

Attaining Competitiveness through Competition Law: A Universal Perspective in Indian Context

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Abstract: In the era of digitalization, competitiveness is must for the survival of economic entities. The survival is the most efficient one. Though in U.S. the Competition Law is not a single legislation unlike India. In U.S. there are Antitrust laws like Sherman Act, Clayton Act, Robinson Act to regulate and prohibit antitrust activities whereas in European Countries there is common law known as EC Competition Law and there is common Authority i.e. EC Commission for dealing with the competition issues with other countries and European Countries. As far as India is concerned, before Competition Law there was MRTP Act, 1969. After 1990 when Indian economy was opened for the World, it was very difficult to regulate the market with the provisions of MRTP Act, 1969. In the Year 2002, the Competition Act, 2002 replaced the MRTP Act, 1969 but the Commission actually started functioning from the year 2009.

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Key Words: Competition Law, Competitiveness, Antitrust Law, Efficiency, Dominance, MRTP Commission, EC Competition Law.

LIST OF ABBREVIATIONS

AJ	American Journal
Art	Article
CCI	Competition Commission of India
SC	Supreme Court
Doc.	Document
DOJ	Department of Justice
EC	European Communities
ECC	European Competition Commission
ECJ	European Court of Justice
ECR	European Court Reports
Ed.	Edition
Eur.	European
ECN	European Competition Network
FTC	Federal Trade Commission
ICN	International Competition Network
ILR	International Law Review
Int'l	International
J.	Journal
L.	Law
MLAT	Mutual Legal Assistance Treaty
MOU	Memorandum of Understanding
MRTP	Monopolies and Restrictive Trade Practices
NYUJ	New York University Journal
OECD	Organization for Economic Co-operation Development
OFT	Office of Fair Trading
p.	page
Para	paragraph
pp.	pages
Rep.	Reporter
Res.	Resolution
Rev.	Review

TOR	Treaty of Rome
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WTO	World Trade Organization

1. Introduction:

Attaining competitiveness through competition is the mixed question of law and economics whereas competitiveness through competition is one of the aims and objects of Competition Policy. Competition policy throughout the world revolves around the term 'competition' of which legislative definition has not been given. According to writer competition is an instrument of *excellence, efficiency* and *satisfaction*. The writer states that the actual competitiveness may be achieved only by actual enforcement of competition policy after doing economic analysis of market. In *People v. Sheldon*¹ the court stated that **COMPETITION** is the life of trade. If competition policy is not enforced appropriately, the trade and business would be crumpled. It is not possible to give a statutory², comprehensive or straight jacket definition of the term 'competition' because if a statutory definition of the term 'competition' is given, the narrow approach may affect the competition and the definition clause itself may be anticompetitive but inclusive definition may be cited by the legislature. *Black's Law Dictionary*³ defines competition stating that competition refers to the effort or action of two or more commercial interests to obtain the same business from third parties.

Competitiveness may be achieved through competition if competition is regulated by competition policy and there is actual enforcement of such policy otherwise in the absence of such enforcement, competition policy would be good for nothing. According to write-up the following points should be discussed in order to attain competitiveness through competition:

- Virtues of competition increase the economic efficiency
- Nexus between economic theory and competition law
- Attaining competitiveness by regulating price practices under competition policy
- Attaining competitiveness through competition advocacy
- Whether Section 32 of the Competition Act, 2002 is sufficient to attain competitiveness?
- Role of international organizations to cooperate and to attain competitiveness

- Whether patent monopoly increases competitiveness?

- Attaining competitiveness by applying Rule of reason and per se rule

- Abuse of dominant position eliminates competition

According to author the scope of competition lies in fair⁴, horizontal⁵, perfect⁶ and vertical⁷ competition. The increasing scope of trade and business has also increased the scope of competition. Competition policy is an instrument to promote fair competition and increase the economic efficiency so that trade and business can be given a new dimension.

2. Virtues of competition increase the economic efficiency

The virtue or magic of competition which increases economic efficiency depends on the following factors:

- ❖ Competition tends to provide purchasers with a range of choices.⁸

- ❖ Competition can provide incentive for firms to become more efficient.

