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*Topic: - "Interface between Competition Law and Consumer
Protection: A Global Study with reference to India"*

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DECLARATION

I hereby declare that this dissertation on the topic titled as "*Interface between Competition Law and Consumer Protection: A Global Study with reference to India*" is the outcome of research conducted by me under the guidance of **Dr. Ashok R Patil** (Associate Professor in Law Chair on Consumer Law & Practice), National Law School of India University. I also declare that this work is original except for such help taken from such authorities as has been acknowledged at the appropriate places.

I further declare that this work has not been submitted in part or in whole for any degree at any other university.

Date: 30/05/2012

Place: Bangalore



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CERTIFICATE

This is to certify that the dissertation on the topic titled as "*Interface Between Competition Law and Consumer Protection: A Global Study with reference to India*" submitted by Mr. Praveen Singh, ID No. 437, for the degree of LL.M. (Business Laws) of the National Law School of India University, Bangalore is the product of bona fide research carried out under my guidance and supervision. This dissertation or any part thereof has not been submitted elsewhere for any other degree.

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
AIR	All India Reporter
CA, 2002	Competition Act, 2002
CCI	Competition Commission of India
CPA, 1986	Consumer Protection Act, 1986
E.C	European Commission
E.U.	European Union
ECJ	European Court of Justice
ECMR	European Community Merger Regulation
End.	Edition
FICCI	Federation of Indian Chambers of Commerce and Industry
FTC	Federal Trade Commission
MIS Report	Management Information Service Report
MRTP Act	Monopolies and Restrictive Trade Practice Act
MRTPC	Monopolistic and Restrictive Trade Practices Commission
MTP	Monopolistic Trade Practice

OECD	Organization for Economic Co-operation and Development
OFT	Office Of fair Trading
p.	Page
pp.	Pages
RTP	Restrictive Trade Practice
SC	Supreme Court of India
U.K	United Kingdom
U.N	United Nations
U.S.A	United States of America
UNCTAD	United Nations Conference on Trade and Development
UTP	Unfair Trade Practice

TABLE OF CASES

NATIONAL CASES

- Ashoka Smokeless Coal Ind. P. Ltd. v. Union of India 2007(2)SCC640
- Competition Commission of India v. Steel Authority of India Ltd. Civil Appeal No. 7779 of 2010
- In re Samir Gas Agency RTP Enquiry No. 46/1986, order dated 20.12.1990.
- Mahindra and Mahindra Ltd. v Union of India (1979) 1 Comp CAS 1 (SC).
- Raymond Wollen Mills Ltd. v MRTP Commission 1976) 1 Comp LJ 106 (Bom).
- Re Borosil Glass Works RTP Enquiry No. 22/1984, order dated 24.1987
- Re Mangaldeep and others RTP Enquiry No. 46/1986, order dated 20.12.1990.
- Sri Neeraj Malhotra v. North Delhi Power Limited, BSES Rajdhani Power Limited and BSES Yamuna Power Limited, MANU/CO/0026/2011
- Tata engineering and Locomotive Company Ltd v Registrar of Restrictive Trade Agreements (1977) 1 Comp CAS 71 (SC).
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- Allied Tube & Conduit Co. v. Indian Head, Inc., 486 U.S. 492 (1988)
- Broadcast Music Inc. v CBS, 441 US 1,19-20 (1979)

- FTC v Superior Court Trial lawyers Ass'n, 493 US 411,424 (1990)
- Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (2001)

CAT 1

- Spectrum Sports, Inc. v McQuillan 506 US 447,458 (1993)
- State oil v Khan 522 US3, 10(1997).
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- United States v Addyston Pipe & Steel Co., 85 F. 271
- United States v. Aluminum Co. of America 148 F.2d 416 (2d Cir. 1945).
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- United States v. Trans-Mo. Freight Ass'n, 166 US 290 (1897)

CHAPTER- ONE
INTRODUCTION

CHAPTER ONE

1.1 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. Promotion of consumer welfare is the common goal of consumer protection and competition policy. At the root of both consumer protection and competition policy is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance. If the nature of the industry is such that dominance in terms of market share cannot be avoided, it seeks to ensure that there is no abuse on account of this dominance.

The UN General Assembly adopted the Guidelines for Consumer Protection on April 9, 1985 (General Assembly Resolution 39/248). The Guidelines provide a framework for governments, particularly those of developing countries, to use in elaborating and strengthening consumer protection policies and legislation. 2010 marks the 25th year of the adoption of the UN Guidelines for Consumer Protection. The draft UN guidelines were discussed at great length from the 1960s onwards before finally being adopted in 1985. In 1999 guidelines were formally expanded with Section G on sustainable consumption, and were re-adopted in the UN General Assembly decision 54/449.

The UN General Principles set out the legitimate needs of consumers as follows:

1. The protection of consumers from hazards to their health and safety
2. The promotion and protection of the economic interests of consumers
3. Consumer access to adequate information to enable making informed choices according to individual wishes and needs
4. Consumer education, including education on the environmental, social and economic impacts of consumer choice
5. The availability of effective consumer redress
6. Freedom to form consumer and other relevant groups or organizations and the opportunity for such organizations to present their views in decision-making processes affecting them
7. The promotion of sustainable consumption patterns (added in 1999).¹

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. For the common man interface between the competition law and consumer protection seems tenuous but if we view it legally as well as historically then we find that answer is quite different.

¹ Yang – Ching Chao: International and Comparative Competition laws and Policies, Kluwer Law International pg.441

As quoted by the **W.J.Kolasky**, deputy assistant attorney general, Anti Trust Division, and U.S. Department of Justice:

*“The ultimate goal of any sound competition policy must be consumer welfare, which competition advances through lower prices, higher outputs and enhanced innovation.”*²

According to the **Deputy Assistant Attorney General, E.U.** -

*“Actually, the goal of the competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of consumer.”*³

European Commission in its XXXIInd Report on Competition Policy 2002⁴ declares that-

“One of the main purposes of European competition policy is to promote the interest of the consumers, that is, to ensure the consumer benefits from the wealth generated by the European Economy”.

Or in United states ‘The FTC acts to ensure that market operates efficiently to benefit consumers. In United Kingdom the office of fair trading statements of purpose declares,’ The OFT’s goal is to make markets work well for consumers.

According to the above observations it is pertinent to note that across the globe consumer protection or welfare has been recognized as the ultimate goal of the competition policy.

² See William J.kolasky, U.S. and E.U.Competition Policy: Cartels, Mergers, and Beyond (25 January 2002)

³ Mario Monti , The Future of the Competition policy in the European Union(9 July 2001)

⁴ Katalin Judit Cseres, Competition Law And Consumer Protection, kluwer International, p.324

In India Hon'ble S.C has also expressed similar view in the case of *Ashoka Smokeless Coal Ind. P. Ltd. v. Union of India*⁵ where it observed that-

“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 policy of the open market as to be achieved the benefit of the consumer must be kept uppermost in mind by the State.”

Ultimate goal of the competition law and consumer protection is maximum consumer welfare. Here we have to understand that 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. In the further discussion we need to understand how both the laws are interconnected and how competition law is an effective tool of consumer protection though at some points both the laws are having tension. In the further discussion we need to

⁵ 2007(2)SCC640

understand that how in the other countries both the laws are interconnected and what are the judicial pronouncement regarding this. How competition Act, 2002 and Consumer protection Act, 1986 are the similar tool of consumer welfare, it can be understand from the further discussion.

1.2. RESEARCH METHODOLOGY

1.2.1. RESEARCH OBJECTIVE

The objective of the research is to study the interface between the Competition Law and Consumer Protection. Both the laws are meant to be for consumer welfare. Whether competition is the best tool to serve the Consumer Protection will be epicenter of my project to find out the solution. I will also try to find out the tensions and complements between the Competition Law and Consumer Protection. Further my objective will be to look after the relation between the Competition Act, 2002 and Consumer Protection Act, 1986.

1.2.2. RESEARCH METHODOLOGY AND SOURCE OF DATA

As researcher has taken the research problem about the interface between the Competition Law and Consumer Protection so researcher would try to summarize his research in the analytical and in descriptive manner. As a research methodology I will use doctrinal method of research.

For this dissertation research Researcher has relied on primary sources of data namely as different Statutes and secondary source of data namely Books, Journals, Online Databases, Magazines, Newspapers as well as consultation and discussions with supervisor which are valuable for researcher to find out the right path for this research. All the sources have been duly cited.

1.2.3. HYPOTHESIS

Competition Law and Consumer Protection Act are enacted with the same objective as consumer welfare, though short term goal of the both the legislation may be different. Being the consumer welfare legislation there are much tensions and compliments between the both laws but it would be very difficult to draw a line between both the laws or to determine the separate area for both law. It seems that Consumer Protection and Competition Act overlap each other at maximum point of time. Competition Act, 2002 was enacted with the sole objective of consumer welfare. Competition Act is passed after repealing the MRTP Act, 1969 which was outdated in protecting the consumer interests with the changing circumstances.

1.2.4. RESEARCH QUESTIONS

- 1-** Whether Competition Law is the best tool to serve the Consumer protection?
- 2-** What are the compliments and tensions between the competition law and Consumer Protection Law?
- 3-** How in U.S., E.U., and U.K., Competition Law and Consumer protection is interrelated?
- 4-** Whether in India, Competition Act, 2002 is a tool of Consumer Protection?

1.2.5. CHAPTERIZATION

For the purpose of elucidating the topic, the dissertation is planned to be divided into following chapters-

The First Chapter is an introductory of the research topic which lays down brief outline of the topic, need of research, objective of the research, issues involved in the topic and method of research followed by the researcher throughout the paper.

Second Chapter deals with the interface between the Competition law and Consumer Protection. In this chapter main focus is on the objective and goal of the Competition Law and Consumer Protection. In very elaborate manner objectives of the both the laws are discussed. It is very necessary to understand the goal of Competition law and Consumer Protection because at very first instance it seems that objective of the both the laws are same but actually this is not so. Though ultimate goal is same as consumer welfare but objective of Competition law and Consumer Protection is different.

Third chapter is mainly relating to the interface of Consumer Protection and Competition Act in various jurisdictions like U.S., E.U., and U.K. In this chapter I have tried to mention that how judiciary has tried to interlink the Competition Law and Consumer protection. Almost in all the judgments concerned Court has interpreted that ultimate goal of competition Law is consumer satisfaction. In this chapter I have discussed the Competition Law of the above countries and how they are connected to the consumer welfare.

In the fourth chapter, position of India has been discussed relating to the interface of Competition Law and Consumer Protection. In detail I have discussed about the MRTP Act and Consumer Protection. It is very relevant to know here about the situations which were relevant for the enactment of the Competition Act, 2002. In a detailed manner I tried to make a comparison between the MRTP Act and Consumer Protection Act, 1986. Also in this chapter I have discussed that how Competition Act is an effective measure to serve the Consumer protection and a comparative study has been made between the Competition Act, 2002 and Consumer Protection Act, 1986.

And last chapter is dedicated to the conclusion. Finally we can get to know that how and in which manner Competition can serve the consumer protection. After the detailed discussion it became clear in the last chapter that, though the just goal of both the laws is different but the

ultimate purpose is same. We cannot bifurcate the area of Competition Law and Consumer Protection. These law goes side by side.

1.2.6. MODE OF CITATION

The researcher has followed a uniform mode of citation throughout this dissertation research.

