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COMPETITION LAW: CONCEPTUAL AND THEORETICAL BACKGROUND

By: Eshita Pallavi

ABSTRACT

Modern economic theory focuses on the optimal allocation of the resources of an economy. From this theoretical perspective, a competitive market is only an instrument used to achieve efficient allocation. Hence, it is plainly evident that efficiency is the ultimate goal, and if agreements between firms or mergers lead to a higher degree of efficiency, then they should be allowed. However, where the market suffers from imperfections, the duty lies on the State to intervene and correct the same. In light of this context, the research focuses on the conceptual and theoretical background of competition law and policy. It outlines the objective of competition laws and the economic theories behind its formulation. It also entails into a philosophical analysis of competition to find the jurisprudential basis of these policies and the reason to place it in the domain of public laws albeit the fact that traditionally matters of trade and commerce were derived from laissez faire market and considered beyond the purview of State supervision. Finally, the research also discusses the history of competition law and policy.

1.1. INTRODUCTION

Competition is a relatively simple concept. It means "struggle or contention for superiority, and in the commercial world, this means striving for the custom and business of people in the marketplace"[1]. In essence, competition can be described as a process of rivalry between firms seeking to win customers' business over time. In our world with limited resources, competition among market participants aims to achieve better output at the best level. The benefits of competition[2] can be summarised as:

- Lower prices
- Better products that are of higher quality
- Higher rate of innovation
- Wider choices for consumers
- Greater productive and allocative efficiency

The benefits of competition clearly suggest that it has an effect on the economy as a whole.

[1] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW, 4 (9th ed, Oxford 2012).
[2] *Id.* at 7.

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To determine the extent of this effect, one needs to look into how competition exists in different forms of market. This is the point where we turn to economics for the end goal of competition is efficiency of the market *in toto*.

Now, having seen that competition is an economic phenomenon, it becomes imperative to understand the different economic theories of competition as there cannot be good law without good knowledge of the subject matter to which that law applies. First, the expectation of competition in an idealistic state of affairs and then what happens in reality and the measures to correct them. While the classical school of economic thought proposes that the market forces can correct itself in its free state, the inability of the market to do so calls for different remedial techniques. At this point, the State intervenes to correct the market failure and thus, the competition laws and policies come into picture. The objective of competition therefore moves towards the welfare of the public as a whole and is not confined to the idea of a free market alone. With this intervention, the philosophical analysis of competition also takes a front seat and it becomes necessary to dwell into the thoughts of political thinkers who called for state intervention in the commercial arena.

1.2. ECONOMIC THEORIES BEHIND COMPETITION LAW

A significant change was seen in the economic approach to competition over a period of time. From the idea of private ownership of capital and unfettered free enterprise to the government regulating the means of production, we have moved towards a welfare state, trying to balance the corporations' free decision-making power and the government's complementary position in a successful economy. Before embarking on the different theorems, one needs to understand the ideal state that the competition policy as a whole try to achieve in the first place: a state of **perfect competition**.

1.2.1. Theory of Perfect Competition

Neo-classical economic theory says that social welfare is maximized in perfect competition[3]. There are a large group of buyers and sellers who are well educated in a fully competitive market and deliver standard goods and services with no obstacle to market entry or exit[4]. The market under perfect competition provides the highest possible level of distribution and efficiency[5], increasing consumer benefit. This model of market economy is specifically aimed at the limited group identified as consumers rather than the general society at large. A major proportion of the economic analysis of competition policy and its consequences focused on perfect competition and stem out of this model.

[3] SCHERER AND ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3rd ed., Houghton Mifflin 1990).
[4] WHISH & BAILEY, *supra* note 22, 4.
[5] *Id.* at 5.

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1.2.2. Theory of Allocative Efficiency

The distribution efficiency under perfect competition is theoretically related to the general equilibrium theory and normatively related to the Pareto criterion[6]. The pareto criterion states that "economic resources are allocated between different goods and services in such a way that it is not possible to make anyone better off without making someone else worse off leading to achieve what is termed as *pareto efficiency*"[7]. This theoretical appeal in economics is attributable to the widespread belief that there is no interpersonal utility distinction.

