SEMESTER-II

LM-104-COMPETITION LAW CREDIT-4

TOPIC-8: COMPERATIVE COMPETITION LAW OF US, EU AND INDIA

By Dr. Syed Mohammad Yawar, Assistant Professor, Department of Law, Aliah University, Kolkata

INTRODUCTION

- United States of America is one of the first countries which initiated the Competition Law by describing them as ‘Anti-trust Laws’. In US the earlier enterprises were in the forms of trusts.
- As early as 1890 the Sherman anti-trust Act was passed, followed by other anti-trust laws.
- United States Department of Justice manages the Anti-trust division and these violations are treated as crimes.
- Treaty on the Functioning of the European Union (TFEU) governs the competition law in Europe. Enforced on 1st January 1958 it is one of the most important treaties which govern the European Union.

INDIA

- The Competition Law in India was passed in 2002 and enforced in 2003.
- The object of the Competition Act 2002 was to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.
- It established Competition Commission of India as watchdog for the Competition Law abuses.

- The predecessor of the Act of 2002 was the Monopolies and Restrictive Trade Practices Act 1969 (MRTP), which was more focused on the Monopolistic, Restrictive and unfair Trade Practices.
- The scope of the MRTP Act was limited and the Commission established by it, i.e. Monopolies and Restrictive Trade Practices Commission was not having power to punish the wrongdoers. It could only pass a *cease and desist* order.
- The Competition Act 2002 prohibits Anti-Competitive Agreements, Abuse of Dominant Position and regulates the combinations through Chapter 2. It provides for the establishment of the Commission and bestow upon it number of powers to inquire and punish.
- The Act also created an office of Director General to assist Commission in investigation of the Competition Law abuses.
- The Act also has some unique features like, Leniency provisions and Competition Advocacy.

UNITED STATES

- In **United States**, US Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the Federal Trade Commission (FTC), and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.[1]
- The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the

[1] Official Website, Federal Trade Commission , The Anti-trust Law, Available at: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws last visited 19/04/2020

facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.[2]

Here is an overview of the three core federal antitrust laws.

1. The **Sherman Act** outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.[3]

- The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the **Department of Justice**. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal

[2] *Supra* Note 1
[3] *Ibid*

penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.[4]

2. The **Federal Trade Commission Act 1914** bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.[5]

3. The **Clayton Act 1914** addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the **Robinson-Patman Act of 1936**, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the **Hart-Scott-Rodino Antitrust Improvements Act** to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates

[4] *Supra* Note 1
[5] *Ibid*

either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.[6]

4. In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.[7]

EUROPEAN UNION

- Competition encourages companies to offer consumers goods and services at the most favourable terms. It encourages efficiency and innovation and reduces prices. To be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.[8]

- European antitrust policy is developed from two central rules set out in the **Treaty on the Functioning of the European Union(TFEU)**:

1. **Article 101** of the Treaty prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor). Only limited exceptions are provided for in the general prohibition.

[6] *Ibid*
[7] *Supra* Note 1
[8] European Commission official website, Antitrust Overview, https://ec.europa.eu/competition/antitrust/overview_en.html Available at: last visited 19/04/2020

The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.[9]

2. **Article 102** of the Treaty prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.[10]

- The **European Commission** is empowered by the Treaty to apply these rules and has a number of investigative powers to that end (e.g. inspection at business and non-business premises, written requests for information, etc.). The Commission may also impose fines on undertakings which violate the EU antitrust rules. The main rules on procedures are set out in Council Regulation (EC) 1/2003 which include:
    - The procedures for anticompetitive practices cases
    - The procedures for abuse of dominance cases
    - The key actors and checks and balances in proceedings for the application of Articles 101 and 102 TFEU .[11]

- **National Competition Authorities (NCAs)** are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted. National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. Building on these achievements, the Communication on Ten Years of Antitrust