- ❖ Competition is often said to provide an incentive for technological progress. The best way to increase the total receipts is the technological progress.⁹

- ❖ It can also be argued that competition in economic markets is most consistent with a democratic political system.

Competition increases the allocative efficiency, productive efficiency and dynamic efficiency. As a general rule, the limitation of market power and prevention of abuse of dominant positions enhances the allocative efficiency by reducing deadweight loss and forcing inefficient firms to make way for more efficient ones.¹⁰ Competition policy also contributes to dynamic efficiency by restricting the ability of dominant firms or group of firms to insulate themselves from competition and thus avoid the need to innovate in order to protect their market shares. Ultimately, effective competition helps to motivate managers to minimize "slack" or "X-inefficiency"¹¹. As *Hicks*¹² famously remarked, "The best of all monopoly profits is a quiet life."

3. Nexus between economic theory and competition law:

Economic theory attempts to establish a framework with which to analyze *what* Goods would

be produced, *how much* of those goods, and how the goods will be distributed? Here the question of competition policy comes. In order to stand in the market, several measures may be adopted by the manufacturers to produce the goods and supply the same but the competition policy regulates the several measures taken by manufacturers to promote, enhance the competitiveness in the relevant market. Price determination of goods depends on supply and demand but the monopolist may control the price determination by taking artificial measures. For e.g. the monopolist may reduce the manufacture of said goods for short period. In this situation the demand would go up and the consumers are forced to pay high price for the same goods of same standard and same utility and the monopolist has option to increase the price of said goods. Such artificial measure taken by the monopolist would be anticompetitive. However, absolute monopoly is not possible but patent monopoly, copyright monopoly may be abused in such a way and therefore, the Competition authority has to look at the market situation that under which circumstances the prices go up and by the application of 'rule of reason' or 'per se rule', as the case may be, the appropriate action should be taken.

4. Attaining competitiveness by regulating price practices under competition policy

Several price practices like excessive pricing, predatory pricing, price squeeze, rebate prices, price discrimination, refusal to deal & non-price contractual etc are the forms of price practices which affect competition in the market. Competitiveness may be achieved by regulating all these practices.

5. Attaining competitiveness through competition advocacy

Competition advocacy is one of the tools to attain the competitiveness and therefore, under **Section 49 (3)** of the Competition Act, 2002 there is an obligation to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. This is the beauty of the Competition Act, 2002 but in other jurisdiction there is no such provision regarding competition advocacy in order to attain competitiveness.

6. Whether Section 32 of the Competition Act, 2002 is sufficient to attain competitiveness?

Section 32¹³ of the Competition Act, 2002 confers subject-matter jurisdiction on Competition Commission of India but the actual beauty of Section 32 of said Act lies in the extraterritorial enforcement jurisdiction. The better extraterritorial enforcement jurisdiction of Competition Commission of India depends on bilateral agreements with other States. In the absence of any bilateral agreement¹⁴ regarding competition law, under International law¹⁵ there would

not be any obligation on any state to cooperate with Competition Commission of India and the beauty¹⁶ of Section 32 of the Competition Act, 2002 would be futile. In *United States v. Aluminum Co of America*¹⁷ Justice Hand laid down the principle of 'effects doctrine'¹⁸. The notion of this doctrine has been incorporated under Section 32 of the Competition Act, 2002 and the actual application and enforcement of such provision would attain the competitiveness through competition.

7. Role of international organizations to cooperate and to attain competitiveness?

OECD¹⁹, UNCTAD²⁰ and ICN²¹ are playing important role to cooperate for the enforcement and development of competition law. The Organization for Economic Cooperation and Development ('the OECD') is active in matters of competition policy.²² In 1995 it published a Revised Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade²³ which provides further notification, consultation and cooperation in competition law cases involving the legitimate interest of foreign Governments; this Recommendation replaced an earlier one of 1986.