CHAPTER-TWO

**INTERFACE BETWEEN CONSUMER
PROTECTION AND COMPETITION LAW**

CHAPTER TWO

INTERFACE BETWEEN CONSUMER PROTECTION AND COMPETITION LAW

Competition authorities all around the world are becoming more conscious of the effects which competition policy has on consumers. They seem to be increasingly anxious to declare how significant their role as enforcers of competition law is for the consumers well being. As it is clear by the above mentioned statements that competition policy has its one of goals to improvement of consumer interest. But is this consumer welfare ultimate goal of the competition policy. To understand this it is essential to understand that what are the objects and goals of the competition policy and consumer protection. Can competition policy effectively protect consumer interest? All those aspects shall be discussed in the following chapter.

2.1. OBJECTIVES AND GOALS OF THE COMPETITION POLICY- According to the UNCTAD⁶ Model Law on Competition states that the main objectives of national competition law and policy are 'to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development'⁷. While discussing the objectives of the competition policy three main stream policies can be

⁶ The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body. It is the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues. Cited from http://en.wikipedia.org/wiki/United_Nations_Conference_on_Trade_and_Development last visited on 28.05.2012

⁷ UNCTAD, 2001b. Model Law: The Relationship Between a Competition Authority and Regulatory Bodies, Including Sectoral Regulators, TD/B/COM.1/EM.17/3, United Nations: New York and Geneva

distinguished and it can be associated with one or two relevant school of thoughts. One of the three stream policy is based on the idea that competition is a value and itself. Another concept is based on pure economic efficiency arguments and third policy is based on the wider recognized goal that public interest is the ultimate purpose of the competition.

Ordoliberals⁸ saw competition as being closely linked to the individual freedom and strong basis for society. Competition law was considered to create and safeguard the conditions under which competition could effectively operate. The primary task of competition law was to protect the competitive process from private economic power. It is believed that main purpose of the competition is to serve the main means of eliminating private economic power and thereby to safeguard individual economic freedom of the market participants⁹. The economic freedom notion considers a restriction on competition as a restriction on the economic freedom of participants on the market place.

But in contrast to the above mentioned rule Austrian school argued that unconscious actions develop into competition which is therefore an automatic process. Freedom of competition was believed to lead to positive results such as the increased economic performance of producers, reduced cost, dynamic technical progress and consumer- directed production and state intervention in the process of competition are only wrong and harmful when they create barriers to market entry.

⁸ Ordoliberals followed earlier conceptions of liberalism in considering that a competitive economic system was essential for a prosperous, free, and equitable society. In their so-called ordoliberal version of society, economic freedom and competition were the source not only of prosperity, but also of political freedom. Ordoliberals argued that economic freedom is essential for political freedom and vice-versa cited from www.clasf.org/CompLRev/Issues/Vol2Issue2Art1Gormsen.pdf last visited on 28.05.2012

⁹ Sauter (1997) p.28, 251 (1998) p.117.

So it is clear that both the school has similar opinion that competition has value in itself but they differ in view that how to maintain it. Ordoliberalism holds that a certain legal framework and a certain level of state intervention is essential to preserve the effective competition but in different to it Austrian school¹⁰ has believe in beneficial working of the free markets and very much in favor of a laissez- faire policy.

Competition policy is based on the idea that competition policy can serve goal of wider public interest. Harvard school also supports this view. According to this school achievement of desirable economics results, the creation and promotion of competitive process, the prescription of fair conduct norms and restriction of the power of the large firms as the main purpose of the competition policy. Harvard scholars opposed market concentration, even when it might lower costs and prices, thereby benefiting consumers. Harvard scholarship convinced many judges to presume the illegality of any conduct by firms with market power, regardless of its effect on consumers. For example, in 1945, in *United States v. Aluminum Co. of America*,¹¹ Judge Learned Hand found Alcoa liable for monopolizing the aluminum manufacturing market.¹² Taking advantage of economies of scale by expanding its manufacturing capacity to meet increasing demand, Alcoa was able to deliver quality products to customers at low prices. Judge Hand's decision penalized Alcoa simply for engaging in aggressive competition that benefitted consumers

The Harvard School approach had a similar effect in deterring consumer-friendly mergers. In 1963, the government persuaded the Supreme Court to preclude a merger between two banks

¹⁰ The Chicago School scholars asserted that markets should be given a free rein because the greatest good comes from "the natural tendency of firms... to be efficient." Eleanor Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 917 (1987), cited from the Piraino, Thomas A. Jr. (2007) "Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century," *Indiana Law Journal*: Vol. 82: Iss. 2, Article 4.

¹¹ 148 F.2d 416 (2d Cir. 1945).

¹² *Id.*

in the Philadelphia area that together held only thirty percent of the relevant market. The Court deemed irrelevant the defendants' arguments that the merger might have enhanced their ability to provide better services to their Philadelphia customers¹³.

Post Chicago school also argues that non-economic factors such as the protection of small business, creation of entrepreneurial opportunity, prevention of the industrial concentration, promotion of individual liberty or the distribution of economic power are the main purpose of the competition policy¹⁴.

Taking into account UNCTAD's experience with development issues *UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Anticompetitive Practices* contains the following objectives

- to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;
- to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through (i) the creation, encouragement and protection of competition; (ii) control of the concentration of capital and/or economic power; (iii) encouragement of innovation;
- to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;

¹³ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963) ("[A] merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.").

¹⁴ Schmidt, Rittaler (1989) p.48, Lande (1999) p.875

- to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;
- to provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels¹⁵.

Competition policy usually focuses on a specific reconciliation of the overall interest of society with the particular interest of the consumers. Question is whether competition policy strives to achieve pure economic goals in particular economic efficiency or whether it may include non- economics goal like income distribution, diffusion of economic and political power or fostering business opportunities. Three approaches are possible-

- Competition policy may ignore consumer interests and focus solely on total welfare and economics efficiency.
- It may recognize the immediate and short – term interests of consumer as primary aim of competition policy.
- Competition policy might recognize consumer welfare as an essential long term goal where the immediate interests of consumer are subordinate to the economic welfare of the society as a whole¹⁶.

First approach have little attraction for policy makers as it ignores the wealth transfer from the consumers to producers and there by neglects any kind of protection for consumer

¹⁵ UNCTAD, 2001. *Consumer Protection, Competition, Competitiveness and Development*, TD/B/COM.2/CLP/23, United Nations: New York and Geneva.

¹⁶ Bordly (1987) p.1035

interests. Chicago school has an opinion that competition law is not suited to dealing with income distribution. Bork argued that economic efficiency benefits consumer directly through reducing the cost of goods and services through increasing the value of the goods and services.¹⁷ Second approach would prefer immediate short term consumer interests to the overall social interest. It disregards efficiency gains and benefits that drive productivity growth and innovation and that could actually benefit the consumers in the long run. Short term consumer interests have to be subordinated to a certain degree to producer's interest. Only in this way is it possible to achieve long term and durable productivity within the economy, which benefits consumers for a long durable basis. Third approach aims at long term consumer interests through subordinating the short term consumer interests overall welfare of the whole society on condition that consumers are provided with a fair share of the overall economic welfare.

Competition policy following this approach will however only allow activities that increase the overall welfare of the society but harm consumers short term interests if the below mentioned condition are fulfilled. First activity must increase total welfare by realizing substantial innovation and production. Second activity has to be necessary, reasonable and proportionate so as to harm consumers as little as possible.

2.2 OBJECTIVES AND GOALS OF THE CONSUMER PROTECTION- To say that the goal of consumer protection Law is to promote the benefit and the interests of consumers is almost tautological. It is true, however, that what constitutes the benefit of consumers is not something that everyone would agree upon, and that it can be understood in different forms and with various emphasis: as economic efficiency and social welfare in consumers' markets,

¹⁷ Bork (1978) p.8

as a re-distributive policy objective favoring consumers, or even as a paternalistic view of what the legal and economic rights of the consumer population should look like. Probably, the reasons behind all real-world consumer protection legislation in all real-world legal systems combine to a greater or lesser extent, welfare, redistribution, and paternalist thread¹⁸, rightly or wrongly understood.

In consumer law everything revolves around the consumer welfare. Consumer as special economic actor is the ultimate subject of the consumer protection. Consumer law consists mandatory rules that guarantee that parties will not depart from the legislative rules to the detriment of the consumers. It further comprises an obligation to disclose information as information plays an important role in the field of the consumer protection. Only well informed market parties can exercise their buying power and to activate competition. Consumer law measures address the safety and quality controls of consumer goods and services, consumer's ability and willingness to exercise choice. Consumer law is aimed at the improvement of the existing substantive law, like ability, standards form of contract, competition or advertising.

Consumer law is also oriented to words the social aspect of the market this view is generally contrast to the general opinion of the public that consumer law is only oriented towards the economy. It focuses on the standards of living of people and on the improvement of these standards. Consumer's interest is in informed choice concerning products and services at competitive price and quality, social goal is to minimizing physical harm in the design or provision of the products and services is equally important. Goals of the consumer protection

¹⁸ See Ian Ramsay, "Consumer protection", in Peter Newman (editor), *The New Palgrave Dictionary of Economics and the Law*, vol. 1, MacMillan, London, (1998), p. 410, emphasizing the combined presence of those three rationales, and expressing overall a positive opinion on this plurality of motivations. For reasons that will become clear in section 5 below, I am somewhat skeptical about the appeal of the redistributive and paternalistic motives in consumer protection Law.

depend on the way in which consumers and their needs exist. Definition of consumer protection depends on which theory of consumer protection it rely. There are mainly two model of consumer protection.

2.2.1.PATERNALISTIC MODEL- according to this approach of consumer protection markets have become non-transparent through product differentiation and multiplicity of packaging and distribution methods and that the competitive market is unable to transport the necessary information to the consumers. Furthermore, consumers are believed to decide in an irrational way and are uninformed because of non-transparency on the market. Consumer protection policies based on this theory try to restore the balance between consumers and producers on the market. They try to strengthen the consumer's weak market position. According to this approach legislator can regulate market circumstances by means of mandatory rules, where an imbalance between the economic power of consumers and that of producers makes correction necessary. This model relies heavily on state intervention in order to realize its policy goals: disclosure and provision of information in understandable ways, regulation of the substance of transactions, statutorily mandated contract terms or standard form consumer transactions in order to strengthen the market and to adjust the environment of consumers.¹⁹

2.2.2. LIBERAL MODEL – According to this approach consumer is sovereign. He is well aware to his needs and is best person to decide about his requirements. According to this theory consumer is able to define their needs for goods and services, to send their message concerning their needs to the market and to the producers and to satisfy those needs at a reasonable price and by choosing good quality. This approach

¹⁹ Katalin Judit Cseres, Competition Law And Consumer Protection, kluwer International, p.321

argues that competition law is able to considerably control market failures through strengthening the consumer's position by regulation together with information provisions and consumer education and counseling. This approach can be labeled as liberal, representing a kind of *laissez-faire* approach. The consumer is believed to be capable of being self-responsible by making rational economic decisions. This approach relies on competitive markets and is critical of state intervention. It believes that the regulation of competition can rectify consumer problems. It is argued that the law only has to intervene in case competition fails as a consequence of information deficits.²⁰

