Journal Homepage: - www.journalijar.com

INTERNATIONAL JOURNAL OF ADVANCED RESEARCH (IJAR)

Article DOI: 10.21474/IJAR01/14090
DOI URL: http://dx.doi.org/10.21474/IJAR01/14090

ISSN NO. 2320-5407

RESEARCH ARTICLE

A COMPARATIVE STUDY OF THE ANTI-TRUST LAWS IN U.S, U.K AND INDIA WITH SPECIAL REFRENCE TO HORIZONTAL AND VERTICAL ANTI-COMPETITIVE AGREEMENTS.

Ruchi Singh

Manuscript Info

Manuscript History
Received: 15 November 2021
Final Accepted: 18 December 2021
Published: January 2022

Key words:-
Anti-Competitive Agreement, Horizontal and Vertical, U.S. Antitrust Laws, U.K. Competition Act, Competition Act 2002

Abstract

This article focuses upon the conceptualization of the term 'competition' and how competition in the present era has been a potent tool for encouraging economic development and socio-economic welfare rather than curbing monopolies only. The article shall be contextualised highlighting the facts related to the enactment of the Competition Laws in India, U.S and U.K and its actual implementation with special reference to horizontal and vertical anti-competitive agreements. The aim of the article is to do a comparative analysis between the provisions dealing with anti-competitive agreements in U.S.A and U.K and section 3 of the Indian Competition Act in order todiscusses the need of competition in global economic market, and why at all this concept of competition is of utmost importance to us.The analysis done in the article strictly restricts to the interpretation given to anti-competitive agreements under section 3 of Competition Act in India and its comparison thereof with Antitrust Laws in U.K and U.S. The paper aims to highlight the scope and interpretation of anti-competitive agreements as it is among the most sanitizing issues recently in global market.

Introduction:-

Monopoly kills the positive spirits of competition by imposing heavy costs in every society thereby colluding against the public to raise the cost[1], and eventually making the general public its easy prey. The objective behind not letting competition to establish its feet in the market is to earn maximum, more than the natural profit at the cost of consumers. It also discourages efficiency and innovation which competition stimulates, thus making the society at large, suffer. Besides stimulation, competition provides consumers with a very wide set of alternatives and enhances product differentiation and better satisfaction of consumer demand.[2]

Thus, competition in the present era has been a potent tool for encouraging economic development and socio-economic welfare rather than curbing monopolies only.

[1] Mittal, D.,Taxmann's Competition Law & Practice,Preface to first edition, I-7, 2nd edition.
[2]Ibid.

Corresponding Author:- Ruchi Singh

There are certain viewpoints that the developing economies don't need a competition law framework. Among these the first is that free trade would by itself be sufficient to protect the competitive process because market is a self-regulated structure with the aid of demand and supply parameter.[3]

The other viewpoint says that the developing countries might not fit into the emerging trend of competition law and the competition regime may prove to be harmful rather than being good, also there might be chances of wrong decision making.[4] But, actually developing economies like India strongly need competition policy, as its implementation would rather help it in its socio-economic development by curbing monopolies and promoting healthy competition in every sector of the Indian economy.

Ordinarily, competition is being taken in a negative sense and the general perception is that competition legislation will lead to cut-throat competition and may adversely affect the individuals.

Legislation on 'competition' is not a naive concept as it dates back to around 50 B.C., the time when the oldest example of competition legislation i.e. Lex Julia De Annona was enacted in the Roman Empire. Although the concept is much older than it seems, the competition legislation in various developed nations has come in late 19th century and mid-20th century. During the modern period, the USA has been the front runner codifying the common law principles of competition law as the American Sherman Act, 1890. With the enactment of legislations like the Clayton act, the Federal Trade Commission Act the American competition law got a new shape altogether.[5]

Competition law, known in the United States as antitrust law promotes or maintains market competition by regulating anti-competitiveconduct.[6]As, the economic well-being of a society depends on the production and availability of cheaper & better goods, services and solutions; innovations and competition ensure such production and availability.[7] In an era of globalization and integration of world economies, a need is felt by countries to have competition regimes. It is apparent by the fact that when the WTO came into being in 1995, about 35 countries had competition law, as compared to hundred now and some more are in the process of having. Walking on the similar footsteps, as the globalised and liberalized Indian economy is witnessing cut-throat competition, the need of the time was of a better regulatory and adjudicatory mechanism to provide institutional support to fair and healthy competition in India. The natural repercussion of this is that the Indian market should be strong enough to face competition domestically as well as internationally.[8] Thus to ensure this, India enacted the Competition Act, 2002 replacing the earlier MRTP Act, which just protected against domestic unfair competition. The new act ensures to bring about positive spirit of competition.