8. Whether patent monopoly increases competitiveness?

Patent monopoly and competition policy are two ways to attain the same objectives i.e. the economic and scientific development of society.²⁴ But patent monopoly affects the competition and decreases the competitiveness when patent monopoly is abused.²⁵ However under **Section 140**²⁶ of the Patent Act, 1970 certain restrictive conditions should be avoided but this provision is not sufficient to completely prohibit the abuse of patent monopoly. **Section 83(f)** of the Patent Act, 1970 ensures that the patent right is not abused by the patentee but what amounts abuse of patent monopoly which affects the competition, is a tough job before Competition Commission of India to identify. Henceforth, the writer suggests that in case of interface between patent monopoly and competition policy regarding abuse of patent monopoly, competition policy²⁷ should be applied. Under following circumstances abuse of patent monopoly decreases competitiveness:

- ❖ If patentee imposes unreasonable conditions while granting license.
- ❖ If patentee refuses to give the license without any justifiable reason.
- ❖ If patentee charges high prices for the patented product. (See. Fig.1).

This is one of the examples of abuse of patent monopoly and this affects the economic efficiency and

competition. The patent monopolist may charge unreasonable prices by regulating the quantity of patented products and generates more profit.

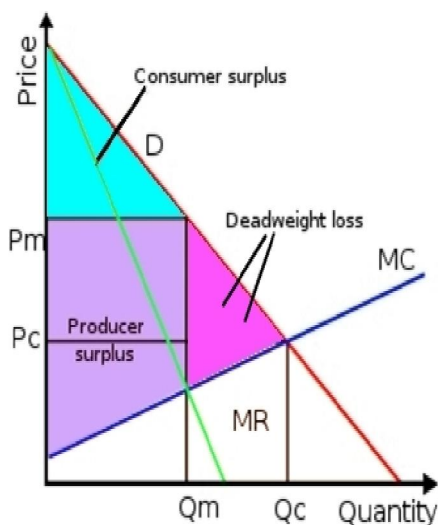


Fig. 1

Figure 1. one of the examples of abuse of patent monopoly and this affects the economic efficiency and competition. The patent monopolist may charge unreasonable prices by regulating the quantity of patented products and generates more profit.

9. Attaining competitiveness by applying the rule of reason or per se rule:

Competitiveness may be attained only when competition law is interpreted and enforced properly. The rules for determining the impact of anti-competitive conduct on fair markets are the 'rule of reason' and 'per se rule'.²⁸ The rule of reason²⁹ in examining the legality of restraints on trade was explained by the *US Supreme Court in Board of Trade of City of Chicago v. US*³⁰.

In *United States v. Socony-Vacuum Oil Co.*³¹ the defendants were convicted of conspiring to raise gasoline prices by buying up and removing from the market. The US court applied per se rule in this case. In India also the Supreme Court of India applied the 'rule of reason' in *Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement*³². In this case the court stated that the decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be restrictive trade practice. However, after the judgment of this case by amendment of *Section 33(1)* of MRTP Act in 1984, allocation of an area for the disposal of goods sold became a per se restrictive trade practice. *Section 3(3)(a to d)*³³ of the

Competition Act, 2002 is based on 'per se rule'. *Section 3(4)(a-e)* of the Competition Act, 2002 is based on 'rule of reason'.³⁴

10. Abuse of dominant position eliminates competition

Competitiveness comes through competition but abuse of dominant position kills competition. Regulatory provisions in this regard are *Section 4*³⁵ of the Competition Act, 2002 (in India), *Article 82*³⁶ (in European Communities) of the Treaty of Rome, 1957 and *Section 2* of the Sherman Act, 1890 (in US). In *United Brands*³⁷ and *Hoffmann-La Roche*³⁸, the European Court of Justice (ECJ) gave a definition of dominance that still stands today: a dominant position is a position of economic strength that enables a firm to prevent effective competition on the relevant market; a firm with a dominant position has the power "to behave to an appreciable extent independently of its competitors, its costumers and ultimately of its consumers."³⁹ Hence, competitiveness through competition may be achieved when abuse of dominant position is regulated.

Conclusion And Suggestion

The writer concludes that attaining competitiveness through competition is the result of competition policy with the better understanding of economics. In the absence of or improper understanding of economics, competition policy cannot achieve its goal mentioned in the Preamble of The Competition Act, 2002.