The allocation theory is based on the reasonable assumption that all the factors of production and factors of functions that exist in the economy remain constant. An efficient allocation implies distribution of the resources in society in such a way so as to achieve the pareto criterion for the entire economy. This means that even by applying any other permutation and combination for reallocation of all the factors available, the welfare of one individual cannot improve without a proportional reduction in the utility of another individual. The theory of 'General equilibrium' shows that this includes a variety of marginal and cumulative conditions. This principle specifically describes the idea of 'efficient allocation', showing that, according to different initial allocations of these resources to citizens in the economy, there are an infinite number of efficient resource allocations in all economies. Therefore, different allocations of resources are efficient for different distributions[8].

Under perfect competition, it is possible to fulfil the goal of allocative efficiency because a reasonable producer would increase his output as long as the market conditions allow him to do so. Considering that any decline in output result in higher prices in a perfect competition, the producer in fact ameliorates his output to a point where the marginal cost and marginal income correlate. This ensures that allocative efficiency is accomplished by allowing customers to purchase the necessary goods at a price they are willing to pay and resources to be distributed precisely as they wish[9].

Goods and services are manufactured at the lowest possible cost under perfect competition. Production quality is achieved here because a manufacturer cannot sell over costs and does not sell below production costs. If a supplier charge over the cost, in the hope of competitiveness, the other rivals will move on to the market. In the long run, there will be a trend causing producers to pay the lowest possible costs and as a consequence, the price coincides with the average production cost, resulting in a state of equilibrium.[10]

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[6] HAL R. VARIAN, MICROECONOMIC ANALYSIS (3rd ed, Norton & Co. 1992).
[7] JOSEPH E. STIGLITZ & JAY K. ROSENGARD, ECONOMICS OF THE PUBLIC SECTOR, 67-71 (4th ed, 2015).
[8] Wolfgang Kerber, *Should competition law promote efficiency? Some reflections of an economist on the normative foundations of Competition Law, in* ECONOMIC THEORY AND COMPETITION LAW (Josef Drexel et al. eds., Elgar 2009).
[9] *Id.* at 95.
[10] WHISH & BAILEY, *supra* note 22.

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1.2.3. Theory of Free Market Economy

Unfortunately, the idea of perfect competition is utopian in nature as the concept of perfect market for the most part, is an illusion which cannot be replicated in the real world. The concept of perfect market is merely theoretical in nature and it cannot be implemented in the practical world. This major flaw in the free market theory is that it does not recognize the externalities and imperfections which can occur in a market as a result of fluctuation of resources due to their scarcity. This means that the level of allocation and distribution depends on a large number of factors that affect the market. As such, the 17th and 18th century mercantilist school argued that government should encourage the market and trade in order to achieve the best public interests.

Nevertheless, in 1776 Adam Smith argued for the restricted role of the government in his idea of an invisible hand in "The Wealth of the Nations." He indicated that "the public interest is maintained when each individual simply does what is in his own self-interest". Smith tried to show how rivalry and the desire for benefit led individuals to supply the products others desired, competing against each other. Only companies which produced as per the demand of consumers and at the lowest possible price would succeed. The economy was led to produce what was anticipated and in the best manner possible, as if by an invisible hand[11]. Many influential 19th century economists such as John Stuart Mill and Nassau promulgated the laissez faire theory in favour of this view. This doctrine suggests that the government should not intervene in any activity of the private sector nor try to regulate or monitor private businesses. Unrestricted competition and a free market will serve society's best interests[12]. The expected results were not obtained through such a free market economy attempt and the system developed severe inefficiencies, such as disproportionate allocation of resources and revenues that caused mass unrest[13].

The result of leaving the market to function devoid of legal and regulatory control is clearly demonstrated by the 'Robber Barons'[14] of the nineteenth century that led to the adoption of the Sherman Act in the USA, thus giving rise to first antitrust policy and the beginning of State intervention in controlling and regulating the market.