2.3. WHETHER GOALS OF BOTH THE LAW CORRESPOND WITH EACH OTHER-

As in the previous paragraphs I discussed about the goals of consumer protection and competition law. It is pertinent that ultimate goal of both the laws are same as consumer welfare, though we can say immediate goal and purpose of the competition law is concerned with the economic efficiency. So it is obvious that efficiency based competition policy shows little concerns about the consumers. . It seems, however, competition policy-makers all around the world are becoming more aware of consumer interests and increasingly try to demonstrate how competition policy benefits consumers. Here it is very pertinent to mention the view expressed by the EC in its XXXIInd Report on competition policy 2002. It defines the goals of the European Competition law in the given words-

'One of the main purposes of European competition policy is to promote the interests of consumers, that is, to ensure that consumers benefit from the wealth generated by the European economy. This objective — is horizontal in nature: the Commission thus takes the interest of consumers into account in all aspects of its competition policy,

²⁰ Ibid, at p.322

namely in countering anti-competitive agreements, in particular hardcore cartels, and abuses of dominant positions, but also in the control of concentration and state aid granted by Member States'.²¹

In the Recently published guidelines on the application of Art. 81 (3) EC Point 13 of the Guidelines declares the goals of European competition law in very explicit terms; "The Objective of Article 81(1) is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition art market integration serves these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers."²²

If we go through the correspondence of the competition law with the consumer protection then we can found it in the commission's consumer policy strategy. 'European consumer policy is central to one of the Commission's strategic objectives, that of contributing to a better quality of life for all. It is also an essential element of Commission's strategic objective of creating new dynamism and modernizing the European economy.'²³

Consumer policy as such cannot be developed in isolation without taking into account other areas that have an impact on the consumers. *DG Sanco Commissioner Byrne* has made the role of competition policy explicit 'Ensuring that competition rules are designed and enforced to the benefit of consumers must be one of the strategic priorities for the future. Work to achieve this goal will include, on the one hand, the setting up of efficient cooperation

²¹ Ibid, at p.324

²² Consumer policy strategy 2002-2006 (COM(2002)208 final) recital 1.1

²³ Ibid

mechanisms between authorities responsible for consumer policy and those responsible for competition policy, and on the other, a better, deeper involvement of consumer representatives in competition policy proceedings. The UK experience with super-complaints is a good example of this. Competition policy offers a powerful and direct means of addressing market failures and it is, in my view, essential that consumer representatives and officials dealing with consumer policy are more directly involved in the enforcement of competition policy.²⁴

Basically the goals of the competition law and consumer protection are same as consumer welfare. The amalgamation of competition law and consumer protection is even more obvious in U.K and U.S law. The US Federal Trade Commission declares its mission as 'The FTC acts to ensure that markets operate efficiently to benefit consumers. The FTC's twin missions of competition and consumer protection serve a common aim: to enhance consumer welfare. The Commission's competition mission promotes free and open competitive markets; bringing consumers lower prices, innovation, and choice among products and services²⁵.

After going through the above text people may have perception that both consumer protection and competition law has maximum similarity but they are not so obviously in harmony. Equally complements and tensions exist. Here I will discuss what are the complements and tensions between competition law and consumer protection.

2.3.1. COMPLEMENTS When markets fail to work effectively we turn to competition law and consumer protection. These two legal areas have a common goal:

²⁴ Byrne(2004) p.6

²⁵ Supra, note 16, p.325

well functioning, competitive markets that promote consumer welfare. In other words, effectively working markets can only be guaranteed when consumers are protected from unrestrained business practices and competition law is effective. Both competition law and consumer protection are aimed at the correction of market failures. Market failures can create both competition and consumer protection problems. The perspective of the two legal areas differs and they approach the problems from different angles. Competition law concentrates on the process of competition between firms and tries to correct structural problems in order to re-establish effective competition on the market. By contrast, consumer protection tries to improve market conditions for the effective exercise of consumer choice. It is primarily concerned with the structure of consumer transactions. Although the two legal disciplines focus on different market failures and offer different solutions and apply different techniques to correct market failures they are both aimed at keeping the market competitive and try to bring market performance close to the model of perfect competition. As the *Australian Competition and Consumer Commission's deputy chair, Sylvan* said-

“Consumer protection and competition law have 'shared roots and intimate connections²⁶”

These are actually two different approaches to achieve the same goal: a competitive market where consumer sovereignty is safeguarded and welfare is maximized. Competition law and consumer protection are thus mutually reinforcing disciplines. Consumer protection serves competition by encouraging consumers to participate in the marketplace and to activate competition. When consumers have a reasonable

²⁶ Sylvan (2004b) p.191 cited from Katalin Judit Cseres, Competition Law And Consumer Protection, kluwer International, p.326

degree of confidence in the market, they will make well-informed decisions and make use of the choices made available by competition law. Effective consumer programmes improve the position of consumers on the market and encourage consumers to engage in more transactions on the market. Stimulating the activity of consumers on the market will subsequently lead to more intensive competition. Thus effective consumer choices will facilitate effective competition and, ultimately, this increases the efficiency of the whole economy and the welfare of society.

Now after seeing the complements between the competition law and consumer protection, it is very essential to have a look of tensions between both.

2.3.2. TENSION²⁷ - Competition law is not specifically oriented towards the improvement of consumers' non-economic interests. It strives for the effective working of the market and it serves the economic and technical progress of society. It focuses on the structure and the effective functioning of the market. Competition law does not recognize certain consumer problems and does not deal with social objectives of consumer protection, like health and safety standards. Competition law should support certain consumer interests, but this is neither its only nor its foremost task. Consumer interests are sometimes subjected to a balancing test against other interests that competition policy promotes. Competition law serves wider public purposes than just consumer protection, such as the protection of easy entry into business, trade policy, and maintenance of small businesses. The economic arguments of competition may lead to outcomes which are not always acceptable to consumers, like high switching costs. More competition might result in the restriction of outlets and therefore more difficult access for consumers. Here we can understand this tension by the given example-

²⁷ Katalin Judit Cseres, Competition Law And Consumer Protection, kluwer International, p.327

“The deregulation of energy markets. In many countries liberalization led to mixed results. While it improved competition for large users, it provided better prices for consumers, but it raised major difficulties for consumers to exercise their choice. The complexity of product selection resulted in certain jurisdictions consumers being disconnected or disadvantaged in terms of market access.”²⁸

These markets cannot work well without effective intervention from the consumer side in order to provide sufficient information.

Now if we see it from the consumer point of view then we find that similar tension may arise from the consumer side. Pro-consumer measures can have contrary effects on competition. Active consumer protection is realized through state intervention and it introduces measures like monitoring systems, substantive controls on contracts, product standardization or increased representation of consumer interests, which form the minimal level of consumer protection. But at the same time the adoption of these protective measures will inevitably restrict competition to a certain extent. Mandatory health and safety standards, stricter warranty and liability rules, collective information systems, collective redress system, regulations on credit and advertising on are all example of protective measures that may restrict and decrease the freedom of commerce and industry. A consumer protection programme may even impose such measures that may ultimately destroy the very competition that increase the consumer choice. Some consumer protection measures create barriers to entry that limit the freedom of sellers. Examples are licensing, self regulatory schemes that directly restrict the numbers of competitors or health and safety measures that lead to the

²⁸ Empirical data showed that for example in the UK only 18% of the consumer's switched provider after liberalisation of the energy market in 1999. OFGEM (2001) cited in Waterson (2003) p.139

withdrawal of products or to the regulation of markets limiting entry and innovation. They might eventually lead to higher prices for consumers.

if consumer protection is aimed at correcting the alleged economic imbalance between consumers and other market participants without acknowledging the fact that competitive markets can solve a great deal of consumer problems, consumer protection can easily thwart the effective working of competition. Such a regulation not only crosses the goals of competition policy, but damages consumers as well. After going through the above discussion question comes in the mind that that whether competition law is effective tool to protect consumers. We will examine this question in the subsequent discussion.

2.4. WHETHER COMPETITION LAW IS AN EFFECTIVE TOOL TO PROTECT CONSUMERS- This question is certainly more complex in nature and it requires some problematic issue to be revealed. According to the **Adam Smith**²⁹-

“Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer”

Competition law is primarily concerned with market failures that originate from structural problems, like monopolistic market structure, collusive or exclusionary practice. By prohibiting anti-competitive behaviors competition law makes it possible that consumers get good quality for a reasonable price. It actually maintains the availability of consumer choice on the market. However, there are certain information problems, like information asymmetry and switching costs that competition law does not acknowledge. There are also special

²⁹ Smith(1789), cited from Katalin Judit Cseres, Competition Law And Consumer Protection, kluwer International, p.328

consumer protection issues such as health and safety requirements that competition law does not address. Second, there is an ultimate reason why competition law might not be the right tool to increase consumer welfare. Second reason I will discuss under the 'Chicago Trap'.

2.5. INFORMATIVE MARKET FOR CONSUMERS AND COMPETITION LAW³⁰

In order to achieve economic efficiency two conditions have to be fulfilled: consumers should behave rationally and must be perfectly informed about the alternative choices they can make and about the effects of these choices. Consumers are neither perfectly informed nor do they always act rationally. Competition law, however, does not deal with the conditions for effective exercise of consumer choice. Problems of consumer protection also arise in reasonably competitive markets. The primary rationale for regulating consumer markets is information failures. Its true focus is to provide good quality and cost of consumer information and to make free and well-informed decisions possible. Consumer problems arise where the information costs are relatively high or the value of the information perceived is relatively low. When the source of consumer problems problem is related to structural features of a market then competition policy can address it and resolve it. However, when the source of the problem is informational and the market is fully competitive then competition policy is not able to identify and respond to potential sources of information failures. Markets with low barriers of entry, low sunk costs and many rivals and rapid rates are, from a competition policy perspective, fully competitive. However, from a consumer perspective these markets may represent severe information problems. For example, rogue sellers are more likely to be operating in a market with low or no barriers to entry. This is when there are many sellers, and when the rate of entry and exit in the market from the producer's side is high.

³⁰ Katalin Judit Cseres, Competition Law And Consumer Protection, kluwer International, p.329

So from the above reading it is clear that there are certain gaps between the objective of consumer protection and competition policy. Competition law is not an entirely effective tool to protect consumers means that certain additional regulatory measures are needed. Where relevant market failures have been identified, that cannot be resolved by market-based solutions, like private law norms of tort, contract and property rights, then government intervention might be needed. Competition policy makers might want to achieve certain policy goals that are not in conformity with the consumer welfare standards.

But According to the '**Hondius**³¹ -

"Relationship between the competition law and consumer Protection is of 'Love -Hate' nature".

Indeed, the relationship of competition law and consumer protection is somewhat turbulent. They share a common goal that is to provide consumers with access to a range of competitively priced goods and services in markets free of unfair and deceptive practices. Yet, none of them is capable in itself to achieve this and to make markets work well. In other words a competitive market structure needs active consumers and vice versa. The ultimate objective is to realize social goals in an economically efficient way, even though such a balance will often entail a second best solution. This is key to realize effective competition and maximized consumer welfare on the market. Effective competition will only be realized when consumers have sufficiently strong position to actively participate on the market.