Competition Law for India has its source in the Indian Constitution. Article 38 and 39 of the Constitution of India triggered the enactment of Competition legislation in India. These Articles are a part of the Directive Principles of State Policy which have inspired the State to enact legislation to promote competition in the Indian market.[9]

Articles 38 of the Constitution of India highlights that it's the responsibility of the State to promote the welfare of the people. Article 38 also aims at promoting social and economic justice in order to maintain stability and balance in the society. Article 39 of the Indian Constitution imposes obligation on the State that it shall direct its policy towards securing just and equitable distribution of the resources of community so that it subserve common good.

It was on the basis of these Constitutional obligations imposed on the State in the Part IV[10] of the Constitution of India that the Parliament enacted the MRTP Act in 1969 to deal with the problem of that time and for a purpose that

[3].Rodriguez A.E. and Malcom B. Coate (1997), "Competition Policies in Transition Economies: The Role of Competition Advocacy." Brooklyn Journal of International Law, Vol. 23, p. 365.
[4]Ibid.
[5] Competition Commission of India v Steel authority of India, (Civil Appeal No. 7779 of 2010)
[6]Taylor, Martyn D., International competition law: a new dimension for the WTO?, Cambridge University Press (2006) p.1.
[7]Supra at note 1, Pg. 4.
[8]Viswanathan, Suresh T., Law and Practice of Competition Act, 2002, Edition 2003, Bharat Law House, New Delhi.
[9]Choubhey, Akash and Mishra, Saurabh, "Competition Law: Glancing Back and Looking Ahead", (2004) Practical Lawyer Web Journal 17.
[10] Directive Principles of State Policy, Part IV, Constitution of India, 1950.

was relevant at that time. After 1990s, when India opted for liberalization, privatization and globalization and obligations were imposed on it by WTO agreements, like GATS and TRIPS, it were Articles 38 and 39 of the Indian Constitution which triggered the need for a new competition legislation. Thus, the competition legislations in India have source in Article 38 and 39 of the Indian Constitution.

The preamble of the Competition Act 2002 Act manifests that the objective is to provide, keeping in view of the economic development of the country, for the establishment of a Commission which would check that there is no harm to free and fair competition and that the consumers are all protected.

Competition and its Role in Economic Development

A simple definition of economic development would be the development of economy of a country or an area for standard living of its people by enhancing factors such as land, labour, poverty rates, leisure time, capital, technology, literacy rates, environmental quality etc.

By bringing in the competitiveness, the eradication of problem of concentration of wealth due to monopoly, regulation of consumer welfare and promotion of innovation and entrepreneurship can be achieved.

The relationship between societal development and economy is very intricate. In other words social and economic development are just the two sides of the same coin, that being the human development. The history of development of any society can be traced through the detailed study of the economic system thereof. Thus any step that affects the economy is bound to have an effect on the social order.

Need for competition regime to regulate anti-competitive practices

The need for competition regime was felt to ensure an objectively free and competitive market. Abuse of market power must be curbed to assure consumers low prices and high quality.[11]

Generally market power is restricted by:

1. Predation
2. Takeovers and mergers
3. Cartelisation

The competition regime aims to preclude any attempt of transgressing free trade and healthy competition.[12]

Here the concept of free trade needs further elaboration. We generally follow the concept that free trade brings in more competition but here in modern and technological sense, free trade has more complexities and it also does not provides safety from all edge. We cannot also rely on the notion that competition drives out unfair trade practices.

Monopoly is the mother of unfair trade practices. The need of competition regime basically was felt to reinforce forces of competition and also counter the evil spirit of monopoly.

If we take a broad outlook at the competition regime globally, making special focus on our domestic legislation, we find that the overall objective behind bringing competition laws and policies has not changed remarkably.[13]

The substantial concentration of power on certain enterprises adversely affects the spirit of competition and the competition law largely focuses on avoiding this gross concentration of power.

The primary role of competition law is therefore to solve the situations where the activity of one or two enterprises leads to a collapse of the market structure and healthy competition.

If we summarise the needs for a comprehensive competition regime we might say that:

1. It seeks to bring about a more regulated regime which would ensure healthy competition among private enterprises.

[11]Guide to Competition Law in India, Based on The Competition Act 2002, Universal Law Publishing Co. Pvt. Ltd. Pg.11.