The writer's views are suggestive rather than comprehensive and conclusive. The writer suggests that with the deeper understanding of economics to increase economic efficiency in trade, the Competition Commission of India should also emphasize on the enforcement part and particularly on extraterritorial enforcement jurisdiction of Competition law. The writer strongly suggests that India (like US, EU and Canada) should also enter into *bilateral agreements and mutual legal assistance treaties* for the better implementation and enforcement of Indian competition law outside the country in order to attain competitiveness through competition. But only this step is not sufficient, hence, Competition Commission of India should also use its weapon given under the *proviso* of *Section 18* of Competition Act, 2002.

End Notes

¹ *People v Sheldon* 139 NY 251. In this case the court has acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in

- trade, and have held such agreements to be invalid because it affected the competition.
- ² There is no statutory definition of the term 'competition' under Sherman Act, 1890, Clayton Act, 1914, The Treaty of Rome, 1957, The Competition Act, 1998 (UK), The Competition Act, 2002 (India).
 - ³ Bryan A. Garner, "BLACK'S LAW DICTIONARY", Seventh Edition, 1999, West Group St. Paul, Minn., p.278.
 - ⁴ Fair competition denotes open, equitable, and just competition between business competitors. For further clarification see; Bryan A. Garner, "BLACK'S LAW DICTIONARY", Seventh Edition, 1999, West Group St. Paul, Minn., p.278.
 - ⁵ Horizontal competition refers to the competition between a seller and its competitors. The Sherman Act, 1890 prohibits the unreasonable restraints on horizontal competition, such price-fixing agreements between competitors. In India under Section 3 of the Competition Act, 2002, such anti-competitive practice has been prohibited.
 - ⁶ Perfect competition refers to a completely efficient market situation characterized by numerous buyers and sellers, homogenous product, perfect information for all parties, and complete freedom to move in and out of the market.
 - ⁷ Vertical competition refers to the competition between participants at different levels of distribution, such as manufacturer and distributor.
 - ⁸ Thomas D. Morgan, Jeffrey L. Harrison and Paul R. Verkuil, "ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS", Second Edition, West Publishing Co. St. Paul, Minn., 1985, p.14.
 - ⁹ Some argue that a monopolist has an incentive to innovate in order to keep or justify its monopoly. The monopolist may also have an incentive to innovate because it is less worried about a competitor's stealing its invention. For better understanding see; F.M. Scherer, Industrial Market Structure and Economic Performance 346-78 (1970); Posner, Natural Monopoly and its Regulation, 21 Stan. L. Rev. 577-84 (1969); Demsetz, Information and Efficiency: Another Viewpoint, 12 J. Law & Econ.1 (1969).
 - ¹⁰ Abel M. Mateus & Teresa Moreira, "COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY AND ANTITRUST ENFORCEMENT", Kluwer Law International, 2007, p.179.
 - ¹¹ J. Haskel, "COMPETITION AND X-INEFFICIENCY: A SURVEY", Paper prepared for the Office of Fair Trading, London, 1996.
 - ¹² J. Hicks, "ANNUAL SURVEY OF ECONOMIC THEORY: THE THEORY OF MONOPOLY, ECONOMETRICA", 3 (January, 1935): 1-20.
 - ¹³ Section 32 of the Competition Act, 2002 makes provision regarding acts taking place outside India but having an effect on Competition in India.
 - ¹⁴ The author favours bilateral agreement in place of multilateral agreement for the enforcement of Competition law outside the territory. Between US and other States the bilateral agreements are mentioned below: Agreement with Germany – 1976 (USA/L/III/1); Agreement with Australia-1982(USA/L/III/2); Consumer Sentinel Network Confidentiality Agreement(USA/L/III/2A); Agreement Between the Federal Trade Commission of the United States of America and the Australian Competition & Consumer Commission on the Mutual Enforcement Assistance in Consumer Protection Matters (USA/L/III/2B); Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance (USA/L/IH/2C); Agreement with Canada – 1995 (USA/L/III/3) US - Canadian Task Force on Cross - Border Deceptive Marketing Practices (USA/L/III/3A)
 - ¹⁵ Under International law there would be international obligation only when there is any treaty or agreement otherwise under Vienna Convention, 1969 there would not be any obligation on any state therefore, for the writer emphases on the formation of bilateral agreement between India and other states for the enforcement of competition law outside its jurisdiction.
 - ¹⁶ The author refers the insertion of Section 32 under the Competition Act, 2002 as beauty of the said Act because under MRTP Act, 1969 there was no such provision giving extraterritorial jurisdiction to MRTP Commission but this beauty would be futile if actually Competition Commission of India cannot exercise extraterritorial jurisdiction.
 - ¹⁷ *United States v. Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945)
 - ¹⁸ Effects doctrine applies when any action taken outside the country has 'direct, substantial, and reasonably foreseeable' effects within the Country.
 - ¹⁹ OEC Doriginated in 1948 as the Organization for European Economic Co-operation (OEEC), led by Robert Marjolin of France, to help administer the Marshall Plan for the reconstruction of Europe after World War II.
 - ²⁰ The United Nations Conference on Trade and Development was established in 1964 in order to