1.2.4. Theory of Welfare Economics

The correlation between efficient allocations and competition is demonstrated by the first principle of welfare economy: if the conditions of a perfect market model are fulfilled by all the elements (products and factor markets), then a universally decentralized behaviour of achieving the optimum output by all the actors would provide for an adequate allocation throughout the economy and hence, the pareto criterion would be automatically achieved[15]. It is obvious that,

[11] ADAM SMITH, AN ENQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (S.M. Soares, MetaLibri 2007).
[12] BRUNO LEONI, LAW, LIBERTY AND COMPETITIVE MARKET (Carlo Lottieri, Transaction publishers 2009).
[13] STIGLITZ & ROSENGARD, at 80.
[14] TIM MCNEESE, THE ROBBER BARONS AND THE SHERMAN ANTITRUST ACT (Chelsea House Publishers 2009).
[15] Wolfgang, *supra* note 29, at 96.

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given all its idealistic assumptions, the 'perfect competition' paradigm remains fundamental to economic theory. It is an ideal form of the market from the viewpoint of the objective of efficient allocation and, even more broadly, of organizing the whole economy.

The theory of the welfare market failure is thus based on the notion that any deviation from the premises of' perfect competition' contributes to some form of allocative inefficiency, and therefore calls for certain correction of the allotments by economic policy. From such theoretical perspective of welfare economics, a variety of economic policies are considered necessary to solve different kinds of problems related to market failure, and competition policy is just one of them. Competition is therefore an instrument with the specific purpose of achieving allocative efficiency in terms of economic theory of allocation[16].

1.2.5. State Intervention in Market Economy

In order to provide for optimal allocation of resources, the State intervenes in the market against its failures. There are six conditions under which the markets are not Pareto efficient and they provide a rationale for government activity.

1. Failure of Competition

In order for markets to result to pareto performance, competition has to be perfect, that is, the producer becomes the price-taker with the consumer being the sovereign. But, the market price of a commodity can be changed if the factors of production are controlled by a single firm, as in, a monopoly, or a small group of firms, as in, oligopoly. As one or few players are responsible for all goods and since total production dictates price through the supply-to-demand relationship, monopolists and oligopolists will either be able to raise their price through limiting their own production volumes or to decrease output with an increase in prices. It would result in lower production relative to perfect competition, and therefore some buyers would be robbed of the goods and services they were willing to pay for at the reasonable price of the market. In this case there is no allocative inefficiency, i.e. the resources of society are not shared as effectively as possible.

2. Public Goods

Pure public goods are those which either are not commonly supplied by the private players or are inadequately supplied. These products have two characteristics. Firstly, the additional person who enjoys the good has no marginal costs. Additionally, it is usually hard or impossible to exclude persons from the benefits of a pure public good. In the absence of high profits, private players hesitate to manufacture these goods that eventually leads to market inefficiency. This assumption provides the government with a justification for regulating the market.

[16] *Id.*

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3. Externalities

Externalities refer to the effects of market players ' acts which include costs to others or influence other third parties. It can be either positive or negative. Market price is not directly impaired by externalities. However, it has a substantial impact on the allocation of resources made available which eventually renders the market inefficient. Market players indulge in activities that produce negative externalities because the cost of such negative effect is borne by all. This seems to be more beneficial than engaging in activities that result in positive externalities where the profits are shared by all. Therefore, government intervenes in the market to dissuade players from such negative externalities.

4. Incomplete Markets

Whenever private markets fail to provide a good or service even though the cost of production is less than what the consumers are willing to pay, there is a market failure that we refer to as incomplete markets. It is unlike a complete market where all the goods and services are readily available for which consumers are willing to pay more than the cost of production. For instance, in insurance and capital market sector, the continuous innovation, transaction costs, asymmetrical information and enforcement costs are the reasons for underproduction of goods and services in these arenas which invites the State to step in and create and equilibrium between supply and demand.

5. Information Asymmetries

Most policy actions are motivated by the consumers ' imperfect information and the perception that too little information is provided by the market itself. Although the principle of perfect competition implies that all information regarding the products are equally dispersed to the consumer, in reality, the same is not true. Complete access to the information for making a choice of product must be given to the consumers even before allocation of those products begin. This means that complete knowledge should be imparted for making a rational decision. For this, the government interferes by introducing mandatory product labelling steps to ensure such a flow of information from the producer to the customer. and removing any information asymmetries.

