39}\)

The manner in which complaint is to be made, the procedure on receipt of complaint and the reliefs that can be granted by the District Forum and the State Commission are incorporated in sections 12, 13, 14 and 18 of the Act, while the procedure to be adopted by the National Commission is given in section 22 of the Consumer Protection Act, 1986 read with the rules 14

\(^{38}\) Preamble to the Consumer Protection Act, 1986

and 15 of the Consumer Protection Rules, 1987. The following reliefs can be granted by the Consumer Disputes Redressal Agencies:

A. to remove the defect pointed out by the appropriate laboratory from the goods in question;
B. to replace the goods with new goods of similar description which shall be free from any defect;
C. to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
D. to pay such amount as may be awarded by its as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;
E. to remove the defects or deficiencies in the services in question;
F. to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
G. to withdraw the hazardous goods from being offered for sale;
H. to provide for adequate costs to parties

The Consumer Protection Act aims at simply protecting the consumers. Its ultimate aim is to protect the consumers against unfair trade practices and determine trade is fair, whether there exists competition or not. Moreover the definition of consumer does not include a person who resells the goods or buys it for commercial purpose. Thus the ambit with respect to the definition of consumer is narrow.
4. PROPOSITIONS

4.1 CONSUMER PROTECTION IS A CONSEQUENCE OF COMPETITION

Competition promotes efficiency and productivity. In an industry where there is intense competition, often, there is a tendency, that the industry would become better and efficient. This happens because competition eliminates the poor performing products or services and leaves only good and outstanding products for the general masses to consume. This particular advantage of competition is more likely to benefit the general population, since they would have better quality products and services for maybe cheaper prices.\(^{40}\) As there exists competition in the market, the market players try their best to provide consumers what they need. Consumers need good quality products at lower prices.\(^{41}\) Now if there is Competition in the market, the market players in order to survive will be compelled to bow down to the demands of the consumer, i.e. quality products at lower prices.

Charles Darwin had given the theory of the survival of the fittest. According to Darwin in nature, only the fittest will survive and the weaker will be eliminated by natural forces like enemies, weather etc. Thus every offspring will have to compete with its fellow off springs for food, water, shelter. Off-springs who are weaker than others will be eliminated by nature. Applying the same theory by Darwin to the market competition the situation seems similar. In the market as well the players have to fight with each other for survival and those who are weak are eliminated by nature i.e. the market forces. This example may be applied to competitive markets in some respects like the fittest survive and for a firm to be fit has to attract consumers and consumers


\(^{41}\) Dando B. Cellini, Economic Growth and Consumer Welfare: Role of Competition Law
want good quality at lower prices. Thus it is a consequence of competition that consumers are protected. Competition law seeks to prevent harm to competition, and consumer welfare will be thereby maximized.\textsuperscript{42}

The competition process provides the greatest incentives for merchants to offer consumers the best quality goods and services at the lowest possible prices. The competitive process generates the greatest possible level of public surplus. By protecting the competitive process therefore, competition protection provisions indirectly promote consumer welfare.\textsuperscript{43} Competition leads to reduced prices and to more choices, which benefits the consumer.\textsuperscript{44}

Evidence has shown that with competition, prices go down while without competition, prices go up.\textsuperscript{45} Equally, there may be other benefits in terms of improvements not only in prices but also in services offered and choices available to consumers.\textsuperscript{46} Competition is therefore perceived as a driving force of choice. Competition among producers tends to lower prices, provide consumers with choice, generate more information for consumer decisions and open new markets for competitive firms. Competition is therefore seen as a necessary element for consumer welfare\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{42} Frank H. Easterbrook, When is it Worthwhile to use Courts to Search for Exclusionary Conduct? 2003 Colum. Bus. L. Rev. 345, 347.
\item \textsuperscript{43} Retrieved from http://www.jftc.com/Libraries/Speeches_and_Presentations/Institutionalizing_Competition_Policy_in_the_CSME_-_Mr_David_Miller.sflb.ashx, retrieved on 21\textsuperscript{st} July 2010
\item \textsuperscript{44} Irina Haracoglou, Competition Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law, Competition Law Review, Volume 3, March 2007
\item \textsuperscript{45} Consumers International, Consumer Benefits of Competitive Markets, Presentation and Compilation of competition cases, Retrieved from www.consumersinternational.org, Retrieved on 14\textsuperscript{th} July 2011
\item \textsuperscript{46} In Peru the connection fee for a fixed line fell from $1500 in 1993 to $150 in 2001, and the waiting time for installation fell from 118 to 2 months. Other changes also came as a result of liberalisation, such as an increase in the total number of telephones per hundred inhabitants, an increase in internet provision, as well as in employment in the sector.
\item \textsuperscript{47} PD Camarasca, European Merger Control: Getting the Efficiencies Right, Antwerpen, Insertia-Hart 2000
\end{itemize}
though not in itself a sufficient one. Thus consumer welfare is not the main goal of competition law, but the implementation of Competition Policies leads to consumer welfare.