provide a forum where the developing countries could discuss the problems relating to their economic development.

- ²¹ International Competition Network has been established in 2002 to the competition policy of different jurisdictions.
- ²² See; Richard Whish, "COMPETITION LAW", Fifth edition, Oxford University Press, 2003, p. 447.
- ²³ See; OECD document C(95) 130 (final), 27 July 1995.
- ²⁴ See Article 1 Section 8 Clause 8 of US Constitution which states that the object of copyright and patent monopoly is to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. The object of the competition policy is also same by increasing and promoting fair competition.
- ²⁵ According to Section 3(5) of the Competition Act, 2002, the appropriate action to restraint the infringement and reasonable conditions may be imposed by the patentee but patent monopoly cannot be abused otherwise Section 4 of the Competition Act, 2002 would be applicable.
- ²⁶ Section 140 of the Patent Act, 1970 talks about avoidance of certain restrictive conditions.
- ²⁷ The abuse of patent monopoly should be regulated under Competition Act, 2002.
- ²⁸ T. Ramappa, "COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS", Oxford University Press, 2006 (First edn.), p. 75.
- ²⁹ If rule of reason is applied, the complainant has to prove that there is 'appreciable adverse effect on competition' in the relevant market.
- ³⁰ *US Supreme Court in Board of Trade of City of Chicago v. US* 246 US 231 (1918)
- ³¹ *United States v. Socony-Vacuum Oil Co* 310 U.S. 150 (1940).
- ³² *Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Agreement* (1977) 47 Comp Cas 520 Supreme Court.
- ³³ If any anticompetitive agreement is alleged to have been committed under Section 3(3)(a-d) of the Competition Act, 2002, there would be presumption to have an appreciable adverse effect on competition and therefore, 'per se' rule would be applicable. Following are other cases where the US Supreme Court has applied the 'per se rule': *United States v. Socony-Vacuum Oil Co.*, 310 US 150, 210; division of markets (*United States v. Addyston Pipe & Steel Co.*, 85 F. 271); group boycotts (*Fashion Originators' Guild v. Federal Trade Commission*, 312 US 457); and

tying arrangements (*International Salt Co. v. United States*, 332 US 392).

- ³⁴ Section 3(4)(a-e) of the Competition Act, 2002 is based on rule reason because the complainant has to prove that anticompetitive agreement causes or is likely to cause an appreciable adverse effect on competition in the relevant market in India.
- ³⁵ Section 4 of the Competition Act, 2002 imposes an obligation on an enterprise not to abuse the dominant position.
- ³⁶ Article 82 of the EC Competition Law also prohibits the abuse of dominant position and mentions four examples of abuses i) directly or indirectly imposing unfair prices or other unfair trading conditions; ii) limiting production or development to the prejudice of consumers; iii) unequal treatment of trading parties, thereby placing some at a competitive disadvantage; and iv) making use of tying contracts, hence, forcing unnecessary supplementary obligations on consumers.
- ³⁷ Case 27/76, *United Brands Co and United Brands Continental BV v. Commission* [1978] ECR 207, [1978] 1 CMLR 429, para. 65.
- ³⁸ Case 85/76, *Hoffmann- La Roche & Co AG v. Commission* [1979] ECR 461, [1979] 3 CMLR 211
- ³⁹ In economic terms, one would, hence, say that a dominant position is one in which the firm has a "reasonably large degree of market power.

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