³¹ Prof. Mr. E.H.Hondius is having expertise on Consumer law; Contract law; European private law; Tort law. He is professor in law in the organization "Molengraff Institute for Private law". He has written an article on Competition Law and Consumer Protection Law: A Love Hate Relationship. For more details-
<http://www.narcis.nl/personresd/id/340/Language/EN/RecordID/PRS1234574>

CHAPTER-THREE

**INTERRELATION OF COMPETITION LAW
AND CONSUMER PROTECTION WITH
SPECIAL REFERENCE TO U.S., U.K AND
E.U**

CHAPTER-THREE

INTERRELATION OF COMPETITION LAW AND CONSUMER PROTECTION WITH SPECIAL REFERENCE TO U.S., U.K AND E.U

As in the previous chapter we have seen the various aspects of the competition law and consumer protection. How both laws have compliments and tension with each other and how competition law is a tool for the Consumer Protection? Without the active help of the competition law it is difficult to achieve the ultimate goal of the both the laws which is consumer welfare. In this chapter I will discuss the relationship of the Competition Law and Consumer Protection with reference to the U.S., U.K., and E.U laws. From the common man point of view connection between competition law and consumer protection seems less significant but if we see it from the legal point of view of historically then situation is quite different. As discussed by the –

W.J.Kolasky³², deputy assistant attorney general, Anti Trust Division, U.S. Department of Justice:

“The ultimate goal of any sound competition policy must be consumer welfare, which competition advances through lower prices, higher outputs and enhanced innovation.”

3.1. POSITION IN UNITED STATES OF AMERICA ABOUT COMPETITION LAW AND CONSUMER PROTECTION- In the USA the main laws that apply to antitrust cases are the Sherman Act and the Clayton Act. The Sherman Act was passed more than a century ago because it was 'concerned about those activities of trusts and monopolies that unduly restrained trade or caused a monopolization of interstate commerce'. Main aims of the competition policy are maximizing consumer welfare and efficiency. This approach also

³² See William J.kolasky, U.S. and E.U.Competition Policy: Cartels, Mergers, and Beyond (25 January 2002)

resembles with the thoughts of the Chicago school's towards Anti- Trust and their influence over the U.S. Competition Law. Accordingly, harm to individual competitors and rising market concentration does not, in themselves, raise antitrust concern.³³ Instead, the relevant issue focuses exclusively on the question of whether price and quality are going to be rendered inferior.

3.1.1. RELATION BETWEEN U.S SHERMAN ACT, CLAYTON ACT AND CONSUMER PROTECTION-In the Sherman Act nowhere consumer or efficiency words have been used but it condemns the restraints on trade. Section 1 of the Sherman act is all about the illegality of contract or combination which restricts the trade and commerce among the several states³⁴.

If we go through the text of the Sherman Act then it makes all agreements restraining trade illegal, regardless of their effects on consumers or efficiency.³⁵ However, the problem with such a literal interpretation was that almost commercial agreements restrain trade in one way or another. The statute was considered so literally that even partnership agreements between would-be competitors was held as prohibited³⁶. After some time it became clear to the courts and commentators that this literal interpretation is workable at all and possibly this could not had been the intention of the legislature. The court held, the Sherman Act prohibits only 'unreasonable' restraints on trade, that is, unreasonable reductions of competition.³⁷ The courts have made it clear that the Act represents a policy judgment that competition best serves consumers.³⁸

³³ See Eric Posner, *The Jurisprudence of Greed* 151 U. PENN. L. REV. 1097, 1108 (2003)

³⁴Section 1 of Sherman Act, which reads as follow- "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

³⁵ See, e.g., *United States v. Trans-Mo. Freight Ass'n*, 166 US 290 (1897), cited from the Ramanujam Adarsh, *Competition Law and Consumer Protection : Two Wings of Consumer Welfare* (2008) Comp LJ, p.107

³⁶ *Id.*

³⁷ *United States v Addyston Pipe & Steel Co.*, 85 F. 271 (6th Or-1898), cited from the Ramanujam Adarsh, *Competition Law and Consumer Protection : Two Wings of Consumer Welfare* (2008) Comp LJ, p.108

³⁸ See *FTC v Superior Court Trial lawyers Ass'n*, 493 US 411,424 (1990), cited from *Ibid.*

The US Supreme Court has taken every opportunity to emphasize that the antitrust laws exist for the benefit of consumers³⁹. Under the class of so-called per se offenses, such as price fixing and agreements to restrain trade are presumed to be against consumer welfare and thus per se anticompetitive⁴⁰. For other offenses, the test applied is that of the rule of reason, which involves deciding:

"...whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including the specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect"⁴¹

In monopolization claims under section 2 of the Sherman Act⁴², consumer harm is a very significant criterion- A classic example is that of predation. Predation is the practice of setting artificially low prices to drive competitors out of the market, and then raising. Prices to recoup this earlier loss. If proved, predation will be prohibited since ultimately it will result in rise in prices above a competitive level. There is general presumption that merger may reduce cost and increase efficiency but even after that court invalidated the merger on the basis that the same raises price or that such benefits are not passed on to the consumers. Nowhere in sec.1 or 2 of the Sherman Act consumer welfare has been mentioned but with the help of the judgments court held that consumer welfare was the legislative intention behind these legislation. In the case of *The United States v Visa USA*⁴³, the conduct was held to be illegal

³⁹ See, eg., *Spectrum Sports, Inc. v McQuillan* 506 US 447,458 (1993) (The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.

⁴⁰ See *Broadcast Music Inc. v CBS*, 441 US 1,19-20 (1979)

⁴¹ *State oil v Khan* 522 US3, 10(1997).

⁴² Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

⁴³ 2001-2 Trade Cas. (CCH) para 74,440 (S.D.N.Y. Oct 9,2001).

since the court found that the conduct led to higher prices and reduced output.³² There is general agreement that 'consumer harm' includes restriction in output, and usually associated with an increase in price or reduction in quality.

If we go through the Clayton Act, 1914 then we find that it specially deals with specific restraints (price discrimination, tying, interlocking directorates, corporate acquisitions). Section 3 of the Clayton Act makes it unlawful for a person to sell goods upon a condition compelling a buyer refrain from dealing in competitive goods, but only when the effect of the agreement may 'substantially lessen competition or tend to create a monopoly'⁴⁴. Though directly sec. 3 does not deal with the consumer protection but indirectly is all about the consumer protection. Basic intention behind these legislations was to give safeguard to the consumers against the unfair trade practice. Like sec.3 of the Clayton Act, sec.7 Act prohibits those corporate acquisitions that may 'substantially lessen competition or tend to create a monopoly.'⁴⁵ From the wording of the sections it is clear that consumer interests have been taken into consideration in the form of choice to purchase products, consumer equality in terms of service and price etc.

The Merger Guidelines⁴⁶ are equally consumer-oriented. Under the Guidelines, in conducting the inquiry as to whether 'cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive/ and the federal enforcement agencies ought to consider whether 'cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.

⁴⁴ Clayton Act § 3, 15 U.S.C.A. § 14.

⁴⁵ Clayton Act § 7, 15 U.S.C.A. § 18.

⁴⁶ U.S. Dept of Justice & Fed. Trade Comm.'s, 1992 Horizontal Merger Guidelines § 4 (1992) (with 1997 revisions), reprinted in 4 Trade Reg. Rep. (CC11) P 13,104, cited from the Ramanujam Adarsh, Competition Law and Consumer Protection : Two Wings of Consumer Welfare (2008) Comp LJ, p.110.

3.2. POSITION IN U.K. AND E.U. ABOUT COMPETITION LAW AND CONSUMER

PROTECTION – Like wise U.S., we may directly not find the consumer oriented reference in the U.K and E.U. legislations. U.K and E.U legislations relating to the consumer protection and competition law is almost similar. Here I will discuss first E.U situation on the topic first because U.K Competition Act, 1998 is basically based on the E.U treaty itself.

3.2.1. SITUATION IN E.U.- Article 81(1) of the Treaty establishing the European Community ('EC Treaty') prohibits agreements between undertakings, decisions of associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market. This provision provides a non-exhaustive list of agreements which may be prohibited. Though article 81(1) does not directly mention the words like 'to the detriment to the consumer interests' or prejudice to the consumer interests, but the ultimate objective behind these provisions are to protect the consumers from the unfair trade practice. If we go through the examples given in paragraph (a) to paragraph (d) given in the section 81(1) like prices may be fixed at an artificially high level [paragraph (a)]; there may be less choice for the consumer [paragraph (b)]; or prices may be excessive in relation to the prices charged to other consumers [paragraph (c)] it is quite pertinent that consumer protection has been taken into mind while framing these legislations.

According to the commission perception restrictions on competition by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. According to the Commission such practices result in a reduction in consumer welfare as consumers

must pay higher prices for the goods and services in question.⁴⁷ Likewise Art.81 (1) of E.U Treaty Art. 82 prohibits the abuse of a dominant position and applies under the following conditions-

- 1- The company holds a dominant position, taking into account its market share and other factors, such as whether there are credible competitors, whether the company has its own distribution network and whether the company has favorable access to raw materials; all are factors which allow the company to evade normal competition.
- 2- The company dominates the European market or a 'substantial part' of it.
- 3- The company abuses its position by, for example, overcharging customers, charging excessively low prices designed to squeeze out competitors or bar new entrants from the market, or granting discriminatory advantages to some customers.

European Community Merger Regulation (ECMR) has also come up with certain guidelines relating to the mergers and acquisitions and basic purpose behind the regulation is consumer welfare which is visible from this statement-

"...is possible that the efficiencies brought about by a concentration [may] counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration may not violate the substantive test."⁴⁸

However, in light of the ECJ's judgment in **British Airways**, we know that there may be a second stage of analysis at which efficiency and consumer welfare are *directly* introduced. At paragraph 86 of the judgment, the Court indicates that an efficiency justification is also

⁴⁷ European Commission Notice on the Application of Art. 81(3) EC, [2004] O.J. 001/97, para.84. cited from Ramanujam Adarsh, Competition Law and Consumer Protection : Two Wings of Consumer Welfare (2008) Comp LJ, p.111

⁴⁸ Regulation No. 139/2004, O.J. L 24/1 (2004), Recital 29.

permissible under Article 82 EC⁴⁹. Hence, today it seems clear that European competition law requires, in all three areas – Article 81, Article 82 and Merger Control – a two-stage analysis. At the first stage it follows a more open approach and does not directly concern itself with consumer benefits. The EC Treaty's decision to protect competition as such is based on a fundamental confidence in the benefits of a market economy. As has been demonstrated above, this concept does not allow for a reduction to just one single aim such as consumer welfare. Competition advances a number of aims which cannot be determined in an exclusive manner. Individual freedom of action, the protection of market participants against the abuse of market power by others, an interest of consumers in a cheap supply of the goods desired, and a collective interest in the promotion of technical and scientific progress have all been regarded as figuring among these aims. But at last it is clear that protection of consumer interests is one of the fundamental reasons behind the framing of the E.U Treaty.

3.2.2. SITUATION IN U.K. United Kingdom's competition law is based on the EC treaty itself. In U.K competition law was passed in the year, 1998. Moreover, similar to Article 81 (3) of the EC treaty, section 9 of the UK Act allows ex-emption in case the consumers are given a fair share of the resulting benefit Case-law in the UK reflect a similar scenario as well. Acts which have resulted or may result in excessive pricing, limiting consumer choices, etc., have been prohibited. Similar initiatives can also be seen on the national level. By means of example, in the UK the Enterprise Act 2002 gave enforcement authorities extended powers to take swift and effective action against traders who do not comply with their legal

⁴⁹ To quote the paragraph in full: "Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the cases (see, to that effect, Michelin, paragraph 73). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse."

obligations to consumers; enhanced the role of the Office of Fair Trading (OFT) in encouraging and approving codes of practice for certain trade associations; and imposed on the OFT the obligation to respond to 'super complaints' brought by certain consumer bodies within a certain timetable. Likewise, Ofcom⁵⁰ who is under the statutory obligation to further the interests of consumers, where appropriate by promoting competition (section 3(1) Communications Act 2003), recently published a consultation on its approach to the promotion of consumer interests. Ofcom's objective is to integrate consumer policy with competition policy so that account is taken of consumer preferences and priorities, and so that consumer protection is complemented by, 'well-designed rights and regulations; access to information about rights and risks; effective complaint-handling processes; and active monitoring and enforcement'⁵¹. Basically in U.K consumer law is grounded on, *inter alia*, the Consumer Credit Act 2006, the Unfair Contract Terms Act 1977, and Part 8 of the Enterprise Act 2002. Harmonization and convergence have only recently begun to take place, both on the European and international level.