6. Unemployment, Inflation and Disequilibrium

The capitalist economies in the past have been ravaged by recurring periods of high levels of unemployment, in both workers and machines, which is symbolic of the largest market failure in a free economy. The high unemployment rates are generally known to show that the economy does not perform well on the market. The issues raised by unemployment and inflation are complex enough and warrants State intervention to correct the same.

1.3. PHILOSOPHICAL FOUNDATION OF COMPETITION

Competition law and policy generally revolve around its goals, objectives and priorities.

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By defending small business from the actions of big companies to consumer protection as well as to optimizing capital as a whole, the legal philosophy underlying the antitrust strategy has shifted. To make sense of the future direction of competition law for the benefit of society, then antitrust needs anchoring and it is philosophy that provides the flukes. In light of the interplay between public interest and economic freedom of market players viz-a-viz the political thought behind enactment of Competition policy is traced out in this segment.

1.3.1. Utilitarianism Theory

The egalitarian approach to competition law is based on Mill and Bentham's utilitarian ethical approach, which provides the greatest amount of happiness to the maximum number of individuals. This approach, in competition law, focuses primarily on what is of greatest benefit to consumers and society as a whole[17]. This theory states that the moral significance of an action must be measured through its effect on happiness- "the excédent of satisfaction over suffering"[18] aggregated across the whole "society", which could be one nation or the whole world[19]. Normative economics assumes that policy, law, etc., has its impact on "welfare," and this concept is often so broadly defined that it is perfectly compatible with the utilitarian notion of happiness. Identification of economics with utilitarianism was strengthened by the popular propensity to use the word "utilities" for defining welfare in the phrase "utility maximisation" and by the fact that many prominent utilitarian theoreticians, such as Bentham and Edgeworth and John Stuart Mill, have been prominent economists as well[20]. The "welfare theory" concept is also in fact rooted in Bentham and Mill's utilitarian theories.

Under Competition Law and Policy, the aim is to improve consumer welfare and, ultimately, society as a whole. The concept of having a level of satisfaction can be balanced by this consumer welfare or total welfare. The antitrust is generally aimed at providing all participants in society with equal opportunities to gain benefits. Therefore, the parallel efficiency that these laws aim to achieve is essentially a situation in which the gain of each person is maximised and maximum output is achieved.

1.3.2. Theory of Distributive Justice

Rawl's theory of "*justice as fairness"*[21] portrays a society of free individuals possessing equal fundamental rights and interacting within an equal economic framework. His second theory of distributive justice governs wealth and income sharing and notes that social and economic inequalities must meet two requirements: (a) they must be attached to roles and offices available

[17] Benjamin Hume, *The Goals of European Competition Law: Utilitarianism and Deontology,* S.J. L., Issue 6, https://sites.google.com/site/349924e64e68f035/issue-6/the-goals-of-european-competition-law-utilitarianism-and-deontology (last visited on Feb. 03, 2020).
[18] HENRY SIDGWICK, THE METHODS OF ETHICS, 413 (7th ed. 1981).
[19] *Id.*
[20] Richard A. Posner, *Utilitarianism, Economics, and Legal Theory,* 8 J. Legal Stud. 103 (1979).
[21] JOHN RAWLS, A THEORY OF JUSTICE (Reissue ed., Harvard University Press 1971).

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to all, in conditions of equitable equality of opportunity; and (b) they should benefit most of the least-advantaged members of society. The first part addresses "the principle of fair equality of opportunity"[22]. The concept is interpreted as a condition in terms of competition law and policy, wherein all business players are given equal opportunities and resources to enter and exit the market.

The second principle is the "difference principle" or concept of inequalities in which resources, should flow from those who are better-favoured to the less-favoured, in order to achieve equality in the economy and society[23]. Competition law, politics and policies are essentially based on this distributive justice principle in which resources are distributed in a manner that does not affect small companies and businesses by concentrated market players.

The principle of distributive justice is also integrated into the ideals of egalitarianism. This means that each individual is entitled to the same amount or level of materialistic things or resources. The theory is most often explained because people are morally equal and because equality of material goods and services is the best way to achieve this moral ideal.[24].

Under the egalitarianist economics, equal status is assumed by all and everybody is entitled to accumulate wealth in a free-market economy[25]. Egalitarian economies therefore emerge as the basis for idealizing competition, with no barriers to any entity, and with the free flow of market forces, the economy achieves output. And, it is the failure of the economy to attain such egalitarian position that the State intervention is justified based on the concept of social contract theory but simultaneously embodying the principles of distributive justice.