[9] *Supra* Note 8
[10] *Ibid*
[11] *Ibid*

Enforcement identified further areas to create a common competition enforcement area in the EU.[12]

- As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts to ensure that EU competition rules are applied coherently throughout the EU.[13]

PROHIBITION ON ANTI-COMPETITIVE AGREEMENTS

INDIA

- **Indian Competition Act 2002** Sec.3 regulates anti-competitive agreements. It provides:
  1. The definition and prohibition of anti-competitive agreement.
  2. Prohibition of agreements including cartels:
     a. Price fixing
     b. Output restriction
     c. Market sharing
     d. Bid-rigging
  3. Control on:

     (a) Tie-in arrangement;

     (b) Exclusive supply agreement;

     (c) Exclusive distribution agreement;

     (d) Refusal to deal;

[12] *Ibid*
[13] *Supra* Note 8

(e) Resale price maintenance

UNITED STATES

- In **United States**, Sherman Act 1890 Sec.1 provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $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."[14]
- ***Copperweld v. Independence Tube,* 467 U.S. 752 (1984)**

The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.[15]

- ***Texaco Inc. v. Dagher*, 547 U.S. 1 (2006)**

[14]Cornell Law School, Legal Information Institute, Sherman Act 1890, Available at: https://www.law.cornell.edu/uscode/text/15/1 last visited 19/04/2020
[15] Justitia US Supreme Court Available at: https://supreme.justia.com/cases/federal/us/467/752/ last visited 19/04/2020

“It is not per se illegal under §1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products. Although §1 prohibits “[e]very contract [or] combination … in restraint of trade,” 15 U. S. C. §1, this Court has not taken a literal approach to that language, recognizing, instead, that Congress intended to outlaw only unreasonable restraints, e.g., State Oil Co. v. Khan, 522 U. S. 3, 10. Under rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. See, e.g., id., at 10–19. Per se liability is reserved for “plainly anticompetitive” agreements. National Soc. of Professional Engineers v. United States, 435 U. S. 679, 692. While “horizontal” price-fixing agreements between two or more competitors are per se unlawful, see, e.g., Catalano, supra, at 647, this case does not present such an agreement, because Texaco and Shell Oil did not compete with one another in the relevant market—i.e., gasoline sales to western service stations—but instead participated in that market jointly through Equilon. When those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market. Arizona v. Maricopa County Medical Soc., 457 U. S. 332, 356. As such, Equilon’s pricing policy may be price fixing in a literal sense, but it is not price fixing in the antitrust sense. The court below erred in reaching the opposite conclusion under the ancillary restraints doctrine, which governs the validity of restrictions imposed by a legitimate joint venture on nonventure activities. That doctrine has no application here, where the challenged business practice involves the core activity of the joint venture itself—the pricing of the very goods produced and sold by Equilon. Pp. 3–6."[16]

EUROPEAN UNION

- **Art.101 of Treaty on the Functioning of the European Union (hereinafter TFEU)** provides:

  1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by 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 internal market, and in particular those which:

  (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

  (b) limit or control production, markets, technical development, or investment;

  (c) share markets or sources of supply;

  (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: —

[16] Justitia US Supreme Court Available at: https://supreme.justia.com/cases/federal/us/547/1/ last visited 19/04/2020

a. any agreement or category of agreements between undertakings,

b. any decision or category of decisions by associations of undertakings,

c. any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(ii) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[17]

- ***Consten SaRL and Grundig GmbH v Commission of the European Economic Community*; 56 and 58-64; Judgment of the Court of 13 July 1966**

  "Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance,

[17] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT last visited 19/04/2020 (file:///C:/Users/hp/Downloads/CELEX_12012E_TXT_EN_TXT.pdf)

could not allow undertakings to reconstruct such barriers. Article 85 (1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process."[18]

ABUSE OF DOMINANT POSITION

INDIA

- **Section 4: Prohibition of abuse of dominant position Abuse of dominant position:** (1) No enterprise or group shall abuse its dominant position.