Consumer protection and enforcement can now be seen to be moving on the same trajectory as competition law, both in terms of cooperation and convergence, and is also seen to warrant the attention of the antitrust policy community:

- 1- The consumer protection community can borrow heavily from antitrust enforcement experience with hard-core cartels in designing strategies for attaching cross-border fraud. Cooperation between competition policy and consumer protection officials and practitioners can accelerate the pursuit of effective international approaches to

⁵⁰ Independent regulator and competition authority for the UK communications industries. For more details please see <http://www.ofcom.org.uk/>

⁵¹ Ofcom, Consultation on consumer issues, published 8 February 2006.

detecting and punishing fraud. ... Limiting cross-border fraud is important to the establishment of successful market regimes⁵².

Policy	Competition policy & law	Consumer protection policy & law
Aim	Protect competitive process/ supply of options	Protect ability to choose
Target group	Fairness between trading parties/ interests of consumers	Fairness between traders and consumers mostly/ empowering consumers
Practices covered	Cartels, abuse of dominance, anticompetitive mergers	Unfair and deceptive advertising, fraud etc
Legislative regime	On European level Articles 81 and 82 and Merger Regulation Corresponding provisions in national legislation	More scattered - Harmonization now taking off and national regimes vary
Enforcement	Separation between national and European level By competition authorities (and in some cases sector regulators)	Mostly national enforcement May vest with several bodies including competition authorities, sector regulators or designated agencies

In a very recent decision, a merger was prohibited due to the following concerns:⁵³

⁵² TJ Muris, 'The Interface of Competition and Consumer Protection', at the Fordham Corporate Law Institute's
29th Annual Conference on International Antitrust Law and Policy, 31 October 2002, p.24

⁵³ Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (2001) CAT 1, at para.518

- (i) Higher prices;
- (ii) A reduced incentive to maintain the quality of the offer; and
- (iii) A reduction in choice for consumers.

The role of the consumer has been strengthened across Europe, both outside and within antitrust law. Competition policy and law is increasingly called to address the relation of both the two systems of law (consumer protection policy and law and competition policy and law) and the role of the consumer within antitrust law – procedural and substantive.

While the role of the consumer may be central to the definition of the relevant a market and the determination of dominance, the effect of conduct on consumers is not traditionally directly considered in competition enforcement. Harm to consumers is not necessary to a finding of anti-competitive conduct; the absence of harm to consumers in itself will not exempt anticompetitive conduct, in the absence of a clear benefit. In most cases, harm to consumers is presumed from harm to the competitive process. While in some cases consumers are more obviously affected and directly considered, that has more to do with the nature of the conduct in question than with a belief that competition policy and enforcement should depend on an actual or potential harm to consumers.

CHAPTER –FOUR

**INTERRELATION OF COMPETITION LAW
AND CONSUMER PROTECTION IN INDIA**

CHAPTER –FOUR

INTERRELATION OF COMPETITION LAW AND CONSUMER

PROTECTION IN INDIA

In India prior to the Competition Act, 2002, MRTP Act, 1969 was existing. Mainly these both the laws are relating to the smooth running of the market. Main purpose behind this legislation is to prohibit the anti competitive activities and abuse of dominance position by the seller, but ultimately the central goal behind these legislations is consumer welfare. It is pertinent to note here that almost every case relating to competition law would be, either directly or indirectly, related to consumer protection in many ways. This is because of the fact that the competition law is, as the erstwhile monopoly law under the MRTP Act was before it, mainly intended to protect the interest of the consumers and it seeks to focus on the after effect of statutory violations. Prior to the Consumer Protection Act, 1986, there was MRTP Act, 1969 which was indirectly oriented to the consumer welfare, though directly it was dealing to the restrictive trade practice and curb on monopoly. In the light of changing circumstances of country after liberalization, it was essential to amend the existing law which was unable to meet with the changing situation. Then in the year 2002 competition Act was passed to prohibit the anti competitive agreement and abuse of dominance situation. First I will try to understand that how consumer protection was made sure under the MRTP Act, 1969.

4.1. CONSUMER PROTECTION UNDER THE MRTP ACT- MRTP Act was passed while taking into care Articles 38 and 39 of the Constitution of India which mandate, *inter alia*, that the State shall strive to promote the welfare of the people by securing and protecting

as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing-

- 1- that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
- 2- That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

This act was passed with certain objectives which we can short out from its preamble. Some of them were firstly, prevention of concentration of economic power to the common detriment; secondly, control of monopolies, thirdly, prohibition of monopolistic trade practices; and, fourthly, prohibition of restrictive trade practices⁵⁴.

In *Raymond Wollen Mills Ltd. v MRTP Commission*⁵⁵, it was observed that the basic feature and the paramount consideration which pervades throughout the statute are the public interest, the common good and to keep a watch and control on the operation of the economic power to the common detriment. It was further observed, in reference to 'common', that though it refers to the common man, the weaker sections of society, consumer, it does not include manufacturer, supplier and distributor.

4.1.1. CONSUMER PROTECTION AND RESTRICTIVE TRADE PRACTICE UNDER

MRTP ACT MRTP Act, 1969 in clear words defines what restrictive trade practice is.

According to the sec.2 (o) of the act, restrictive trade practice means, “A practice which has

⁵⁴ Dugar, S.M., Commentary on the MRTP Law, Competition Law & Consumer Protection Law, Volume I. 4th edition, 2006, p. 586

⁵⁵ 1976) 1 Comp LJ 106 (Bom).

or may have the effect of preventing, distorting or restricting competition in any manner⁵⁶. Section 33, 35 and 36 of the MRTP Act are also related to the Restrictive Trade Practice and consumer protection. According to the sec.33⁵⁷ of the act every agreement relating to any of the trade practices enumerated in clauses (a) to (l) of sub section should be registered with the director general pursuant to the provisions of section 35⁵⁸. According to the sec.33 (1) following practices shall be deemed to be restrictive trade practice –

- Any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- Any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- Any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- Any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;
- Any agreement to grant or allow concessions or benefits, including allowances, discounts, rebates or credit in connection with, or by reason of, dealings
- Any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

⁵⁶ According to the sec.2(o) of MRTP Act- "Restrictive Trade Practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular

- (i) which tends to obstruct the flow of capital or resources into the stream of production, or
- (ii) Which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow at supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

⁵⁷ Section 33. Registrable agreements relating to restrictive trade practices.

⁵⁸ Section 35. Registration of agreements

- Any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;
- Any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;
- Any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;
- Any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;
- Any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;
- Any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods; 99]
- Any agreement not herein before referred to in this section which the Central Government may, by notification specify for the time being as being one relating to a restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf;
- Any agreement to enforce the carrying out of any such agreement as is referred to in this sub-section.

Before the judgment of *Tata engineering and Locomotive Company Ltd v Registrar of Restrictive Trade Agreements*⁵⁹ and *Mahindra and Mahindra Ltd. v Union of India*⁶⁰ in this sub section word “shall be deemed” was not there. Legislature intentionally brought the

⁵⁹ (1977) 1 Comp Cas 71(SC).

⁶⁰ (1979) 1 Comp Cas 1(SC).

amendment in the section. In these judgments it was held that a trade practice does not become a RTP merely because it falls within one or the other clauses of section 33(1), but that it must also satisfy the definition of 'restrictive trade practice' contained in section 2(o). Thus, these trade practices belong to the genus of RTP defined in section 2(6), and as defined in section 2(6), are treated as statutory illustrations of RTPs which the MRTP legislation sought to regulate. However, there may be trade practices, other than those covered by sub-section (1) of section 33, which in terms of section 2(6) may be categorized as RTP.

Here it is pertinent to mention the judgment given by the S.C in the *Voltas Ltd. V Union of India and others*⁶¹. The apex court while referring to sub-section (1) of section 33 stated that a deeming clause has been introduced by the Parliament saying that every agreement falling within one or more of the categories mentioned therein shall be deemed to be an agreement relating to restrictive trade practices. So, here it may be noted that courts have tried to look into various aspects of anti-competitive agreements and ensured that no agreement of any kind may be left without looking into the merits and public interest at large which ultimately means consumer protection.

Ultimately the reason behind the restrictive trade practice is to protect the consumer from the mal practice of the sellers. In *Telco case* MRTP commission held that every trade practice which comes in the per view of the sec.33 (1) of the is restrictive trade practice ipso facto. There is no any need to taste it with the touch stone of sec.2 (o), but S.C took the contrary view and held that every trade practice in restraint of trade is not necessary a restrictive trade practice. Definition of RTP is exhaustive one not an inclusive one. So whether trades practice is restrictive one or not should be arrived by applying the rule of reason. Courts have always given priority to the interest of the consumers in determining the restrictive trade practices.

⁶¹ (1995) 2 Comp LJ 17 (SC)

4.1.1.1. JUDICIAL PRONOUNCEMENTS AND RESTRICTIVE TRADE PRACTICE-

In *Re Mangaldeep and others*,⁶² the Commission held that a gift scheme requiring that the entrant thereto is required to have a coupon, which is available on every purchase of textiles worth Rs. 250 at the show room of the respondent is a restrictive trade practice, covered by sub-clause (ii) of section 2(o).

In *Re Samir Gas Agency*⁶³, the Commission held that compelling the customers to opt for cash and carry system for obtaining supply of refilled gas cylinders, instead of adhering to home delivery system, was restrictive trade practice in as much as it involved manipulation of supply conditions, imposing unjustified costs on the customer.

Again in the case of in *Re Borosil Glass Works*⁶⁴, the Commission held that the respondent has misused its freedom to select its customers to restrict competition. From these cases, it may be noted that courts have always chosen to check the balance of system takes place between the competition law and the consumer protection ensuring that no grievance of the consumer would be left unattended.

These are few instances where commission tried to protect the interests of the consumers by holding the concern activities restrictive trade practice in nature. All these provisions are framed with a clear intention of consumer protection.

⁶² RTP Enquiry No. 46/1986, order dated 20.12.1990.

⁶³ RTP Enquiry No . 46/1986, order dated 20.12.1990.

⁶⁴ RTP Enquiry No. 22/1984, order dated 24.1987

4.1.2. CONSUMER PROTECTION AND UNFAIR TRADE PRACTICE UNDER

MRTP ACT- Unfair Trade Practices under⁶⁵ the Act include, practices such as making false statements in relation to the quality, quantity (the statement could either be oral or in writing or even by visible representation), sponsorship, uses or benefits of goods, passing off old goods as new, or giving of warranty/guarantee which is not based on proper test, making public representation that purports to be a guarantee or warranty or a promise to replace or replace articles if there is no reasonable guarantee that the warranty/repair or replacement will not be carried out.