[12]Ibid, Pg. 12

[13]Competition Commission of India v. Steel authority of India, (Civil Appeal No. 7779 of 2010)

2. The legislation would also serve the need of making the government more responsible towards actions of private parties without encroaching upon their internal management and decision making procedure.[14]

Historical Background of the Genesis of Competition Policies

India started her quest for industrial development post-independence and the Industrial policy resolution of 1948 marked the beginning of evolution of Indian Industrial Policy and thereafter there have been shifts from the regulated policies of 1948 and 1956 Policy Resolution[15], to the free market economy in 1991.[16]

The 1948 Resolution also redefined and confined the role of state's authoritative role in industrial development while defining the broad contours of corporate policies. The 1956 Resolution was to achieve the objective of growth, social justice, self-reliance in industrial sector and defined the parameters of the government's regulatory mechanism.[17]

But before we move on to the evolution of Indian Competition regime we must focus on the genesis of competition laws. If we trace the history of competition laws globally from its very origin when no comprehensive legislations were there common law practices were followed by many civilized nation states. Common law greatly valued property rights and individual freedom to contract. Therefore what was unlawful under common law was "monopoly", because monopoly restricted individual freedom to enter into contracts.[18]

The English rule was that an individual was free to contract or abstain from contracting and he had the freedom to enforce every right related to it, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his rights to carry on trade.[19]

Now as we have already discussed in the first chapter monopoly has its bitter side effects because it raises the wealth of the rich at the cost of the down trodden. Competition is an antithesis to monopoly and it enhances consumer's choice and promotes competitive prices. Though the genesis of competition legal regime lies in the common law yet most countries in the world have enacted legislations to protect free market economies.[20]

The first laws relating to competition was framed by Canada in 1889.[21] Later U.S passed its Anti-trust regulation "The Sherman Act"[22] which is generally regarded as the starter of modern competition regime.[23]

The need to form a specific legislation was felt because under common law no concept of per se liability against anti-competitive practices. The court did the onerous work of fixing liability based on case to case basis. Therefore the Sherman Act brought provisions to fix liabilities in cases of arrangements and contracts which were anti-competitive,[24] and also prevent practices of monopolizing trades.[25]

The passage of this act was a step of reformation as against the wide loopholes of common law, as it made it illegal to try to restrain trade, or from monopoly. This act was framed with the objective of non-interference[26] or undue

[14] Mittal D.P., Competition Law & Practice (A Comprehensive section wise commentary on Law relating to Competition Act) ,Taxmann's, 3rd Ed., Pg. 3
[15]Ibid
[16] The phase of globalization and liberalization is marked post 1991, after which Indian economic regulations were deregulated.
[17]Supra at note 1.
[18]Mogul Steamship Co. v.McGregor, 1892 AC 25.
[19]Ibid.
[20] An economic system in which the allocation of resources is determined solely by supply and demand.
[21] Combines Act of 1889.
[22] The Sherman Act 1890.
[23]Furse Mark, Competition Law of the EC and UK, Oxford University Press, 6th Ed., Pg. 3.
[24] Section 1, Sherman Act, 1890.
[25] Section 2, Sherman Act, 1890.
[26]Copperweld Corporation. v. Independence Tube Corporation., 467 U.S. 752.

restraint upon the freedom to trade,[27] but it did not provide protection against enforcing contracts, regulating combinations, if the contract did not interfere with the freedom to trade.[28]

The act used the words "restraint of trade"[29] and "attempts to gain monopoly"[30] but there was no proper explanation given to these words by the congress.[31] Even after the passage of Sherman Act there was great ambiguity, and confusion prevailed regarding what would be illegal under the act, and to clear these blurred views the Clayton Act[32] was passed.

The Clayton Act expands on the general prohibitions of the Sherman Act and addresses the problems of anti-competitive practices in their infancy. The act specially prohibited discriminatory practices, exclusive dealings, tying contracts[33], interlocking directorates in competing corporations, and purchase of stock in competing concerns.

The test of prohibition under the act is to "decrease competition or tend to create any kind of monopoly". Thus cartelizing acts as doomed under the Sherman Act were further extended and specified under the Clayton Act.

With the boom of 19th century rapid consolidation of enterprise took place especially in forms of trusts but with the development in economics later these consolidations broke up and were replaced by newer technologies of merger and acquisition. Clayton Act was the first among other Acts which dealt with exclusive provisions against monopolistic mergers. It prohibited any merger whose affect would hamper competition.[34]

The Clayton Act extended the prohibition of the Sherman Act to price discrimination, but the Congress did not find this Act efficient enough to tackle the situation and Federal Trade Commission Act[35] was passed to further impose a general ban on "unfair" trade acts, practices and any method of business thereof.

This Act establishes a commission known as federal trade commission which is empowered to take actions against any person, partnership, corporation or enterprise from using trade method which is adversely effecting competition. The Commission has the power to penalize for the contravention of Sherman Act, Clayton Act, or any other act which is not mentioned in these acts but is against the positive spirit of competition.[36]

The Clayton Act was further amended also in 1950[37], before amendment[38] the Act covered any acquisition by one corporation of stock of another corporation, when there is any chance or likelihood that such an acquisition would create monopoly or would restrain free trade and any line[39] of commerce[40]. The amendment now forbids acquisition of assets of a competing firm. Thus what is now prohibited is any amalgamation not regarding whether it involves stock or asset.

