A LECTURE ON

COMPETITION LAW

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INTRODUCTION TO COMPETITION LAW

The Nature of the Initial of Early Industrial Policies and of Economy

- The Quest for industrial development began in India after independence. The Industrial Policy of 1948 and policy resolution of 1956 marked the beginning of the evolution of Industrial development in India.
- These Industrial Policies has not been static. We can identify differences between the Industrial policies of initial years and present policies. The policies of initial years were being driven by the force of regulated economy, whereas the present one is being driven by the force of free marked economy.
- Among the initial industrial policies:
  - the 1948 policy delineated the role of the state in industrial development both as an entrepreneur and as an authority to control the economy;

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- the 1956 policy' objectives was to growth, social justice and self-reliance in the industrial sector. This policy also defined the parameters of government's regulatory mechanism.

- Interestingly, in both initial policies, agriculture was left to the private initiatives.
- In initial policies, license to production in the core section was allowed to private sectors in a very limited capacity. In contrast, public sectors had scope to achieve a commanding heights by controlling major share of production.
- Again, the Government could intervene directly through monopoly purchase and distribution agencies like the STC (State Trading corporation), MMTC (Mines and Minerals Trading Corporation) etc.

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- Also, the government could regulate the international trade, and the trade regulatory mechanism were in the form of licensing of import quota.
- The model of Industrial development of then was structural model (popularly known as Nehruvian Model) with the objectives of achieving a defined set of investment allocations based on the State determined priorities.
- In addition, the desired allocation was to be achieved by the administrative mechanism of licensing and production and granting quotas in the case of scarce resources like foreign exchange, etc.
- This model dominated the policy till 1980. And some of the politically induced measures of the seventies like bank nationalization, the takeover of the wholesale trade in

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food grains, the increasing government control through MRTP Act 1969 and FERA, 1973 increased the control power of the Government over the means of production and industrialization.

- The model served its purpose and became anachronistic in 1980s and 1990s.

Consequences of Planned and Control Economy

The policies were detrimental to economic efficiency and productivity.

- ✓ There was no competition.
- ✓ There was no incentive for cost reduction.
- ✓ There was automatic protection to domestic producer of import-substitute.

To understand more better, let us have a look on the report of Raghavan Committee on Competition law. The report observed as follows—

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"…The absence of domestic competition, along with the unconditional protection from imports provided to domestic industry together with the other aspects of the licensing regime, fostered a high cost industrial structure which was domestically inefficient in the utilization of resources and not competitive abroad. In addition to the static mis-allocation and inefficient utilization of resources, the system was also dynamically inefficient insofar as it was not likely to encourage technical change. On the other hand, a competitive market structure with 'right' prices would have promoted a dynamic, efficient, productive and competitive industrial sector."

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Economic Reforms and Industrial Policy 1991

- In 1991, the government announced a new industrial policy on 24th of July. 1991 which envisioned liberalization and competitive environment.
- The main thrust of this policy has been to unfetter the spirit of enterprises and expose the economy to greater competition, internal and external.
- The policy has shifted the emphasis diametrically and dramatically from import substitution to export generation to enable the economy to become more competitive and efficient.
- The policy has changed the role of government from that of only exercising control to one of providing help and guidance to the entrepreneurs in their efforts.
- The policy requires making the essential procedures fully transparent and time responsive by eliminating delay.

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- The basic changes in the new policy relate to industrial licensing, foreign investment and technological collaboration, government ownership of the industry and special control on very large private enterprises and future treatment of large industrial houses governed by the MRTP Act 1979.
- Many measures were taken to implement this policy. Among other things, Rupee was depreciated, cash compensatory support and export subsidy eliminated, import license at the discretion of the official stopped.
- Thus the objectives of the new industrial policy has been to increase the degree of competition between firms, so that there is incentive for raising productive, improving efficiency and reduction of costs.

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Competition—Advantages and Disadvantages

Competition offers very important benefits. Not only it stimulates innovation and efficiency, it also provides the consumer with a wider set of alternatives. There are due to competition enhanced product differentiation. Moreover, there are scope of better satisfaction of consumer demand.

Opposite to competition is Monopoly. In the state of monopoly there is no option for the consumer. Given that producers can control prices by reducing or increasing production, production may be less than optimal and efficient. Buyers cannot switch to other sellers even though the price is relatively high. Profit is centered on producers because consumers have no other choice. After all, the product is essential to meet their needs.

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- But just the prospect of competition made it realize that the consumer could not be taken for granted. Competition build a pressure on account of which firms improve their offerings and bring price down to the bare minimum. It is Competition which awards work ethics and penalize laziness. Markets which are not competitive are not a market but are traps.

Nature of Competitive Economy

A truly competitive economy has to be free from public or private constraints on market. Otherwise it cannot be competitive. In free competitive markets, prices tend to adjust to the levels that just clear the market. It is a market condition where neither buyers, nor sellers exercise any influence on price.

