

## COMPETITION LAW ESSAY COMPETITION, 2014

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**Name** : **Pragati Dwivedi**

**Contact Number** : **9974245985**

**Name of the Institution** : **Institute of Law, Nirma University**

**Course & Year of study** : **Institute of Law, Nirma University**

**Permanent Address** : **48/1 Mandir Road,**  
**Namo-Narayan Apartments,**  
**Dum-Dum Cantonment**  
**Kolkata-700028**  
**Flat Number- 501**

COMPETITION LAWS OF INDIA VIS-À-VIS OTHER COMPARATIVE  
JURISDICTION WITH REFERENCE TO CARTELISATION

-Pragati Dwivedi

**Abstract**

*India, when attained independence; subsequent steps were taken up to strengthen the economy of the country. It is undebatable that economy forms the backbone for sustenance of any society. It is impossible for a country to do anything without a stable economy and economy is nothing but management of resources of a country. The foundation for independent India's economy was set in a planned sector which brought in its purview planned utilisation and consumption of resources. The foundation for independent India's economy was set in a planned sector which brought in its purview planned utilisation and consumption of resources. It was only at this time when the Monopoly and Restrictive Trade Practises Act; hereby referred as MRTP was passed with the following two objectives: a] to prevent the concentration of economic power in few hands that would thereby lead to monopolistic behaviour and b] to curb the unfair and restrictive trade practises. The ulterior motive of the same was to protect the interests of the consumers. The present paper analyses the paradigm shift of the Competition Act from that of the MRTP. Further, the paper cites scenarios of effective implementation of the provisions of the Competition Act by the Competition Commission of India particularly with reference to cartels. The article studies comparative jurisdictional trends with regards to the U.S. Anti-trust Laws, the EU laws and those prevailing in India. For the purpose of the comparative study, four characteristic feature have been identified that includes the exemptions granted, the effect of the laws on extra-territorial transaction, sanctions granted and the leniency that has been adopted for dealing with the anti-competition acts. The paper concludes citing two recent cases, that of Tata Motors & Mahindra & Mahindra and the other being the case of 14 car companies where severe action have been taken by the Competition Commission against the companies involved in the detrimental anti-competitive actions thereby establishing the effective ways the Competition Act has protected the interest of the consumers.*

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## ➤ COMPETITION ACT, 2002: ITS BEING AND SUBSEQUENT EVOLUTION

India, when attained independence; subsequent steps were taken up to strengthen the economy of the country. It is undebatable that economy forms the backbone for sustenance of any society. It is impossible for a country to do anything without a stable economy and economy is nothing but management of resources of a country. The foundation for independent India's economy was set in a planned sector which brought in its purview planned utilisation and consumption of resources.<sup>1</sup> It was only at this time when the Monopoly and Restrictive Trade Practises Act; hereby referred as MRTP was passed with the following two objectives: a] to prevent the concentration of economic power in few hands that would thereby lead to monopolistic behaviour and b] to curb the unfair and restrictive trade practises. The ulterior motive of the same was to protect the interests of the consumers.<sup>2</sup>

Gradually India's economy was strengthened and Government of India sought to divest its shares in several State Owned Enterprises (SOE's). "A state owned enterprise is a legal entity that is created by the government in order to take part in commercial activities on the government's behalf. An SOE is either wholly or partially a government entity and is embodied with the responsibility to participate in commercial activities."<sup>3</sup>The Competition Act has played an unavoidable role in addressing the issues related to SOE(s) and this stands as a turn-off and a well-informed departure from the MRTP act. It is very important to understand that the Competition Act, 2002 was enacted when economy was at its boom; thereby the main objectives of this act were depicted in accordance to its time of enforcement.<sup>4</sup>The main objectives of the Competition Act were to sustain and promote competition; protect the interest of the traders by bringing flexibility in the trade practises along with protecting the interest of the consumers. The main difference between the MRTP and the Competition Act stands as where the objective of the former was to protect monopolistic competition; that of the latter is to enhance free and positive competition and positive trade.<sup>5</sup>