By this amendment the Congress intended to close the loophole in the original section by broadening its scope so as to include entire range or corporate amalgamation from pure stock acquisition to pure acquisition of assets.[41]

[27]Standard Oil Company v. United States, 22 1 US 1.
[28]Ibid.
[29]Anti-competitive agreements, Section 3, Competition Act, 2002.
[30]Supra, at note 14.
[31]Consumer Protection Act, 1986. (Since the passing of CPA, the various consumer forums were assigned the responsibility of protecting the rights of consumers and settling disputes between the consumer and the trader, this Act also ignited the passion for enacting legislation with regard to competition where the protection of consumers would be the prime target.)
[32] Clayton Act, 1914.
[33] Which made the purchase of an entire line of products a condition of purchase of any one of them.
[34] Section 7, Clayton Act 1914
[35] Section 5, Federal Trade Commission Act 1914.
[36]Ibid, Section 45.
[37]Celler-Kefauver Act, 1950
[38] Section 7, Clayton Act (before amendment).
[39] It means that the provision applied to both horizontal and vertical mergers.
[40]United States v. E.I. Du Pont Nemours & Co., 353 US 586.

The concept of anti-competitive as captured by section 3[42] is also based on the Raghvan Committee recommendations[43]. The subject matters of section 3 may be hit by the subject matter of the remaining three sections, namely section 4, 5 and 6.[44] These sections are generally read with section 19, for the purpose of enquiry and investigation and orders.[45]

The crux of section 3 is nothing but prohibiting such agreements which have the effect of curtailing healthy competition.

It says that any corporate entity of an association of such entities, or persons or a collection of such persons, enters into an agreement the subject matter of which is with regard to:
1. Manufacturing, or distribution or even storage of goods;
2. Or if the aforesaid agreement is with regard to any service;
3. Or if such agreement is with regard to acquiring or controlling such goods, or services by the contracting party the agreement might be anti-competitive.[46]

The test for such agreements to be anti-competitive is:
1. The agreement should have negative effects on competition;
2. Or is likely to have negative effects on competition.

Now as per the recommendations of Raghvan Committee and provisions of section 3 one thing is established that the agreement between firms might have the potential to restrict competition.

If we analyse section 3 thoroughly we find the sub-section 2, 3, 4 of section 3 precisely deals with:
1. Anti- competitive agreements of horizontal nature[47] and,
2. Anti- competitive agreements of vertical nature.[48]

Most of the laws regarding competition agreements refer to horizontal agreements among competitors and vertical agreements relating to an actual or potential relationship of buying or selling to each other.

To understand better horizontal agreements can be said to be any arrangement between enterprises of the same sector, i.e similar products are manufactured by both the enterprise. For example TATA Motors merges with Ford Motors. Here the chance of adverse or negative effect on competition is greater, in comparison to vertical mergers.

The most obvious agreements which could be termed horizontal agreements shall be among companies dealing in the same product, or are at the same stage of production chain, in the relevant market.

The problem here is we cannot precisely define the scope and limitations of relevant market. To attract the provisions of law, the product must be substitutes.

Being at the same stage of production chain implies that the parties to the agreement must be:
a. Either the producer of the good,
b. The supplier or retailer of the good,
c. Or for matter even the wholesaler of the good.

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[41]United States v. Philadelphia National Bank, 374 US 321.
[42] Section 3, Competition Act, 2002.
[43]Talati P. Adi and Mahala S. Nahar, Competition Act, 2002 Law, Practice & Procedure, Commercial Law Publishers, Ed. 2006. See Report of the High Level Committee on Competition Policy and Law, Annexure –D, Pg. 712.
[44] Section 4, 5, 6, Competition Act, 2002. (Section 4 talks of the abuse of dominant positions, section 5 specifically deals with combinations and section 6 deals with the procedure thereof in cases of mergers and acquisitions).
[45] Section 19, Competition Act, 2002. (the section deals with the power of CCI to inquire into any matter connected to an agreement which is anti-competitive or where the dominant position has been misused by an enterprise).
[46] Section 3(1), Competition Act, 2002.
[47] Section 3(3), Competition Act, 2002.
[48] Section 3(4), Competition Act, 2002.

Here the chance of adverse or negative effect to competition is greater, in comparison to vertical mergers. In case of vertical mergers when two or more companies reside at different planes or say functioning at different levels merge with each other.

Here for example one company which manufactures good merges with or enters into an agreement with another company, which supplies similar goods, or say if a company which manufactures car does an agreements with another company which produces tyres.

In principal any kind of agreement[49] which violates the law is illegal. But to bring an agreement into the scope of section 3 it must be a formal or a written agreement.[50]

In further analysis of section 3 it can be said that the law intends to classify or make a distinction between illegal practices of price cartellisation (for it must be penalized in order to establish competition in free market), and perfectly legitimate economic and business practice, in response to a market situation in which a company is placed at certain position which can be described as a price leadership position.[51]

Here this company or this particular market competitor would become the price leader. Now this price leader fixes the price of any goods or services due to:
1. Change in cost of production,
2. Increase in the price of raw material,
3. Or any other related causes.