1.4. HISTORICAL BACKGROUND OF COMPETITION LAW

The antitrust or competition policy has evolved through the years and were mostly the result of the economic and political thought that influenced the contemporary government. Before a substantial legal framework was developed to regulate the market, the economic freedom of the players was protected by the common law doctrine of restraint of trade.

1.4.1. Doctrine of Restraint of Trade

The doctrine of restraint of trade is a limited doctrine that allows a party to escape a contract which unreasonably restrain their ability to trade. It was in contrast to the earlier view that restrictive covenants are vital to protect the interests of the employer as there are no implied terms

[22] Shlomi Segall, *Fair equality of opportunity*, *in* THE CAMBRIDGE RAWLS LEXICON, 269-272 (J. Mandle & D. Reidy eds. 2014).
[23] Samuel Freeman, *Original Position*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta, Summer ed. 2019), https://plato.stanford.edu/entries/original-position/ (last visited Feb. 21, 2020).
[24] Lamont, Julian and Favor, Christi, *Distributive Justice*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta, Winter ed. 2017), https://plato.stanford.edu/archives/win2017/entries/justice-distributive/ (last visited on Feb. 21, 2020).
[25] Will Kenton, *Egalitarianism*, *in* Government and Policy, Investopedia (May 8, 2019), https://www.investopedia.com/terms/e/egalitarianism.asp.

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that provide protection from competition, solicitation and sharing of trade secrets or confidential information after the contract of employment is terminated.

Under the early common law of England, all contracts whereby a person bound himself to abstain from the exercise of a particular trade, business or vocation were void, regardless of whether the restraint was general or special, as being against public policy. J.S. Mill justified this doctrine to preserve liberty and competition. The reasoning was that contracts in restraint of trade tend to eliminate or reduce competition and enforcement of such a contract was to deny the tradesman the right to earn his living.

The doctrine has evolved over a period of time in terms of providing exception in the form of reasonableness of a contract. While in the *Dyer's case*,[26] the contract restraining practice of trade was held illegal and void, a change in the judicial attitude was witnessed in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*[27] where the covenant was held to be reasonable and enforceable for protection of goodwill. In the latter case, it was held that a contract restraining trade would be void and contrary to public policy unless special circumstances show them to be reasonable.

Lord McNaughton beautifully explained the relation between a market player's interest in pursuing his trade and public interest. The public have an interest in every person's carrying on his trade freely; so, has the individual. All interference with individual liberty of action in trading are restraints of trade. They are contrary to public policy and therefore, void.

While the doctrine of restraint of trade intended to provide economic freedom, at least, judicially, the State's actions around the world were influenced by the economic and political thought prevalent at that point of time. Although Adam Smith and other liberalists advocated for minimum or no interference of the State in the market, their idea of private ownership was considered as a vice by the subsequent philosophers like Marx. In the Soviet Union and Eastern bloc of the world, Marxist theories influence the government to control means of production. There was however, not much advancement in competition law policy per se. The nations around the world, however, agreed on one aspect that, markets and private enterprises are at the heart of a successful economy but the government plays a complement role to the market to maintain that economy. The precise role of the Government continued to be a source of contention. It differed between countries and nations over time, depending upon society's expectations from the Government and what the members are willing to pay to meet those expectations, that is, the 'social contract'.

1.4.2. Antitrust Laws in United States

Modern competition law begins with the United States legislation of the Sherman Act of

[26] Dyer's Case, (1414) YB 2 Hen. 5, Vol. 5, 26.
[27] Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] AC 535.