## ➤ FROM MRTP TO COMPETITION ACT: WHY THE SHIFT?

This section of the article would discuss the lacunas in the MRTP act that consequently led to the framing of the Competition Act; establishing the key objectives of the Completion Act.<sup>6</sup> Although the MRTP act had in itself the provisions to prevent the anti-trade practises; they were comparatively weak and inadequate in comparison to the laws of many countries. The biggest shortcoming of the MRTP act was analysed as that it proved to be failure for providing any relief to

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<sup>1</sup> Sorrel v Smith (1925) AC 700 per Lord Cave L.C.

<sup>2</sup> Ware and de Freeville Ltd. V Motor trade Association (1921) 3 K. B. 40, C.A. at p. 67

<sup>3</sup> Hornby v. Close (1867) L.R. 2Q.B. 153.

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<sup>4</sup> Bellshill & Mossend Co-operative Society V Dalziel Co-operative Society (1960) AC. 832

<sup>5</sup> ITC Ltd. v MRTP Commission (1996) 46 Comp Cas 619)

<sup>6</sup> Bholanath Shankar Das v Lachmi Narain AIR (1930) All.83 at p.89

the complainants; all that it could do is to detest and refrain the wrongdoer from engaging in the restricted practises, however it could not impose any penalty for the breach in law. Another limitation of the same was that it did not take into account the extra-territorial domain. It is an established, well settled and prudent practise that trade cannot be limited to the intra-territorial domain; so can't the laws which deal with the adjudication of such dispute matters.<sup>7</sup> Hence an extra-territorial jurisdictional operation ought to have been taken but the Supreme Court had refused to acknowledge the extra territorial application of the Act.<sup>8</sup> Thirdly, the MRTP act had lacunas in itself with reference to the definitional provisions as it did not define the terms like abuse of dominance, cartels, collusion, price-fixing, predatory pricing etc. However, the general rule while giving interpretation to the words of the act was that all kinds of restrictive trade practises ought to be refrained; however the general interpretation led to several ambiguities and uncertainty on the key business issues. Hence the Competition Act came into being.<sup>9</sup>

### ➤ INDIA'S COMPETITION ACT WITH REFERENCE TO CARTEL: CARTEL VIS-À-VIS COMPETITION LAW

*“The practice of cartels or business combinations has so much historical importance. A]those concerned with the regulation of terms of employment,(service cartels) and B] those concerned with the regulation of trading terms and conditions(trade cartels). In both cases the law relating to such combinations is closely associated with that of conspiracy. The history in brief about the cartels is legislation in England to control monopolies and restrictive practices were in force well before the Norman Conquest.<sup>10</sup> In 1561 a system of Industrial Monopoly Licenses, similar to modern patents had been introduced into England. But by the reign of Queen Elizabeth I, the system was much abused and used merely to preserve privileges, encouraging nothing new in the way of innovation or manufacture. <sup>11</sup>Three characteristics of monopoly were identified by the court and these are (1) price increases (2) quality decrease (3) the tendency to reduce artificers to idleness and beggary. In 1623 Parliament passed the Statute of Monopolies, which for the most part excluded patent rights from its prohibitions, as well as guilds.”<sup>12</sup>*

This section of the paper analyses the key provisions of the Indian Competition Act and how the provisions have been implemented by the Competition Commission with regards to cartelisation. In order to understand how and why the present Competition Act does the effective implementation

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<sup>7</sup> Malathi Anant, The Competition Act Overview, Nishith Desai Associates, The Chamber's Journal, SS-VI 13, March 2014

<sup>8</sup> See Fair Play, Volume 4 January-March 2013. The CCI publishes four newsletters per year that are available on the CCI website.