Here the other players of the market have no option but to follow this market leader, and to increase or decrease their prices, as per the price quoted by their leader. To assume in such a case, an informal cooperation or an informal agreements would be too harsh and would ignore a market place reality.[52]

Mixed logics under section 3

Though vertical and horizontal agreements are quite different from each other, and both might be anti-competitive. But at certain points or in certain situations it can be established that firms collaborating on some socially valuable activity may need to agree to do away with competition so as to establish the cooperative relationship.[53]

The Raghvan Committee in its report however recommended any restrictive contracts which contain certain clauses of promoting energy efficient[54] manufacturing processes and production of eco-friendly products or conservation of natural resources should be explicitly permitted as exception.[55]

Rule of reason and rule per se under section 3

Agreements are considered illegal only if they result in unreasonable restrictions on competition. Section 3 has two basic logics, subsection 3 of section 3 enumerates certain agreements are which are illegal; such as:
1. If through that agreement the price of purchase or sale are directly or indirectly fixed or determined
2. If the said agreement adversely controls manufacturing, supply, marketing, or any other transaction related to such goods, or even service.
3. If the agreement has bid rigging[56] or collusive rigging clause[57].

[49] It might include oral agreements or informal agreements.
[50] Section 3(2), Competition Act, 2002.
[51]Talati P. Adi and Mahala S. Nahar, Competition Act, 2002 Law, Practice & Procedure, Commercial Law Publishers, Ed. 2006, Pg. 39.
[52]Ibid.
[53] Proviso to section 3, Competition Act, 2002.
[54]Ibid.
[55]Supra.
[56] The explanation to section 3 says that an agreement would amount to bid-rigging if corporate entities or their associations thereof doing similar kind of business come together to enter into an arrangement such that it negatively effects the competition for bid, or manipulates any process for bidding.
[57] The Competition Act, 2002 nowhere defines the term, under section 1 of Sherman Act collusive bidding is illegal per se.

4. If through that agreement there is sharing or apportionment of geographical area of market or categories goods or services, or if the number of purchasers are fixed in relation to such goods or services.[58]

This categorization under the Act might be referred as rule per se (i.e if an agreement falls in the above categories such an agreement will be per se anti-competitive).

Under the **rule of reason** the question of adverse effect on competition is settled by examining the facts and certainties of the case. The principle of reason in looking at the legitimacy of limitations on exchange was demonstrated by the US Supreme Court[59].

Any restriction is of substance, until it just controls and pushes rivalry. To focus this address, the Court should customarily think about the realities curious to the business to which limitation is connected, its condition prior and then afterward the limit was forced, the way of control and its genuine or likely effect.[60]

The applicability of rule of reason doctrine is also effective in India because Section 19 enumerates certain factors basing on which an agreement can be determined as anti-competitive, these parameters set out in Section 19 act as deciding factors, and every case can be analysed upon these parameters to decide whether the agreement in the case would amount to an anti-competitive agreement or not.[61]

The position in India is that the per se rule can't be strictly applied, because section 3 has to be read with section 19.[62] Therefore the agreements which would fall under the scope of per se rule can be contradicted on the grounds as mentioned in section 19. However this is not the case in various other jurisdictions. The laws as applicable to nations other than India enlist agreements which would strictly fall under the per se rule.

Hence we can clearly say that the per se rule is of no application under Indian Competition Act, but laws in U.S. highlight this concept. Even the U.S Supreme Court as against courts in India recognises the importance of per se rule. According to U.S Supreme Court there are certain agreements which per se adversely affect competition and positive spirit of rivalry in market and such agreements need to be enlisted and openly condemned.[63]

While explaining the per se rule the U.S Supreme Court also said that, Specific understandings or practices which have the malicious impact on free competition are indisputably ventured to be outlandish and therefore they must be termed unlawful without extravagant enquiry.[64]

However it is not possible to provide a complete list of arrangements that attract the attention of the provision such as rule or reason, and the rule needs to be applied to individual cases.