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1890. While other, particularly European countries, also had some form of regulation on monopolies and cartels, it was the U.S. codification of the common law position on restraint of trade that helped in subsequent development of competition law. Competition policy originated to ameliorate concentrated economic power that was used to manipulate political outcomes[28]. The American term "anti-trust" was devised in response to the American corporations' act of creating trusts to repress their unfair trade practices through certain business arrangements. The Sherman Act was passed as a response to these trusts that created obstacles in a free market economy and in fact became a threat to democracy. Essentially, this law codified past American and English common law of restraints of trade. The underlying principle of the antitrust policy is *"the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institution*[29]*."*

The Sherman Act provided inadequate relief against anticompetitive behaviours, and consequently, amendments to the antitrust laws followed in the form of Clayton Act in 1914 as a result of after-effects of the judgment in *Standard Oil Co. v. US* wherein, in an attempt to prohibit restraint of trade ended up making the perpetrator all the more prosperous. The Clayton Act was thus, enacted as a response to public outcry and aimed to prohibit monopolies.

The Great Depression in the 1930s was the event that most fundamentally changed the attitudes towards Government. The markets had failed and it was at this point of time that John Meynard Keynes argued that the Government should and could stabilize the level of economic activities. In response to this, the federal government not only took an active role in attempting to revive economy but also passed legislations to alleviate other economic problems.

The Robinson-Pattinson Act was passed in 1936 that attempted to protect small business from discriminatory prices by their supplies. At this point, the Harvard school of antitrust laws formed the basis of enactments and judicial pronouncements. This school of thought believed that when markets are concentrated, firms are more likely to engage in anti-competitive conduct. Under this approach, there was a presumption of illegality of any mergers, joint ventures or agreements that allowed firms to obtain, enhance or exercise market power, regardless of whether the conduct had the potential to benefit consumers by lowering prices or increasing output.

A significant change in antitrust jurisprudence occurred in the 1970s when stringent antitrust enforcement triggered a backlash that transformed law and policy. In an attempt to remove progressive or populist political preferences from antitrust legal analysis, new economic thinking associated with the Chicago school of law and economics argued that maximizing *consumer welfare* should be the sole goal of antitrust law. As a result, many business practices once

[28] Tony Freyer, *Antitrust Legislation and Law*, in THE OXFORD ENCYCLOPAEDIA OF AMERICAN POLITICAL AND LEGAL HISTORY, (Donald T. Critchlow & Philip R. VanderMeer eds., New York: Oxford University Press 2012).
[29] Northern Pacific Railway Co. v. United States, 356 U.S. 1,4.

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considered anticompetitive became legal. The applications of antitrust law narrowed, and the judiciary became less interventionist in policing market transactions. The same was reflected in the legislation passed at that time. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 called for a notification of the merger or acquisition only if the total value of the transaction exceeded certain thresholds, thus, beginning to minimise State intervention in mergers or activities of the market players that would otherwise not harm the consumers.

1.4.3. Competition Law in European Union

In European Union, the idea of using law to protect the competitive process emerged as early as 1890s when an Austrian group of scholars and administrators articulated the idea of using law to encourage economic growth and competitiveness but the political turmoil in 1897 prevented any action on the same. After the end of 2nd World War, many European Governments turned to competition law as means of encouraging economic revival.

Earliest 'Community Competition Controls' were introduced in the Treaty of Paris in 1951, establishing the 'European Coal and Steel Community'. In 1957, by virtue of the Treaty of Rome, the European Economic Community (EEC) was created as a common market to promote a harmonious development of economic activities throughout the community. One of the objectives of establishment of EEC was to create independence between member states of Europe and prevent a re-occurrence of a war by uniting them, at least, economically. Accordingly, competition rules were included to assist in the creation of a unified competitive environment and in an attempt to prevent companies from re-erecting trade barriers. Subsequently, the office of Director-General for Competition (DG COMP) was established to implement competition policy for the EU in mid 1980s. Further, in order to coordinate national and EU Competition policies, the European Competition Network (ECN) was set up.

With the development of competition law policy in EU, United Kingdom was under the pressure to formulate its laws in consistence with the EU. With the arrival of the labour government in 1997, the Competition Act finally received royal assent on 9th November, 1998 and the Competition Commission was thereafter, established in 1999.

1.4.4. Competition Law in India

In India, the major development of competition law occurred post-independence. The Industrial Development and Regulation Act, 1951 was the first economic legislation in India wherein the government regulated every aspect of private sector through licensing policies. Public sector was patronized to achieve growth in the market. However, free competition suffered due to this enactment and resulted in monopolies and license raj.