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Abuse of market Power and Unfair Trade Practices

- Free competitive market is an ideal situation. But, in reality, such a situation is unattainable. Big companies in fact eliminate competition by forcing the existing small companies out of business and by blocking entry of the new.
- Monopoly power enables them to exercise considerable influence over prices of commodities that they produce and exact higher prices or profits than would have been possible under competitive conditions.
- The price remain no longer competitive. Moreover, monopoly power often results in a wasteful use of resources. Consumers are not longer sovereign, to decide what is to be produced and in what proportion. That decision is taken by the monopolistic companies. Consumer preferences are not fully appreciated or heeded. Their preferences are

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- Greatly influenced and molded by advertisement and other means, which entails heavy costs, and are directed to what monopolistic companies decide to produce. Too little of some commodities are produced and sometimes, too much of the other. They have both the incentives and the ability to restrict competition. Their interest lies in keeping the market reserved for themselves and subvert the competition by:

  1. *Forcing a competing firm out of business, i.e., by predation ;*
  2. *Buying out those competing firms, i.e., by takeover or merger;*
  3. *Colluding with those competing firms, i.e., by cartelization*.

- These are the unfair trade practices and need to be curbed to ensure free and completive trade.

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The Need of Competition Regulation

Competition cannot be left unfettered in the belief that it will drive out unfair trade practices. Free trade, in the modern and technologically more complex age, does not provide all the safeguards. Force of competition have to be reinforced with a competition law particularly to counter forces of monopoly. By its enactment the government takes the responsibility for assuring competition among private firms without otherwise interfering in their price and output decisions. By enactment, the government takes responsibility to curb the abuse of market power (i.e., predation, takeovers and mergers and cartelization) and tries to rectify the market failure.

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Historical Background of Global Competition Law:

Monopoly imposes heavy costs in every society. It is a conspiracy against the public, to raise prices. It hates competition because competition lowers price to a level which is fair and honest earned under competitive environment. Monopoly is exercised through a collusion between competitors or through market shares against by buying up or bullying the present competitors out of, and the potential from, the market. The purpose is to earn maximum profit at the cost of consumers and rival competitors, more than the natural profit which the fair and free competition endures. It also destroys efficiency and discourages innovation. Competition enhances consumer choice and promotes competitive prices, with the result society as a whole benefits from best possible allocation of resources. At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public.

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The first competition laws was the Combines Act of 1889 of Canada, followed by the US *Anti Trust* laws (Sherman Act in 1890). In United Kingdom and Countries the United Kingdom model after 1947 *Restrictive Trade Practice law and Monopoly and Restrictive Trade Practice (MRTP) LAWS WERE ENACTED.* In 1970s, OECD, then UNCTAD, adopted the terminology of Restrictive Business Practices (REPs) law, which was more recently changed to competition law. The basis structure of all competition laws is broadly the same and usually covers the following aspects:

1. Objectives; 2. Definitions; 3. Scope of Application; 4. Exemption and Exception;

5. Prohibited Practices; 6. Horizontal and Vertical; 7. Merger Control

8. The Competent Authority; 9. Sanctions; 10. Appellate Procedures

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Historical Background of National Competition Law:

In order to understand what is the history of the competition law, we have to looked into the MRTP Act 1969 and then try to understand what were the developments as to this Act after its enactment which led to repeal of this Act and existence of Competition Act 20002.

MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

- The genesis of this Act is traceable to Directive principles of the State policy in article 38 and 39 of the Constitution of India, which, inter alia, provide that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may be, a social order in which justice, social, economic and political, shall inform all institutions of the national life, and State shall, in particular, directs its policy towards securing:

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

ii. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

- The Act originally curbed monopolistic and restrictive trade practices only. These practices were anti-competitive indulged in by manufacturers and their dealers. Unfair trade practices were brought under its purview by amendment in 1984. The Act has a general social policy function as well as economic policy function. The thrust of the Act was directed towards:

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a) Prevention of concentration of economic power to the common detriment;

b) Control of monopolies;

c) Prohibition of monopolistic trade practices;

d) Prohibition of restrictive trade practices; and

e) Prohibition of unfair trade practices.

<u>DEVELOPMENTS AFTER ENACTMENTS</u>

- Major amendments were made in 1991. Provisions relating to prevention of concentration of economic power in a few hands were deleted. With the restructuring of the Act through the 1991 amendments, its thrust was on curbing monopolists, restrict and unfair trade practices with a view to preserving competition in the economy and safeguarding at the interests of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices.

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- Unlike the competition law in other countries which address engendering competition in the market and trade, and which address anti-competitive practices, the MRTP Act fell considerably short of squarely (=exactly/evenly) addressing competition and anti-competitive practices. It lacked provisions to deal with anti-competition practices that may accompany the operation and implementation of the WTO agreements. These have to be spelt out. Special provisions were necessary to deal with identifiable anti-competitive practices some of which are restrictive in character and were not defined, such as: abuse of dominance; cartels, collusion and price fixing, bid-rigging, boycotts and refusal to deal; predatory pricing. With the focus on curbing monopolies and not on promoting competitions, the MRTP Act became obsolete in certain respects in the light of international economic developments relating more particularly to competition laws. Promotion of the competition were the required focus of the time.