Agreements containing a presupposition of illegality

Section 3 enlists horizontal agreements which are illegal or presumed to be anti-competitive. In general the rule of reason test is required to establish an agreement as illegal. However, for certain kinds of agreements the presupposition is often that they cannot serve any useful or pro-competitive purpose and therefore does not need to be the subject of rule of reason test. The following kinds of agreements are often presumed to be anti-competitive:

1. Agreements regarding prices: this includes any agreement entered into to control prices on sale or purchase,
2. Agreement regarding quantities: this would include any agreement which limits or caps manufacture, or investment.
3. Agreement regarding collusive tendering,
4. Agreements regarding market sharing.[65]

[58] Section 3(3), Competition Act, 2002.
[59] Board of Trade of City of Chicago v. U.S, (1918) 246 US 231.
[60] National Society of Professional Engineers v. United States, 435 US 679.
[61] Roy Abir and Kumar Jayant, Competition Law in India, Eastern Law House, 1st Ed., (2008), Pg. 72.
[62] Section 19 explains the term "appreciable adverse effect on competition" as used in section 3 and enlists factors which would render as agreement anti-competitive.
[63] Ibid, at Pg.72.
[64] Northern Pac. R. Co. v US, (356 US 1).
[65] Section 3(3), Competition Act, 2002.

The presumption is that such horizontal agreements and membership of cartels lead to unreasonable restrictions of competition and may, therefore be presumed to have appreciable adverse effect on competition. This provision of per se illegal is therefore rooted in the provisions of U.S. laws and has a parallel in most modern legislations on the subject.

Section 3(4) specifically deals with vertical agreements, and vertical restraint upon competition includes:

1. Agreements which entitle such purchase in which the purchaser in order to buy the good of his choice, also has to buy other item in which he might not be interested, such types of agreements.[66]
2. Agreements by means of which the seller restricts the buyer that he cannot deal in goods other than the goods of this seller or for that matter any other person also apart from the seller.[67]
3. Agreements through which one party limits the supply of any good, or confines the market for the supply or sale or clearance of such good.[68]
4. Agreements which limit or confines that the goods can be bought from or sold to only specific or limited persons or class of persons.[69]
5. Agreements by which the seller of the goods stipulate a condition before selling that the goods can't be re sold by the purchaser to any other person except the person or class of persons fixed by the first seller.[70]

The conclusion which arises out of this brief discussion and analysis of section 2 of Competition Act is:

1. Certain anti-competitive practices can be presumed to be illegal.
2. The agreements which contribute to the improvement of production and distribution and promote technical and economic progress while allowing consumers a fair share of benefits should be dealt with leniently.
3. The "relevant market" should be clearly identified in context of horizontal agreements.
4. Balance price, quality, bid and territory sharing agreements and cartels should be presumed to be illegal.[71]

Analysis of certain terms used in the section

The word competition is not defined in the Act anywhere and therefore to understand the term "competition" we have to refer to judicial decisions and other dictionaries.

Competition for the purpose of understanding anti-competitive agreement refers to a market situation in which:

1. The supplier is not in a position to control supply,
2. The buyers can exercise their own independent patronage while purchasing goods.
3. But both buyers and sellers have full freedom of choice to resort alternative sources of supply and demand.

The word "causes or likely to cause" connote that the person entering into the agreement has to judge or know at the time of entering into the agreement whether the agreement will be a reason or is expected to be the reason of adverse effect on competition.

The term "appreciable adverse effect on competition" is a question of fact and can be decided upon case to case basis, three prime questions have to be answered before satisfying the question of substantial adversarial effect on competition, and these are:

1. Whether there is competition?
2. Whether there is any adverse or hostile effect on competition?
3. Is this hostile or adverse effect substantial enough to be condemned under the provision of law?

Here if the agreement falls under subsection 3 of section 3, it will be presumed that it is negatively effecting competition and the legality of such a provision is doubtful. If the agreement falls under subsection 4, then it is

[66] Section 3(4) (a) Competition Act, 2002.
[67] Section 3(4) (b), Competition Act, 2002.
[68] Section 3(4) (c), Competition Act, 2002.
[69] Section 3(4) (d), Competition Act, 2002.
[70] Section 3(4) (e), Competition Act, 2002.
[71] Talati P. Adi and Mahala S. Nahar, Competition Act, 2002 Law, Practice & Procedure, Commercial Law Publishers, Ed. 2006, Pg. 41.

presumed that there is competition. Here the role of CCI comes and the factors to be taken into consideration by the commission are enumerated in section 19.[72]

Analysis of parameters under section 19

The commission has the power to enquire on its own instance or upon a complain registered by any person or consumer, or upon a reference made by the central government, state government or any other statutory authority.

The Commission should, while figuring out if an agreement has a considerable unfavorable impact on rivalry under section 3, shall have due respect to all or any of the connected elements, specifically the:
(a) Creation of obstructions to new contestants in the business;
(b) Driving existing contenders out of the business;
(c) Ruling out competition by creating obstacles to enter into the market;
(d) Gathering of profits to buyers;
(e) upgrades in preparation or circulation of merchandise or procurement of administrations;
(f) Advancement of specialized, experimental and investment improvement by method for processing or conveyance of merchandise or procurement of administration.