The Monopolies and Restrictive Trade Practices Act (MRTP) was passed in 1969 in response to the growing concentration of the private sector underlined in the Report of Monopolies Inquiry Commission in 1965. The MRTP Committee was set up and charged with investigating

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the actions of companies accused of "monopolistic, restrictive or unfair trade practices". However, the MRTP Act hindered efficiency because of its strict regulations. The MRTP Commission lacked the authority to impose penalties for infringements. Between 1991 to 2007, only 7 cartel lawsuits were resolved, with almost all resulting in dismissal because of lack of evidence. When existing legislation had in some ways become redundant, the focus was shifted from curbing monopolies to encouraging competition in the Indian market.

The country's economic crisis led to economic reforms and the dawn of a new economic and industrial policy in 1991. This break from "command and control regulation" resulted in a reform of competition laws. India became a member of two significant WTO agreements, namely GATT and TRIPS. With the global development in mind, the Raghavan Committee was established to review the MRTP Act. The Committee found MRTP insufficient to promote competition in the market, and proposed that the current Act be abrogated and a new competition statute be adopted, which would include both public and private competition. Consequently, in December 2002 the Competition Act 2002 was passed in parliament and, in January 2003, the Presidential Assent was given. On 1 September 2009, the Competition Act repealed the MRTP Act.

The Competition Commission was established under the Act as a quasi-judicial body bound by principles of rule of law in giving decisions and the doctrine of precedents. The CCI has all the powers of a civil court for gathering evidence. The Act deals with three kinds of actions, namely, Anti-competitive agreements (§3), Abuse of Dominant Position (§4) and Combinations (§§5 and 6).

1.5. CONCLUSION

Since the classical liberal teachings of John Locke, the capitalist economic system has focussed on the correlation between competition and economy[30]. This was further advanced by the free market theory by Adam Smith[31]. Economic and political change with respect to competition and market helps to evaluate goals of competition and thus, the need to determine competition policy as well as the extent of state intervention in the market.

The purpose of antitrust law, according to the traditional concept, is to ensure the right of the market players to compete. The reasoning behind this is that freedom to compete contributes to innovation and to economic and social welfare. This is also the end goal of modern economic approach to competition law. A careful analysis of the existing theories suggests that the primary objective of competition policy is to enhance consumers' welfare by favouring the development

[30] JOHN LOCKE, THE SECOND TREATISES OF GOVERNMENT, AND A LETTER CONCERNING TOLERATION (3rd ed., Blackwell 1966).

[31] A SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, (Edwin Cannan & George J. Stigler eds., University of Chicago Press 1976).

of competition on markets[32]. The goals of antitrust policy can be traced through the very core activities that it tends to prevent or prohibit, such as, entry and exit barriers, abuse of dominant position, formation of cartels, etc.

The role of the State in intervening markets has changed over the time as from being not involved at all to having a complementary role in stabilizing the economy and the same is evident from the legal policies regarding competition law and its enforcement. At present, the government controls the market to an extent that it has an obligation imposed under the social contract to protect the larger public interest involved. This is done by the formulating policies that are based on the idea that perfect competition is the goal and since it is not possible to achieve the same in reality, the State aims towards what is known as a 'workable competition'.

The standards of perfect competition are actually also evolving[33]. A variety of evolutionary competitive principles have been identified in contemporary innovation economics[34]. Such principles find competition to be a dynamic process of creativity and adaptation[35] or a process of parallel development that generates information[36]. This viewpoint strongly criticizes the perfect competition model as an ideal competition type[37]. As in the words of Hayek, "the problem with perfect model competition is that with its knowledge assumptions, it already presupposes the knowledge that is generated through the competition processes"[38].

Nevertheless, all the theories advocate for one common goal of competition, that is, maximum efficiency of the market. The State is the custodian of market economy at present and given the public policy considerations involved in competition, the efficiency is to be achieved by government intervention in the form of regulatory authorities and by public enforcement of the competition laws. Thus, one can conclude that the implications of competitive market on consumers makes it essential to place competition laws under the domain of public laws. However, the economic theories transcend the distinction between public and private enforcement and focuses on effective implementation of the policies for a successful economy. In view of this fact, one needs to see if this goal can be achieved only through public enforcement or is there a scope for accomplishing better results through private enforcement of the antitrust policies.

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