Further practices such as misleading the public concerning the prices at which certain goods are to be sold or giving misleading facts or disparaging the goods or services of the other person, advertising the sale or services at a bargain price which is not intended to be sold at such bargain price, offering gifts or prizes that are fully or partly covered by the amount charged, sale or supply of goods knowing fully well that they do not comply with the standards prescribed, hoarding or destruction of goods, etc. are also included in the definition of unfair trade practices.

Types of unfair trade practice-

- false representation or statements
- Misleading advertisements
- Offer of gift or prize
- Offer of contest
- Sale of sub standard goods
- Hoarding or destruction of goods

⁶⁵ Sec.36A of the MRTP Act, 1969

In the leading judicial decision MRTP commission, in the case of *Colgate dental cream-double protection*, held that advertisement made by the Colgate that it is 2.5 times better than other ordinary toothpaste in fighting germs, is misleading to the public and ordered to advertisement to be stopped.

Likewise another case new Pepsodent v Colgate where it was advertised by the Pepsodent that it is better 102% than the leading toothpaste which was actually Colgate at that time possessing 52% of the market share. When Colgate moved a case against the HLL, commission ordered to the Pepsodent to withdraw its advertise.

4.1.3. CONSUMER PROTECTION AND CONTROL OF MONOPOLISTIC TRADE

PRACTICE UNDER MRTP ACT- Monopolistic trade practices Section 2 (i) of the Act⁶⁶ defines monopolistic trade practice while Section 31 provides for investigation into such practices by the MRTP Commission, either on reference by the Central Government or on receipt of information as to the carrying on of such activities by any such undertaking.

⁶⁶ Sec.2(i) of MRTP Act- "monopolistic trade practice" means a trade practice which has, or is likely to have, effect of, -

- (i) Maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner.
- (ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services,
- (iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India to deteriorate;
- (iv) increasing unreasonably, -
 - (a) the cost of production of any goods; or
 - (b) charges for the provision, or maintenance, of any services;
- (v) increasing unreasonably, -
 - (a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or
 - (b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or by the provision of any services;
- (vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices;

Under Section 32 of the Act, such monopolistic trade practices are deemed to be prejudicial to public interest. Monopolistic trade practices that may be permitted The Central Government may permit such practice if satisfied that it is necessary for defense purposes, to ensure maintenance of supply of essential goods/services or to give effect to any terms of an agreement to which the Central Government is a party.

At each and every point it is clear that MRTP Act was to control the restrictive trade practice, unfair trade practice and control of monopolistic trade practice. These are all those activities which directly affect the interests of consumers. Here as I have discussed in the chapter I about the goal of competition policy, is to increase the competition in the market so that consumer can access it on the reasonable price. MRTP commission was established with the same purpose to curb the anti competitive practices.

4.2. MRTP ACT VIS-À-VIS THE CONSUMER PROTECTION ACT⁶⁷- As I have discussed earlier that MRTP Act was passed with an approach to restrict the unfair trade practice, restrictive trade and practice and monopoly of the enterprises. Along with it Consumer protection Act, 1986 was passed with two approach- (I) to provide simplified, inexpensive and speedy remedy , for the redressal f the grievances of the consumer in regard to defects in goods bought by him or deficiency in service hired or availed of by him and (II) consumer education to cause awareness as to consumer's rights⁶⁸.

Silent features of differences as between these two enactments are as discussed below-

- 1- Under the M RTP Act, the MRTP Commission is the only Authority⁶⁹ to inquire into the allegation of unfair and Restrictive trade practices

⁶⁷ Dugar, S.M, Guide to Competition Law ,LexisNexis Vol.I edn.5 p.23-29

⁶⁸ Object and purpose of the act as explained in the statement appended to the consumer protection bill.

⁶⁹ Sec.5 of MRTP Act

But Under the Consumer Protection Act, there is three tier set up, viz., District Forums, State Commissions and the National Commission⁷⁰, with each of the three Authorities having its own original pecuniary jurisdiction. The complaint lies before the District Forum where the value of the goods or services and the compensation claimed does not exceed Rs. twenty lakhs. The jurisdiction of the State Commission and the National Commission is in cases where the value of goods or services and the compensation, if any, claimed is over Rs. twenty lakhs but less than Rs. One crore and exceeding Rs. One crore, respectively. Further, the State Commission and the National Commission set up under the Consumer Protection Act, apart from having original jurisdiction, have appellate jurisdiction also, i.e., to say, hear appeals against the order of the District Forum and the State Commission, respectively⁷¹. As in the case of MRTP Commission⁷², appeal against the order of the National Commission can be preferred before the Supreme Court⁷³.

- 2- The provisions of the MRTP Act (relating to unfair, restrictive or monopolistic trade practices) do not apply to a banking company, State Bank of India or a subsidiary Bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 or an insurer as respect matters in respect of which specific provisions exist in the (I) Reserve Bank of India Act, 1934, or the Banking Regulation Act, 1949, (II) State Bank of India Act, 1955 or the State Bank of India (Subsidiary Banks) Act, 1959, and (III) Insurance Act 1938, as the case may be⁷⁴.

Such an exemption for the Banking and Insurance Companies is not provided in the Consumer Protection Act.

⁷⁰ Sec.9 of CPA Act,1986

⁷¹ Sec.15 and 19 of CPA Act,1986

⁷² Sec.55 of MRTP Act,1969

⁷³ Sec.23 of MRTP Act,1969

⁷⁴ Sec. 4(2)

3- The definition of Restrictive Trade Practice (RTP) in Section 2(b) is a broad based one. RTP, as defined, means a trade practice which has or may have the effect of preventing distorting or restricting competition. Any practice which tends to obstruct the flow of capital or resources into the stream of production of goods and services is also RTP. Likewise, manipulation of prices, conditions of delivery or flow of supplies in the market, which has the effect of imposing on consumer's unjustified costs or restriction, is also regarded as RTP. Thus, the thrust pointedly is on the effect of the trade practice on relevant competitive situation. Section 33(1) of the MRTP Act lays down in specific terms various practices which statutorily are deemed to be RTPs. Under the Consumer Protection Act, Restrictive Trade Practice in specific term has not been specified.⁷⁵

4- Complaint under the Consumer Protection Act can be filed by a buyer of goods (other than a person who buys goods for commercial purpose or for resale)⁷⁶. There is no such bar under the MRTP Act, in respect of a person who buys goods for resale and/or for commercial purpose.⁷⁷

5- The definition of "goods" in the Consumer Protection Act is narrower than that contained in the MRTP Act. The Consumer Protection Act merely says: "Goods" means goods defined in the Sale of Goods Act, 1930⁷⁸. On the other hand, the

⁷⁵ Sec.2(1) (nnn) of CPA,1986

⁷⁶ Sec. 2(1)(d) of CPA,1986

⁷⁷ Sec.10(a) and 36B(a) of MRTP, Act

⁷⁸ Sec.2(1)(i) of Sale of Goods Act,1930

definition of "goods" in the MRTP Act, inter alia, covers shares and stocks "including issue of shares before allotment"⁷⁹

6- Under the Consumer Protection Act, a complaint would lie if the goods bought or the service hired suffers from any defect or deficiency, as the case may, which may not be relatable to an unfair or restrictive trade practice as defined in the said Act. On the other hand, mere defect in goods or deficiency in service does not become subject-matter of inquiry by the MRTP Commission unless, it has the attribute of unfair, restrictive or monopolistic trade practice as defined in the MRTP Act. In other words, the inquiry under the MRTP Act is focused on the trade practice being unfair, restrictive or monopolistic; and the defect in goods or deficiency in service de hors such trade practice is not actionable under the MRTP Act.

7- Under section 36-A of MRTP Act, unfair trade practice means adoption of any unfair method or unfair or deceptive practice including the specific practices enumerated in sub-sections (1) to (5) thereof. Thus, where a consumer is cheated of the price of a commodity and is charged over and above the notified price, he suffers a pecuniary loss, thus, attracting section 36A.

Under the Consumer Protection Act, a trade practice to be branded as unfair trade practice should be relatable to promoting sale, use or supply good or provision of any service. This aspect is not contained in the definition of Unfair Trade Practice in the MRTP Act.

⁷⁹ Sec.2(e) of MRTP Act,1969

8- Under the Consumer Protection Act, the Consumer Redressal Authority is empowered to direct that (I) hazardous goods shall not be offered for sale, and (II) hazardous goods offered for sale shall be withdrawn from the market.⁸⁰ No such power stands expressly vested in the MRTP Commission under the MRTP Act.

9- An order passed under the MRTP Act, in respect of any restrictive or unfair trade practice, is final as soon as it is passed by the MRTP Commission.

Under the Consumer Protection Act, the order of the Consumer Dispute Redressal Authority shall be final, if no appeal there against has been preferred. Thus, the finality of the order of the Redressal Authority has to await the expiry of the prescribed period of 30 days allowed for filing the appeal; also when the appeal is filed, the order appealed against would not be deemed to be final till such time the appeal is decided⁸¹.

10- Under the MRTP Act, any order made by Commission may be amended or revoked at any time in the manner in which it was made. Thus, there is a provision for review and the same can be sought at any time, i.e., there is no limitation period⁸².

Such review facility is not available under the Consumer Protection Act, 1986.

11- Under the MRTP Act, the MRTP Commission has the power to regulate the procedure and conduct of its business. Under the Consumer Protection Act, the procedure has been laid down in the Act itself.

⁸⁰ Sec.14(1)(g) and (h) of CPA Act

⁸¹ Sec.24 of CPA Act

⁸² Sec.13(2) of MRTP Act

12- If any person contravenes any Order made by the MRTP Commission under Section 36-D or under Section 37, relating to unfair trade practice or restrictive trade practice, he shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten thousand rupees, or with both, or imprisonment in the case of the first offence up to two years and in the case of subsequent offence up to 5 years apart from fine where the offence is a continuing one, as the case may be.

Under the Consumer Protection Act, where a trader or a person against whom a complaint is made, fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both.

4.3. CONSUMER PROTECTION UNDER COMPETITION ACT, 2002 - After independence, India's economic strategy has been one of State-planned development. There were government-imposed controls over economic activity, including entry into and exit from the market. Plant and firm sizes were subject to statutory limitations, and imports and foreign investment were restricted. Government-owned businesses enjoyed protection and preferences, and dominated the 'commanding heights of the economy' in various sectors. These features were reflected in many of the State's economic policies, including those governing industry, trade, labor, foreign exchange, financial sector, and several other areas. In this system, there was little place for competition policy.⁸³

⁸³ Dhall Vinod, Competition law Today- Concepts, Issues and the law in practice, Oxford University Press.

The new economic policies progressively widened the space for market forces and reduced the role of government in business. It was also recognized that a new competition law was called for because the existing Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) had become obsolete in certain respects and there was a need to shift the focus from curbing monopolies to promoting competition. A high level committee was appointed in 1999 to suggest a modern competition law in line with international developments to suit Indian conditions. The Committee recommended enactment of a new competition law, called the Competition Act, and the establishment of a competition authority, the Competition Commission of India, along with the repealing of the MRTP Act and the winding up of the MRTP Commission. It also recommended further reforms in government policies as the foundation over which the edifice of the competition policy and law would be built.

The Competition Act, 2002, came into existence in January, 2003, and the Competition Commission of India was established as a statutory body in October, 2003. The Act states that 'it shall be the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.