These factors widen the scope of section 3 and thus substantiate the consumer protection motive as mentioned in the preamble of the Competition Act 2002. But the actual case analysis of the orders as passed by the Commission would highlight upon the point that how far the objective sought by the preamble has been actually achieved by CCI.

The adverse effect on competition should be in India[73]. However the agreements entered into outside India but operative in India are covered under the scope of section 32.

Subsection 2 of section 3 says that any agreement which violates the provision of subsection 1[74] would be void. When we talk of void agreements the provisions of Contract Act are applicable.[75] The Contract Act classifies what considerations and objects are lawful and what not. It says that the consideration or object of any contract would be illegal or unlawful it is in contravention of any law being in force, or if it fraudulent, immoral, or opposed to public policy.[76] Therefore in view of the provision of section 23 of Contract Act this subsection was not necessary.

Working of restraints (horizontal and Vertical) under U.S. Antitrust Laws

Under the U.S. Laws, the first inspiration of prohibiting anti-competitive agreements can be drawn from the Sherman Act's prohibition of unspecified trade restraints.[77] Though there is little evidence of welfare-reducing trust activities prior to the passage of the Sherman Act.

In any case the dissatisfaction with the Department of Justice's enforcement efforts under the Sherman Act was almost immediate. Only sixteen antitrust cases were instituted by federal prosecutors in the nineteenth century's final decade there were two divergent views about how Sherman Act's perceived deficiencies might be redressed.[78]

1. In the U.S., House of Representative, the favoured course of actions was to enumerate the specific unlawful business practices and make them criminal offences.
2. The Senate, by contrast, wanted to reserve the task of identifying unlawful practices for a new Federal Trade Commission Board, which was to set up as an expert law enforcement body with a board mandate to attack unspecified "unfair methods of competition".[79]

[72] Section 19, Competition Act, 2002.
[73] Section 32, Competition Act, 2002.
[74] Section 3(1), Competition Act, 2002.
[75] Section 23, Indian Contract Act, 1872.
[76] Ibid.
[77] Section 1, Sherman Act 1890.
[78] Talati P. Adi and Mahala S. Nahar, Competition Act, 2002 Law, Practice & Procedure, Commercial Law Publishers, Ed. 2006. Pg. 50.
[79] Ibid.

The Clayton Act ultimately emerged as a as a compromise between these two positions. It enumerated specific antitrust law violations, but did not subject such violators to criminal penalties. To provide, FTC with enforcement flexibility, qualifying phrase was inserted in the bill's final version making the proscribed business practices illegal only when their effect may be to lessen competition considerably or if it tends to create a monopoly.

However three types of business activities were finally banned by the passage of The Clayton Act.
1. Horizontal restraints (interlocking directories and holding companies).
2. Non-price vertical restraints.
3. Price discriminations.

Furthermore, The Clayton Act, despite considering lobbying failed to overturn the U.S Supreme Court decision in Dr. Miles Medical Co. v. John D, Park and Sons Co.[80], which held resale price maintenance to be per se unlawful. The court reasoned that in the case the alleged practice prevented price competition and was equivalent to price fixing among distributors, with no acknowledgement of fundamental difference between inter-brand and inter-brand competition.

Later on, however in U.S v. Colgate & Co.[81], the Court held that the manufactures could refuse to sell any distributors who did not maintain desired wholesale.

Horizontal and Vertical restraints

Horizontal and non-price vertical restraints are potential devices for fostering competition, i.e they are relatively low cost means by which firms can organize in order to expand operations beyond the local level.

There are gradations in governance structures between a fully integrated firm and the market. Holding companies and interlocking directories are governance structures one step removed from complete horizontal integration.

Exclusive dealing contracts and tying arrangements, moreover, are vertical governance structures depends on transaction cost, which are minimized through the competition market process.

Prior to the passage of Clayton Act, firms organized horizontally and vertically using holding companies, interlocking directories, exclusive dealings and tying contracts in order to minimize transaction costs. Prohibition of these devices in Clayton Act forced either vertical or horizontal consolidation of firms, the relative cost of proscriptions transferred wealth.[82]

1. To firms engaged in intra-state commerce and/or,
2. To larger firms threatened by expanding companies.

Historical Object of Antitrust Laws in U.S.

The interest group-based examination of The Clayton Act strongly suggests that economic efficiency was not the dominant issue in 1914. Special interests take center stage in explaining the Sherman Act that preceded it. The Clayton Act transferred wealth from growing firms to relatively large firms and to small firms engaged in intra-state commerce.

This wealth transfer was accomplished by prohibiting certain business practices, namely horizontal restraints and vertical restraints that served as low-cost means by which growing firms could expand and complete inter-state.

Furthermore, the prohibitions of price discriminations protected small manufactures from the lower prices charged by their larger, more efficient rivals. In short the "incipiency doctrine" enshrined in the Clayton Act was a means of transferring wealth rather than an attempt to protect or preserve competition in public interest.[83]

[80] 220 U.S. 373 (1911).
[81] 250 U.S. 300 (1919).
[82] Section 1, Sherman Act 1890.
[83] Section 2, Clayton Act, 1914.