  (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—

  (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. 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

[18] Eur-Lex, Access to European Union Law, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0056&from=EN last visited 19/04/2020

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

Explanation.—For the purposes of this section, the expression— (a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

(b) “predatory price” 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 the goods or provision of services, with a view to reduce competition or eliminate the competitors.

UNITED STATES

- In United States, Sherman Act 1890 Sec.2 provides, “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."[19]

- ***Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)**

"The constituents of an unlawful combination under the Anti-Trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever, and a dissolution of the offending combination should not deprive the constituents of the right to live under the law, but should compel them to obey it."[20]

- ***United States v. Grinnell Corp.*, 384 U.S. 563 (1966)**

The Government brought a civil action against Grinnell Corporation and three affiliated companies, which it controlled through preponderant stock ownership, alleging violations of §§1 and 2 of the Sherman Act. Grinnell manufactures plumbing supplies and fire sprinkler systems, and its affiliates supply subscribers with fire and burglar alarm services from central stations through automatic alarm systems installed on subscribers' premises. The affiliates, which had participated in market allocation agreements, discriminatory price manipulation to forestall competition, and the acquisition of competitors, had acquired 87% of the country's insurance company accredited central station protective service market.

[19] Cornell Law School, Legal Information Institute, Sherman Act 1890, Available at: https://www.law.cornell.edu/uscode/text/15/1 last visited 19/04/2020
[20] Justitia US Supreme Court Available at: https://supreme.justia.com/cases/federal/us/221/1/ last visited 19/04/2020

One affiliated company, American District Telegraph Co. (ADT), itself controls 73% of the national market. The District Court treated the accredited central station service business as a single "market," and held that the geographic market is national. It found that the four companies had violated §§ 1 and 2 of the Sherman Act and entered a decree enjoining them from restraining trade or monopolizing the market, ordering the filing of price information, enjoining them from acquiring any other enterprise in that market, requiring divestiture by Grinnell of its affiliates, and enjoining them from employing the president of Grinnell. All parties challenged the decree.

Held: 1. The existence of monopoly power may be inferred from the predominant share of the market, and where Grinnell and its affiliates have 87% of the accredited central station service business, there is no doubt they have monopoly power, which they achieved in part by unlawful and exclusionary practices. Pp. 384 U. S. 570-571, 384 U. S. 576.”

European Union

- **Article 102 TFEU** (ex Article 82 TEC) Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[21]

- ***United Brands Company v Commission of the European Communities* (1976) case 27/76 Judgment of the Court of 14 February 1978.**

"1 . The opportunities for competition under article 86 of the treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated. for the product to be regarded as forming a market which is sufficiently differentiated from other fruit markets it must be possible for it to be singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible.

2. the dominant position referred to in article 86 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its

[21] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT last visited 19/04/2020 (file:///C:/Users/hp/Downloads/CELEX_12012E_TXT_EN_TXT.pdf)

competitors, customers and ultimately of its consumers in general a dominant position derives from a combination of several factors which, taken separately , are not necessarily determinative." [22]

- ***Intel Corporation Inc., vs European Commission,*** **6 September 2017 (C-413/14 P) EU:C:2017:632 (06 September 2017)**

"Para 142: In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position (see, inter alia, paragraphs 925 and 1760 of that decision), it nevertheless carried out an in-depth examination of those circumstances, setting out, in paragraphs 1002 to 1576 of that decision, a very detailed analysis of the AEC test, which led it to conclude, in paragraphs 1574 and 1575 of that decision, that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.

Para 143: It follows that, in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.

Para 144: In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test."[23]

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[22]Eur-Lex, Access to European Union Law, Summry, Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61976CJ0027 (decision https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN) last visited 19/04/2020
[23] Eur-Lex, Access to European Union Law, Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1587315107280&uri=CELEX:62014CJ0413 last visited 19/04/2020