4.3.1. RAGHAVAN COMMITTEE REPORT ON THE COMPETITION POLICY AND CONSUMER PROTECTION- Following the Government's resolve to enact a new competition law, a High Level Committee on Competition Policy and Law (the Raghavan Committee Report) was set up, which in its report recognized the need for a National Competition Policy and noted that:

“An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalization alone is not sufficient to promote competition and there is a need for a separate competition policy.”

Committee has recommended the changes with respect to the terminology of restrictive agreements as anticompetitive agreements. The agreements were divided in two types: firstly, the horizontal agreements and secondly, the vertical agreements, both of IV dealt with in detail at a later stage.

It is not necessary that the agreement in question should be a formal or written agreement to be considered illegal. In principle, any kind of agreement could be illegal, if it violates the law. In case of written or formal agreements, there can be no legal controversy but on the other hand, in case of oral or informal agreements, it would be necessary to prove in such circumstances regarding the existence of such agreement which would be based on circumstantial evidence.

Having regard to the distinction between the 'horizontal' and 'vertical' agreements, this Committee has also recommended the distinction between both the agreements. Horizontal agreements refer to agreements among competitors and vertical agreements are agreements

relating to an actual or potential relationship of buying or selling to each other.⁸⁴ Horizontal agreements mean to include any agreements between two or more firms that are at the same stage of production chain and, in the same market agreements between enterprises dealing with the same product. It is pertinent to note that substitute of a product may also be considered as the same product.

Raghvan committee report basically emphasis on the need of new law which can be milestone according to the new changing scenario of the globalized world. Committee's report concentrates on the interface of the competition law and consumer protection. In its recommendation committee suggested about it.

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.

4.4. 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 prohibited⁸⁵.

⁸⁴ Dugar, S.M, Commentary on the MRTP Law, Competition Law & Consumer Protection Law, Vol.I 4th edn,2006 p.684.

⁸⁵ Abir Roy and Jayant Kumar, Competition Law in India, Eastern Law House, New Delhi, 2008, p. 54

In a very famous *Allied Tube case*⁸⁶ U.S 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.

Agreements may be of two types-

- 1- **VERTICAL AGREEMENTS-** Vertical restraints are agreements or concerted practices entered into between two or more companies each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.⁸⁷ We can take an example of tying agreements.

- 2- **HORIZONTAL AGREEMENT** - Horizontal Agreement is an agreement for co-operation between two or more competing businesses operating at the same level in the market. This is generally to develop a healthy relationship between competitors.

⁸⁶ *Allied Tube & Conduit Co. v. Indian Head, Inc.*, 486 U.S. 492 (1988)

⁸⁷ http://europa.eu/legislation_summaries/other/126061_en.htm visited on 22.05.2012

The substantial clauses of the agreement may include policies regarding pricing, production and distribution. The Agreement may also discuss sharing of information regarding the products and the market. Horizontal agreements can prompt violations of antitrust laws because these agreements may include clauses which restrict competition. Horizontal agreements may cause negative market effects with respect to prices and quality of products. On the other hand, horizontal cooperation can lead to substantial economic benefits such as sharing risk, cost savings, sharing know-how and making innovations faster.⁸⁸ It includes Cartels, Bid Rigging, etc.

4.1.1. CARTELS AND ITS EFFECT ON THE CONSUMER INTERESTS- According to the OECD recommendation cartels means-

*"...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"*⁸⁹

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 the market. The economic theory tells us that cartels will be inherently unstable since

⁸⁸ <http://definitions.uslegal.com/h/horizontal-agreement/> visited on 22.05.2012

⁸⁹ Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, OECD Journal of Competition Law and Policy, Vol. 8, No-1, June 2006, OECD Publishing

there will always be an incentive to cheat. It is likely to be stable where the benefits to cheat are small.⁹⁰

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. 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.⁹¹ Cartels, therefore, by their very nature eliminate or restrict competition.

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

4.4.2. TYING AND ITS EFFECT ON THE CONSUMER INTEREST-

“An agreement in which a vendor conditions the sale of a particular product on a vendee's promise to purchase an additional, unrelated product”.

⁹⁰ Mark Jephcott, *Horizontal Agreements and EU Competition Law*, Oxford University Press, New York, 2005, at p.4-5

⁹¹ <http://www.kkv.se/upload/filer/eng/publications/3rdnordic010412.pdf>, last visited on 22.05.2012

In a tying arrangement, the product that the vendee actually wants to purchase is known as the "tying product," while the additional product that the vendee must purchase to consummate the sale is known as the "tied product." Typically, the tying product is a desirable good that is in considerable demand by venders in a given market. The tied product is normally less desirable, of poorer quality, or otherwise difficult to sell. For example, motion picture distributors frequently tie the sale of popular video cassettes to the purchase of second-rate films that are piling up in their warehouses for lack of demand.⁹²

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

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 producer who can misuse it to disadvantage of the consumers and the economy

⁹²<http://legal-dictionary.thefreedictionary.com/Tying+Arrangement> last visited on 22.05.2012

4.5. ABUSE OF DOMINANT POSITION AND ITS EFFECT ON CONSUMER

INTERESTS- Dominance can be understood 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 affect relevant market, competitors and consumers by its actions⁹³. In competition Law, dominance situation has not been prohibited rather abuse of dominance situation is prohibited⁹⁴. According to explanation of the sec.4 of competition act "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

- 1- operate independently of competitive forces prevailing in the relevant market; or
- 2- affect its competitors or consumers or the relevant market in its favor;

According to the sec.4(1)⁹⁵ of the Competition Act which prohibits the abuse of the dominant position, no enterprise shall abuse its dominant position and sec.4(2)⁹⁶ of the Competition Act specifies the practices by dominant 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

⁹³ Abir Roy, Jayant Kumar, Competition Law in India on the Anvil, Vol. 42 May (I) Corporate Law Advisor, pp 8-23

⁹⁴ Sri Neeraj Malhotra v. North Delhi Power Limited, BSES Rajdhani Power Limited and BSES Yamuna Power Limited, MANU/CO/0026/2011

⁹⁵ Sec.4(1) of competition Act, 2002 No enterprise shall abuse its dominant position.

⁹⁶ There shall be an abuse of dominant position under sub-section (1), if an enterprise,-

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

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

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

(b) limits or restricts-

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

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

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

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

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

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.

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.

In the very recent *DLF case*⁹⁷ where The Magnolia Flat Owners' Association had filed a complaint with the Competition Commission of India (CCI) against DLF Universal, Haryana Urban Development Authority and the Director Town and Country Planning, Haryana. The director general of CCI, in his report, found that DLF issued allotment letters, and apartment buyers' agreements were signed even before it got approvals from the town planner. Also, after collecting 90% of the money from the buyers, the builder revised the building plans and applied for increasing the height of the towers. Surprisingly, this was done two months after the original date of delivery as promised by the company.

The report also clearly pointed out that there has been an inordinate delay in handing over possession of the project and that because of the change in the number of floors; there has been a change in the floor area ratio and density per acre for the project.

⁹⁷ <http://info.akosha.com/consumer-complaints/articles/dlf-imposing-unfair-conditions-on-its-buyers-cci/> last visited on 29.05.2012

The commission has found DLF to be in contravention of section 4 (2) (a) (i) of the Act, which says that there will be abuse of dominant position if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or service; or price in purchase or sale (including predatory price) of goods or service. Commission imposed 650 cores fine on the DLF company.

4.5.1. PREDATORY PRICING AND ITS EFFECT ON CONSUMER INTEREST- 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”⁹⁸

The predatory firm after driving other competitors from the market raises their price above the competitive 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.⁹⁹

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.

⁹⁸ Explanation (b) of sec.4 of Competition Act,2002

⁹⁹ Einer Elhauge and Damien Geradin, Competition Law and economics, Hart Publishing, pp314

We can take an example of predatory pricing. 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 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.

4.6. MERGERS AND COMBINATIONS AND ITS EFFECT ON COMPETITION-

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 combination¹⁰⁰. 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.

We can take an example of jet airways and kingfisher that are the two leading airlines. Now Kingfisher and Jet are the biggest Airline companies in India and their post merger share would be 60 percent¹⁰¹. 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

¹⁰⁰ T. Ramappa, Competition Law in India- Policy issues and Developments, Oxford University Press, New Delhi, 2006

¹⁰¹ M.M. Sharma, Jet-Kingfisher Merger – Competition Issues, Retrieved from <http://www.vaishlaw.com/article/Jet-Kingfisher%20Merger%20by%20MM%20Sharma.pdf> visited on 22.0.2012

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 merger¹⁰².

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 anticompetitive 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.

4.7. CONSUMER PROTECTION UNDER CPA, 1986- Promotion of consumer welfare is the common goal of consumer protection and competition policy. At the root of both consumer protection and competition policy is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance.¹⁰³

¹⁰² Ibid

¹⁰³ S. S. Singh & Sapna Chadah, 'Consumer Protection in India Some Reflections' IIPA, New Delhi

Consumer protection is enacted in 1986 on the basis of the United Nations Guidelines with a view to provide speedy and better protection to the consumer's interests.

The Act provides for effective safeguards to consumers against various types of exploitations and unfair dealings, relying on mainly compensatory rather than a punitive or preventive approach. The Act applies to all goods and services unless specifically exempted, and covers the private, public, and cooperative sectors and provides for speedy and inexpensive adjudication. The rights provided under the Act are:

- The right to be protected against marketing of goods and services which are hazardous to life and property;
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods and services, as the case may be, to protect the consumer against unfair trade practices;
- The right to be assured of access to a variety of goods and services at competitive prices;
- The right to be heard and assured that consumer interest will receive due consideration at appropriate fora;
- The right to seek redressal against unfair or restrictive trade practices or unscrupulous exploitation of consumers;
- The right to consumer education;

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 respect¹⁰⁴.

This Act, as originally framed, did not cover complaints against RTPs and did not provide redressal to the consumers against such practices. However, the amendment of 1993 has extended the jurisdiction of this Act by covering the RTPs relating to tie-in sales under section 2(nn) of the Consumer Protection Act. Insofar as the RTP relation to tie-in sale is concerned, there exists a concurrent jurisdiction in the Competition Commission and Consumer Disputes Redressal Authorities set up under the Consumer Protection Act. Thus, an aggrieved person always has the choice of selecting any one of the forums for redressal of his grievances.

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

- To remove the defect pointed out by the appropriate laboratory from the goods in question;

¹⁰⁴ Duggal S.M. (2006) Commentary on the MRTP Law, Competition Law and Consumer Protection Law (Law, Practice and Procedures), 4th Edition, Vol. 2, Wadhwa and Company, Nagpur (p. 1122)

- To replace the goods with new goods of similar description which shall be free from any defect;
- To return to the complainant the price , or , as the case may be , the charges paid by the complainant;
- 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;
- To remove the defects or deficiencies in the services in question;
- To discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- To withdraw the hazardous goods from being offered for sale;
- To provide for adequate costs to parties.

It is clear that ultimate aim of the consumer protection is to provide speedy redressal and protection to the consumers against the unfair trade practices. As in the earlier chapter I have discussed that though both the legislation, Competition Act and Consumer Protection Act, are framed with a different aim but ultimate objective of the both the legislation is consumer welfare.