Further competition law stops anti-competitive practices like abuse of dominant position, anti-competitive agreement, combinations etc. These agreements if prevail in the market begin harming the consumers. For example if a firm attains a dominant status and starts abusing its position then it will lead to hike in prices and degradation of quality etc thus affecting the consumers. But competition policy will eliminate the existence of any such anti-competitive agreement thus subsequently protecting the consumers by its actions.

4.2 CONSUMER PROTECTION IS ONE OF THE AIMS OF CCI

Competition law aims to protect competition in the market as a means of enhancing consumer welfare and ensuring the efficient allocation of resources. While to a large extent, it is therefore a ‘consumer-focused competition policy.’

Protection of consumer interests runs through the Competition Act. The preamble of the Competition Act clearly states that the CCI is to protect the interests of the consumers.

Preamble of the Competition Act

‘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 ……..’
Further, Section 18 of the Competition Act which defines the duties of the CCI clearly mentions that protection of interests of Consumers is one of the duties of CCI. 

Moreover the consumers or consumer associations are also given the right to complain against any anti-competitive practices in contravention of sections 3(1) and section 4(1) to the CCI under section 19(1) of the Act.

Further under section 19(3), 19(4) due considerations are also given to the position of the consumers in determining whether a practice is anti-competitive or not. Under Section 19(3) the accrual of benefits to the consumers are seen to determine whether an agreement has an AAEC or not. Under section 19(4) while inquiring whether an enterprise enjoys a dominant position or not under section 4 the dependence of consumers on the enterprise is determined.

The preamble of the Consumer Protection Act says –

An Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected…

Competition Act also mentions protection of Consumer interests as one of its aims. In spite of having a dedicated Act for consumers, the fact that Protection of Consumer Interests is also one of the aims of the Competition Act points towards the fact that consumer protection is one of the aims of CCI.

Section 18 - Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.
Further section 19(1) says – The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association;

Section 19(1) has provisions for both the consumer or consumer association and person as well. Person is defined under section 2(l)\(^49\) of the Competition Act and it also contains an individual or an association. In spite of the definition of person including an individual still the fact that Section 19(1) mentions both a person and a consumer conveys the importance, consumer protection is given under the Competition Act. From the above we can conclude that Consumer Protection is not just a mere consequence of Competition, but in fact one of the aims of the Commission.

\(^49\) Section 2(l) "person" includes—
(i) an individual;
(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
(vi) 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);
(vii) any body corporate incorporated by or under the laws of a country outside India;
(viii) a co-operative society registered under any law relating to cooperative societies;
5. MY OPINION

The Hon’ble Finance Minister for 2009-2010 in his budget speech said that “The government has established CCI, an autonomous regulatory body to promote and sustain competition and market, protect interests of consumers and to prevent practices having adverse effect on competition……

……. The benefits of competition should come to more sectors and their users and consumers. Now it is time for us to work on these aspects to eliminate supply bottle necks, enhance productivity, reduce costs and improve quality goods and services supply to consumers.”

Moreover, recently, the Hon’ble Supreme Court of India in the case of Competition Commission of India v. Steel Authority of India Ltd. observed:

The principle objects of the Act, in terms of its preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effects on the competition to promote and sustain competition in the market, to protect the interests of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country. In other words the Act requires not only protection of trade but also protection of consumer interest.

Thus it can be noticed that protection of consumers’ interest has engaged the parliamentary attention while enacting the Competition Act and the same has been reiterated by Hon’ble

50 Civil Appeal No. 7779 of 2010
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Supreme Court. Therefore the function of the CCI is not only to supervise and sustain competition in the market but also to protect the interests of the consumers.

Thus consumer protection is a vital element of Competition Law, but the question that arises is whether Consumers can be protected by mere implementation of competition policies or that both Competition Law and Consumer Protection Policy should go hand in hand.