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The Central Government, therefore, constituted a High Level Committee on Competition Policy and Law, under the Chairmanship of S.V.S. Raghvan. The committee submitted its report to the Central Government on 22nd May, 2000.

RAGHVAN COMMITTEE REPORT ON COMPETITION LAW

- The report discusses in detail and made recommendations on both Policy and law of competition. It recommended that the competition law should cover all consumers who purchases goods, or services, regardless of the purpose of which the purchase is made. The State Monopiles, Government Procurement and Foreign companies should be subject to the competition law. The committee observed that the focus of most competition laws today in the world is on three main areas:

1. *Agreement among enterprises;*
2. *Abuse of dominance;*
3. *Mergers, or more generally, combination among enterprises.*

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- In respect of each, the committee recommended as follows:

1. **AGREEMENT AMONG ENTERPRISES**

A. All agreement (horizontal and vertical) should be covered by the competition, if it is established that they prejudice the competition.

AGREEMENT	
HORIZONTAL	**VERTICAL**
(Related to)	
Price	Tie-in Arrangement
Quantities	Exclusive Supply/Distribution
Bids (Collective Tendering)	Refusal to deal
Market Sharing	

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B. Certain Anti-competitive agreement should be presumed to be illegal.

C. Agreement that contribute to the improvement of production and distribution and promote technical and economic progress, while allowing consumers a fair share of the benefits, should be dealt with leniently.

D. The "Relevant Market" should be clearly identified in the context of horizontal agreement. [Horizontal agreements are those between parties at the same level of the supply chain (for example, competing manufacturers, distributors or retailers). An example is a price-fixing agreement between two competing retailers.

E. Blatant price, quantity, bid and territory sharing agreement and cartels should be presumed to be illegal.

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2. ABUSE OF DOMINANCE

A. Abuse of dominance rather than dominance should be the key for the competition law.

B. Dominance should be defined in terms of 'the position of strengths, enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant markets and also appreciably affect the relevant market, competitors and consumers by its actions."

C. Abuse of dominance will include practices like restriction of quantitates, markets and technical development.

D. Abuse of dominance which prevents, restricts or distorts competition needs to be frowned upon by the Competition law.

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E. Relevant Market needs to be an important factor in determining abuse of dominance.

F. Predatory pricing (which is defined as the situation where a firm with market power prices below cost so as to drive competitors out of market) is generally prejudicial to consumer interest in the long run. It is to be treated an abuse if it is indulged in by a dominant undertaking.

G. Abuse of dominance and exclusionary practices will need to be dealt with by the adjudicating authority on the rule of reason basis.

3. MERGERS

A. Mergers need to be discouraged, if they reduce or harm competition.

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B. Mergers beyond a threshold limit in terms of assets should requires pre-notification.

Threshold Limit = Value of the assets of the merged entity [at Rs. _____or more]

+

Value of the group to which the merged entity belongs at Rs _____or more,

both linked to *wholesale price index*.

Wholesale Price Index = Wholesale price indexes measure the changes in commodity prices at a selected stage or stages before goods reach the retail level; the prices may be those charged by manufacturers to wholesalers or by wholesalers to retailers or by some combination of these and other distributors.

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c. If within a specified time period of 90 days, the adjudicating authority does not, through a reasoned order, prohibit the notified merger, it should be deemed to have been approved.

THE RAAGHVAN COMMITTEE REPORT, CONTINUE

The Raghavan Committee recommended for the establishment of a Competition Law Authority to be named "Competition Commission of India" (CCI) to implement Indian Competition Act with the following function:

- It will hear competition cases.
- It will play the role of competition advocacy.
- It will have the power to formulate its own rules and regulation to govern the procedure and conduct of its business also its administration.

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- It will have powers to impose fines and sentences of imprisonment.
- It will have the powers to award compensation.
- It will have the powers to r eview the orders of other authorities on the touchstone of competition.
- It will have limited powers of contempt.
- The trial below it should be summary in nature.
- The Constitution of CCI should be as under:
  - It should be a multi-member body comprising eminent persons from field of Economics, International Trade, Commerce, industry, Accountancy, Public Affairs and administration.
  - There will be a collegium for choosing the chairperson and members of the CCI.
  - The CCI will not have less than ten members including Chairperson.

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REPEAL OF THE MRTP ACT 1969

In view of the policy shift for curbing monopolies to promoting competition, there was need to repeal the MRTP ACT 1969 to do away with the rigidity structured by it. Hence the Raghavan Committee recommended its repeal and winding up of the MRTP commission.

And finally, this ACT was repealed. Cases pending before MRTP commission relating to unfair trade practices were transferred to the concerned consumer court under the Consumer Protection Act, 1986 and those relating to monopolistic trade practices, to CCI.

Based on the report of the Raghavan's committee, the Competition Law of India is enacted, with its name "Competition Act, 2002".

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