4.8. COMPETITION ACT,2002 VIS-À-VIS CONSUMER PROTECTION ACT,1986¹⁰⁵ - Main aim of the competition Act is to prevent the practices having appreciable adverse affect on competition, to promote and sustain competition in markets, to protect the interest of the consumers and to ensure the freedom of trade likewise consumer protection act is enacted with an objective to provide simplified, inexpensive and speedy

¹⁰⁵ Dugar, S.M, Guide to Competition Law ,LexisNexis Vol.I edn.5 p.617-620

remedy for redressal of the grievances of consumers in regard to defects in goods bought/or deficiency in service, charging price in excess of that fixed under any law, sales of goods which are hazardous to life and safety, certain restrictive trade practice and unfair trade practices. Salient features of differences between both the laws are given as under-

- 1- Under the Competition Act, the Commission is the only Authority [Section 7.] to enquire into the allegation of Restrictive trade practices (referred to as Anti-competitive Agreements, therein). Appeal against the order of the Commission can be made to the Competition Appellate Tribunal.

Under the Consumer Protection Act, there is three tier set up, viz., District Forums, State Commissions and the National Commission [Section 9], with each of the three Authorities having its own original pecuniary jurisdiction. The complaint lies before the District Forum where the value of the goods or services and the compensation claimed does not exceed Rs. twenty lakhs. The jurisdiction of the State Commission and the National Commission is in cases where the value of goods or services and the compensation, if any, claimed is over Rs. 20 lakhs but less than Rs. 1 crore and exceeding Rs. 1 core, respectively. Further, the State Commission and the National Commission set up under the Consumer Protection Act, apart from having original jurisdiction, have appellate jurisdiction also, i.e., to say, hear appeals against the order of the District Forum and the State Commission, respectively [Sections 15 and 19]. Appeal against the order of the National Commission can be preferred before the Supreme Court [Section 23).

- 2- Under section 3 of the Competition Act, Horizontal trade agreements, specified therein are treated as per se actionable while vertical agreements specified therein are

actionable if such agreements cause appreciable adverse effect on competition. No such distinction exists in the Consumer Protection Act.

A complaint relating to restrictive trade practice can be made before Commission under section 19 of Competition Act read with section 3(4) thereof or also before the concerned Consumer Dispute Redressal Authority under section 2(1)(c) of the Consumer Protection Act.

In view of the definition of "Consumer" in section 2(1)(d) of the Consumer Protection Act, a buyer who obtains goods for resale or for a commercial purpose is, however, not regarded as a consumer, and he cannot therefore, invoke the jurisdiction under that Act and become a complainant thereunder. There is no such bar for invoking the jurisdiction of the Competition Commission by such a buyer of goods, i.e., to say one who buys goods for resale and/or for commercial purpose can also seek redressal against the restrictive trade agreements from the Commission.

- 3- Under the Competition Act, Commission may suo motu initiate an inquiry [Sections 19 and 21).

The Consumer Dispute Redressal Authorities are more akin to judicial authority in their functioning and they cannot suo motu initiate any inquiry in matters falling within the purview of the Consumer Protection Act, e.g., defects in goods, deficiency in service, or unfair or restrictive trade practice.

- 4- Complaint under the Consumer Protection Act can be filed by a buyer of goods (other than a person who buys goods for commercial purpose or for resale) [Section 2(1)(d)], There is no such bar under the Competition Act, in respect of a person who buys goods for resale and/or for commercial purpose.

5- The definition of "goods" in the Consumer Protection Act is narrower than that contained in the Competition Act. The Consumer Protection Act merely says: "Goods" means goods defined in the Sale of Goods Act, 1930 [Section 2(1)]. On the other hand, the definition of "goods" in the Competition Act, inter alia, covers shares, debenture, stock and shares after allotment and products manufacture, processed or mined as also goods imported into India (Section 2(i)).

6- Under the Consumer Protection Act, the Consumer Redressal Authority is empowered to direct that (i) hazardous goods shall not be offered for sale, and (ii) hazardous goods offered for sale shall be withdrawn from the market [Section 14(1) (g) & (h)]. No such power stands expressly vested in the Competition Commission under the Competition Act.

7- An order passed under the Competition Act is final as soon as it is passed **by** the Competition Commission.

Under the Consumer Protection Act, the order of the Consumer Dispute Redressal Authority shall be final, if no appeal there against has been preferred. Thus, the finality of the order of the Redressal Authority has to await the expiry of the prescribed period of 30 days allowed for filing the appeal; also when the appeal is filed, the order appealed against would not be deemed to be final till such time the appeal is decided [Section 24].

8- Under the Competition Act, the Competition Commission has the power to regulate the procedure and conduct its own business [Section 64]. Under the Consumer

Protection Act, the procedure has been laid down in the Act itself [Sections 12, 13, 14 and 18 & 22). Section 30A also empowers the National Commission to make regulation, with the previous appeal of the Central Government.

CHAPTER FIVE

CONCLUSION

CHAPTER FIVE

5.1. CONCLUSION- After going through the whole discussion we can reach at a conclusion that consumer protection is the final goal of the any competition policy. It is quite clear that competition promote the efficiency. Generally this is tendency of any society that because of competition, any 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 prices¹⁰⁶.

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 prices¹⁰⁷. 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.

In the first chapter as I tried to discuss about the objective and competition law and consumer protection, after a deep analysis we found that competition law is an effective tool to protect the consumer interests but there are certain gaps between the objectives of competition law and consumer protection. Competition law is primarily concerned with economic efficiency and with the overall welfare of society, without distinguishing between different groups of society. While competition regimes all around the world pursue this goal they are usually not based exclusively on efficiency arguments. The awareness of how the enforcement of

¹⁰⁶ <http://ezinearticles.com/?Advantages-of-Competition---2-Untold-Advantages-of-Competition-That-Helps-Every-Industry&id=1944193> visited on 23.05.2012

¹⁰⁷ Dando B. Cellini, Economic Growth and Consumer Welfare- Role of Competition Law

competition law affects consumers is increasing and therefore the implementation of the consumer welfare standard as well. Accordingly, competition law guarantees that consumers get a fair share of the economic benefits resulting from the effective working of markets and economic and technical progress. However, competitive markets do not always result in increased benefits for consumers. More competition does not automatically lead to more consumer welfare. Even in competitive markets serious consumer problems may arise. These are principally related to information failures and may lead to bad deals, high search and switching costs or even getting disconnected to certain markets. Prime examples can be found in the recently liberalized markets of telecommunications and energy.

There is another reason why competition law might fail to be an effective tool to increase consumer welfare. This reason was referred to as the 'Chicago trap'. The 'Chicago trap' is the difference between the broad notion of a consumer in competition law and the narrower notion of a consumer in consumer law. Thus even though the ultimate aim of competition rules is consumer welfare, they can only partly guarantee protection and welfare for final consumers. In other words, final consumers not always profit from a competition law decision even when it is aimed at the improvement of consumer welfare. Competition laws are coincidentally concerned with the welfare of final consumers. Competition law inevitably has as one of its goals the improvement of consumers' interests, but its purpose is not identical to consumer protection. Consumers are often only indirectly protected by competition law and the interests of competition might conflict with those of the consumers.

While competition and consumer protection seem to strive for the same goal and in many aspects competition and consumer issues overlap, they pursue different standpoints and apply different instruments to reach that goal. Their enforcement techniques might even conflict or

leave gaps that have to be filled by the other discipline. These two disciplines complement each other in general; however, they conflict in a number of cases. Being aware of the complements and tensions between competition law and consumer protection is the ultimate way to achieve an effectively working market. These two legal areas have to be harmonized with one another in order to make them friends and not foes

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.”

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 switch¹⁰⁸.

The Planning Commission has constituted the working group on “Consumer Protection” in the context of preparation of the twelfth five year plan. Department of Consumer Affairs,

¹⁰⁸ 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

Government of India has constituted six Sub-Groups to evolve a comprehensive report for the Working Group. The Sub Group on “**Consumer Protection & Redressal, ADR and Consumer counseling**” has been constituted with the Jt. Secretary, Consumer Protection Government of India, as its Convener¹⁰⁹.

ACCORDING TO THE 12TH PLAN STRATEGY AND IMPLEMENTATION PLAN¹¹⁰-

- Consumers need an inexpensive and quick grievance redressal mechanism to ensure that manufacturers and service providers are accountable for the price and quality that the consumers are entitled to. Accordingly, it is necessary to provide several methods of grievance redressal including those which are available in accordance with the provisions of the Consumer Protection Act. Thus, mediation or in-house grievance redressal should be tried, but without giving up the right of the consumer to obtain legal redress ;
- Amendment of Consumer Protection Act to make it more effective and tuned to reducing the backlog of cases.
- Of recent there has been derogation or poaching on the jurisdiction of Consumer Protection Act in some of the areas due to the orders passed by the Courts. Such loopholes in the Act should be plugged through appropriate amendments to the Act and Rules.

¹⁰⁹ Report of the working group organized by the Planning Commission for Consumer Protection for the 12th Five Year Plan.
http://www.google.co.in/url?sa=t&rct=j&q=aim+of+12th+five+year+plan+for+consumer+protection+in+india&source=web&cd=2&ved=0CE8QFjAB&url=http%3A%2F%2Fplanningcommission.nic.in%2Faboutus%2Fcommittee%2Fwrkgrp12%2Fpp%2Fwg_cp2.pdf&ei=Ru28T9ewE4-qrAe7oui8DQ&usg=AFQjCNF5bS17MFrz6oRmtsTtnEAJ7bSz8g&cad=rja visited on 23.05.2012

¹¹⁰ Ibid,

- Computerization and Networking of consumer fora across the country so that consumers can file complaints and access their case status online.
- Setting up counseling and a mediation mechanism at pre-litigation stage and so as to reduce the burden of consumer courts and resolve disputes through out of court settlements.
- Provision of adequate infrastructure to Consumer fora so as to make them function effectively.
- Moving from manual system to computer based system to bring in more efficiency and transparency.
- Provision for monitoring the performance of functioning of District Fora by developing dynamic MIS Reports on the performances related to total no. of cases filed/ disposed and other related performance indicators.
- Provision of funds for the annual maintenance of computer hardware items like computers, ups, replacement of ups batteries etc. under the Scheme on Strengthening Consumer Fora.

Working group for the better protection of the consumer interest made recommendations for 12th Plan period¹¹¹. The basic principle that is recommended for adoption is “Continuity with Change”. This essentially involves the following which are discussed below-

- Strengthening of the existing redressal mechanism to make it more efficient for delivering speedier justice
- Supplement the existing redressal system with an active ADR Mechanism.
- Building a strong consumer information and advisory system.
- Integrate the information, counselling and mediation mechanism into a structured format
- Review of Consumer Protection Act 1986 and take adequate measures to plug loopholes with a view to reduce delays and enhance its reach to new areas of consumer issues.
- Self Regulation and In-house redressal mechanism.
- Information Technology tools for better delivery of service.

¹¹¹ Ibid, note 104

Recently, the Hon'ble Supreme Court of India in the case of *Competition Commission of India v. Steel Authority of India Ltd.*¹¹² 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.**”

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 Protection Act. There needs to be synchronisation between the Competition Act and the Consumer Protection Act.

In a developing country like India public interest or consumer interest has always been a priority and there can be no exception to it. Thus the two disciplines focus on different market failures and other remedies but both are aimed at maintaining well functioning competitive markets that promote consumer welfare thereby concluding that both the disciplines are mutually re-enforcing. finally I can conclude by saying that there always has

¹¹² Civil Appeal No. 7779 of 2010

and always will exist an overlapping of interest between the Consumer Protection and the Competition law as both intend to seek the same outcome i.e. public interest¹¹³.

¹¹³ Bhaskar Brajendu, "Competition Act and Consumer Protection: An Overview" (2011)1 Comp LJ p.9-21.

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