Now both these acts might have a common objective but the mode of achieving it is different. Consumer harm in competition law may differ from consumer harm in the field of consumer protection. In the consumer protection field, harm is relatively simple to define. It is a failure in the origination, the substance, or the remedy of a consumer transaction, which has the effect of undermining the individual consumer transactions to grant individual consumers remedies. In that way it fills gaps that market forces leave unfilled. Defining consumer harm is difficult in competition law. The definition of “consumer antitrust” remains under-theorized—a remarkable reality, given the frequency with which consumer welfare is invoked to justify a particular decision or policy prescription.\(^51\) It is often said that competition law should be primarily concerned with consumer welfare. Such an approach has the tendency to undermine any direct intervention on behalf of individual consumers. If an individual transaction produces a sub-optimal result, Competition Law assumes the marketplace will supply the resolution. The incapable or shady merchant will be replaced by one who serves consumers’ wishes and does so fairly. Across the mass of consumers, then, welfare may be optimized. The handful left unsatisfied before the loser exited the market are too few to bring down the average. Those few

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do not reflect harm to competition. Further Consumer Protection Act to protect the consumers might as well go to lengths in the interest of preventing consumers from being misled; thereby leading to over-regulation and to controls that ultimately diminish the very competition that increases consumer choice.

Competition principles may ensure that consumer protection does not actually work against the consumer interest rather than in its favour. Consumer protection may at times go to lengths in the interest of preventing consumers from being misled; thereby leading to over-regulation and to controls that ultimately diminish the very competition that increases consumer choice. Such measures can create barriers that limit sellers from selling what consumers want. Thus For the benefit of the consumers the competition policy can check measures taken by the Consumer Protection Act if they are against competition. Consumer protection may enhance competition by making it easier for honest sellers to compete in the market. Also, consumer protection may complement competition law by providing useful insights about how competition policy should be executed, and by improving our understanding of how markets operate.

The complementarities between competition law and consumer protection law in relation to ‘consumer sovereignty’ may be seen in the case of switching. Competition law ensures that options that would otherwise reach the market are not impeded, and consumer law ensures that consumers are informed enough to be able to switch. If competition is absent, there would be no products to which consumers would be able to switch. Absence of sufficient information on the alternatives, however, so as to allow consumers to make an informed decision, despite the existence of competition, consumers may still perceive the costs of ‘search and switch’ (finding

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the best deal, overcoming transactions costs related to the change as well as the psychological costs of uncertainty) as being too high in relation to the benefits of switching.\textsuperscript{53}

Competition Law on one hand makes sure that only the honest players compete in the market and Consumer Protection Act ensures that those existing players do not harm the consumers. Now Competition Law ensures there is healthy competition in the market and aims to eliminate all anti-competitive agreements, thus it indirectly benefits the consumers, whereas the Consumer Protection Act ensures that in the present market no player takes undue advantage of a consumer. The aim of both the acts might clash but certainly there is a difference of approach. The CCI will not take petty consumer cases, like in the case of \textit{Prateek v. Uprass Vidyalaya}\textsuperscript{54} the allegations concerned related to a refusal by school to allow a student fill up a form for the Board Exams, and sought monetary relief of 10 lacs and compensation of 20 lacs for harassment and mental suffering. While such a proceeding may conceivably be maintainable before a consumer forum, the competition quite rightly declined to entertain the same. Thus the areas covered under consumer protection are different.

Further to this there does exist certain situations when Competition might not be beneficial for the consumers. Now taking the example of Predatory Pricing, the Consumers though for a short term will be benefited. The consumers will get good quality goods at lower prices, and ultimately it would benefit them, although in the short run. Thus it cannot be blindly believed that consumer protection is a consequence of Competition Law.

Thus it becomes necessary for competition policy not to assume that consumers will be protected as a result of Competition in the market, but to work in a joint manner with the Consumer


\textsuperscript{54} Case No. 05/2010
Protection Act. There needs to be synchronisation between the Competition Act and the Consumer Protection Act.
6. CONCLUSION

6.1 ‘CONSUMER OR THEIR ASSOCIATION’ IS NOT DEFINED UNDER COMPETITION LAW

‘Consumer or their Association’ mentioned in Clause 19 (1)(a) have not been defined. Clause 19(1) (a) says ⁵⁵ that the Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association. Now the problem which arises here is there is no such definition of consumer association and this is left to interpretation, where the MRTP Act had defined ‘Consumer Association’ under sector 2(n) of MRTP Act.

Clause 2(n) of MRTP says "registered consumers' association" means a voluntary association of persons registered under the Companies Act, 1956 (1 of 1956), or any other law for the time being in force which is formed for the purpose of protecting the interests of consumers generally and is recognized by the Central Government as such association on an application made in this behalf in such form and such manner as may be prescribed.

MRTP clearly defined the consumer association, thus only consumers’ associations which qualified under clause 2(n) would be qualified to file a complaint under section 10 of the MRTP Act.