Specific provisions dealing with anti-competitive agreements under U.S. Antitrust Laws

The Sherman Act was enacted in 1890 because there was dire need to provide protection against the allocation of wealth in bigger enterprises. In U.S. trusts operated in 1800 which were the biggest examples of concentration of wealth. The Congress anticipated the loss to economy due to such anti-competitive and monopoly practices by corporations which were already individually established in the market.

As a result of all this the Sherman Act was passed to contest any practice which was of nature anti-competitive. Hence this Act formed the foundation of antitrust laws in U.S. In U.S the jurisdiction of the Congress does not extends to the local acts of trade and commerce within states, hence basing upon The Sherman Antitrust Law many states in U.S formed their own laws to regulate anti-competitive practices.

The Congress had the constitutional authority to pass such law in order to regulate activities relating to trade and commerce. Under this authority this Act was passed. The Sherman Act specifically prohibited entering into any contract or combinations of anti-competitive nature, among different states of America or between American states and foreign nations. Here under section 1 of the Act two activities were prohibited.[84]

1. Any combination or contract restricting trade was per se declared illegal.
2. Any conspiracy restraining trade or commerce.

The basic problem which the Act did not look into was which activities were to be classified under the tag of being illegal. Any practice preventing trade cannot be and must not be illegal per se. hence we can say that The Sherman Act introduced the concept of anti-competitive agreement but did not clarify what which types of agreement would be anti-competitive and how would we measure the bad effect on trade and commerce.[85] Sherman Act also declared any such activity as illegal whose end result puts a restraint on trade.[86]

The Courts however felt that not all the activities hampering competition could be covered under the Sherman Act, and hence to give the Act a wider scope The Clayton Act was passed.

The Sherman Act did not mention classification such as horizontal or vertical anti-competitive agreement to be illegal. The Courts applied the per se rule to decide whether a contract or a combination is restraining trade. In case where this rule did not work out rule of reason was used by the Courts in U.S.

The Clayton Act passed in 1914 cleared the concept of "practices which causes unreasonable restraint on trade. The types of agreements which would be anti-competitive were precisely brought about under the provision of this Act. The Act prohibited activities which involved:

1. Price fixing agreements or price discrimination between different buyers.
2. Exclusive dealing Agreement or tying agreements were declared illegal under this Act.

The Federal trade Commission Act was passed and to provide protection to consumers directly against anti-competitive practices.[87]

Changing traditions of Common Law in U.K.

If we look on to U.K Laws we find that U.K also has specific provisions dictating rules against anti-competitive agreements.[88] Under the U.K Competition Act 1998, any agreement between two or more enterprises, or any related practices which adversely affects the trade in U.K or restricts competition are prohibited.[89]

The provisions under the U.K Act are very much similar to the Indian Competition Act. Agreements which are of nature price fixing agreements or agreements which control the manufacturing or trade of goods are illegal under the Act.[90]

[84] Section 1, Sherman Act, 1890.

[85] The Sherman Antitrust Act however penalized any such practice which would restrain trade and imposed a penalty of $ 10,000,000 on Corporations if they are found to engage themselves in any such contract or combinations.

[86] Section 2, Sherman Act, 1890.

[87] Section 45, Federal Trade Commission Act, 1914.

[88] Section 2, U.K. Competition Act, 1998.

[89] Section 2(1)(a), U.K. Competition Act, 1998.

The core reason behind discussing all these laws is to bring out the fact that in countries like U.S and U.K there is no division between horizontal and vertical anti-competitive agreement as is there in under Competition Act 2002. The major concern under Indian Law is to bring the agreement under any of the two classifications i.e either horizontal or vertical in order to bring it under the scope of the law that prohibits such anti-competitive agreements.

A still closer look at laws of U.S and U.K suggests that these laws support the illegality of anti-competitive agreements or any such practices that adversely affect the benefits of the consumers or harm the market competition but they do not narrow the scope of the law by providing the clause that an agreement must be either horizontal or vertical anti-competitive agreement. Hence the scope for agreements which do not fall in these two categories but are still anti-competitive is not overruled. In this regard CCI must closely analyse Indian law and make necessary amendments to widen its scope.

Conclusion:-

The conclusion that had been made through the comparative analysis is regarding the fact that in other jurisdictions such as U.S and U.K the law does not require that: for an agreement to be anti-competitive it ether has to be of nature horizontal or vertical. Such interpretation of the provision by the Indian regulator authority actually narrows down the scope of the law and also suppresses the object sought to be achieved by the preamble of the Act.

[90] Section 2(2) (a, b, c, d), U.K. Competition Act, 1998.