⁵⁵ 19.(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
(a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association;
6.2 INCLUSION OF UNFAIR TRADE PRACTICES IN COMPETITION ACT

Section 36A of erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) ‘unfair trade practice’ (UTP) was defined as a trade practice, which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any services adopts any unfair method or unfair or deceptive practice including oral, written or visible misrepresentations regarding standard, quality, status, condition usefulness and price of goods or services; false warranty, guarantee or promise regarding goods or services; disparaging of goods and services of another person; and false advertising and misrepresenting with regard to the gifts, prizes and offers in sale etc. But UTP’s are not included in the Competition Act.

6.2.1 WHAT IS AN UNFAIR TRADE PRACTICE?

An unfair trade practice means a trade practice, which, for the purpose of promoting any sale, use or supply of any goods or services, adopts unfair method, or unfair or deceptive practice. Unfair practices may be categorized as under:

1. FALSE REPRESENTATION

The practice of making any oral or written statement or representation which:

- Falsely suggests that the goods are of a particular standard quality, quantity, grade, composition, style or model;
- Falsely suggests that the services are of a particular standard, quantity or grade;
- Falsely suggests any re-built, second-hand renovated, reconditioned or old goods as new goods;
• Represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which they do not have;
• Represents that the seller or the supplier has a sponsorship or approval or affiliation which he does not have;
• Makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
• Gives any warranty or guarantee of the performance, efficacy or length of life of the goods, that is not based on an adequate or proper test;
• Makes to the public a representation in the form that purports to be-
  a warranty or guarantee of the goods or services,
  1. a promise to replace, maintain or repair the goods until it has achieved a specified result,
     if such representation is materially misleading or there is no reasonable prospect that such warranty, guarantee or promise will be fulfilled
• Materially misleads about the prices at which such goods or services are available in the market; or
• Gives false or misleading facts disparaging the goods, services or trade of another person.

2. FALSE OFFER OF BARGAIN PRICE

Where an advertisement is published in a newspaper or otherwise, whereby goods or services are offered at a bargain price when in fact there is no intention that the same may be offered at that price, for a reasonable period or reasonable quantity, it shall amount to an unfair trade practice.

The 'bargain price', for this purpose means-
1. The price stated in the advertisement in such manner as suggests that it is lesser than the ordinary rice, or
2. The price which any person coming across the advertisement would believe to be better than the price at which such goods are ordinarily sold.

3. **FREE GIFTS OFFER AND PRIZE SCHEMES**

The unfair trade practices under this category are:

- Offering any gifts, prizes or other items along with the goods when the real intention is different,
- Creating impression that something is being offered free along with the goods, when in fact the price is wholly or partly covered by the price of the article sold, or
- Offering some prizes to the buyers by the conduct of any contest, lottery or game of chance or skill, with real intention to promote sales or business.

4. **NON-COMPLIANCE OF PRESCRIBED STANDARDS**

Any sale or supply of goods, for use by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by some competent authority, in relation to their performance, composition, contents, design, construction, finishing or packing, as are necessary to prevent or reduce the risk of injury to the person using such goods, shall amount to an unfair trade practice.

5. **HOARDING, DESTRUCTION, ETC.**

Any practice that permits the hoarding or destruction of goods, or refusal to sell the goods or provide any services, with an intention to raise the cost of those or other similar goods or services, shall be an unfair trade practice.
6.2.2 REASON FOR EXCLUSION FROM COMPETITION ACT

It is felt that if UTP’s are added to the Competition Act then they would increase the burden on the Competition Commission and would divert the commission from its main aim. The commission is designed to enhance and promote competition in the market and it is believed that addition of unfair trade practices in the Competition Act will divert its expertise or resources towards unfair trade practices while anti-competitive issues will take a backseat. Moreover as far as unfair trade practices *viz a viz* business transactions are concerned; they are covered under the purview of Competition Act, 2002 if they harm competition in the market. Thus it is argued that there is no need of inclusion of UTP’s in Competition Law.

6.2.3 REQUIREMENT OF UTP’S IN COMPETITION LAW

The UTPs with reference to the consumers are now covered in the Consumer Protection Act, but the main problem is business to business transactions. They are neither covered by the Consumer Protection Act nor the Competition Act and there appears to be a vacuum. Now the term ‘consumer’ under Consumer Protection Act does not include persons who buy goods or hire services for commercial purpose, whereas ‘consumer’ under Competition Act even includes persons who buy goods or hire services for commercial purpose. Thus majority of UTP’s come under the purview of Consumer Protection Act, but the main problem is with UTP’s which relate to business to business transactions as they are no covered under both of these Acts. Thus it is suggested that all UTPs which relate to business to business transactions whether or not they involve competition issues should come within the Commission’s purview i.e. all practices which are allegedly unfair trade practices but have no bearing on competition in the market.
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