<sup>9</sup> European Commission, DG Competition, Glossary of Terms used in EU Competition Policy

<sup>10</sup> Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 768-769 (1984)

<sup>11</sup> Section 43(1) of RTP Act, 1976 of UK

<sup>12</sup> Dr. Alok Ray, "Globalisation and Competition: The Role of a Professional", March 2007 The Chartered Accountant, 1452

against the cartelisation practice, understanding section 3 of the Indian Competition Act is of great importance. Section 3 establishes that those agreements which cause appreciable adverse effect on competition are of the anti-competitive sort and such agreements need not be formal and can be inferable from circumstances as well.<sup>13</sup>

### ➤ **WHY THE LAW AGAINST CARTELISATION?**

*The makers of the Indian Constitution being aware of the potential dangers of Concentration of Economic power, laid down certain principles in Article 39 (b) and (c) of the Constitution, to impress upon the governments of the Country about the need of fighting this danger. It says: — "The State shall in particular direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."*

Cartelisation means a group of participative industries that come together to fix the price of the products and services. This works against the interest of the consumers.<sup>14</sup> The Competition Commission of India ensures there is no monopoly in this sector. This leads to unfair pricing of products and services. Under this system, the competitors illegally give consent to the price, the discounts to goods and services, all of which is made in consensus.<sup>15</sup> The penalty which can be imposed by the Competition Act is three times the amount of the profit which is made out of such agreements or 10% of the average turnover of the cartel of the last preceding three years.<sup>16</sup>

The Cement Cartel Case of 2011 will help us understanding the implementation of the policies of the Competition Commission in a better manner. The Indian Builders Association had filed a complaint in the Competition Commission of India (CCI) against ten cement manufacturing companies putting forth the allegations that the cartel had been formed by them to restrict the output and fix the prices.<sup>17</sup> The CCI had appointed a Director General to review the matter and refer the same to the CCI. The CCI reviewing the evidence gave a 258 page order which suggested that the act of the companies speaks for their intentions and that they are a cartel.<sup>18</sup> The CCI had also held that "the act of the companies in limiting and controlling supplies in the market and in determining

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the prices through an agreement is not only detrimental to the cause of the consumers but also the whole economy.”<sup>19</sup> The CCI imposed a fine of over US \$ 1.13 billion against the ten largest cement manufacturers in India and the Cement Manufacturers Association.<sup>20</sup>

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<sup>13</sup> No. L-3(4)/ Reg- L.P./2009-10/CCI. – In exercise of the powers conferred by section 64, read with section 46 and clause (b) of section 27 of the Competition Act, 2002 (12 of 2003).

<sup>14</sup> Supra, FN 3

<sup>15</sup> Supra, FN 5

<sup>16</sup> European Commission, DG Competition, Glossary of Terms used in EU Competition Policy

<sup>17</sup> Dr. Alok Ray, “Globalisation and Competition: The Role of a Professional”, March 2007

<sup>18</sup> European Commission, DG Competition, Glossary of Terms used in EU Competition Policy

<sup>19</sup> Farnaus v Film Artists’ Association (1964) AC 925.

<sup>20</sup> R.W.Rideout:TradeUnionMembership,The1890Style:M.L.R.vol.26p.43

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### COMPARATIVE STUDY OF THE CARTEL ENFORCEMENT ANTI-TRUST LAWS OF U.S.A; CARTEL ENFORCEMENT LAWS OF THE EUROPEAN UNION AND CARTEL ENFORCEMENT LAWS IN INDIA:

<u>Sl. No.</u>	<u>Point of Difference</u>	<u>U.S.A</u>	<u>EU</u>	<u>India</u>
01	<u>Exemptions</u>	Two kinds of exemption granted: A] Court-made exemption based on Constitutional Rights and B] Legislative Exemption based on the Congress's perspectives.	Article 81(3) admits the possibility that some agreements among competitors may be allowed under EU competition law. However, both the Commission and the Courts have been clear that agreements to fix prices, outputs or markets will very rarely benefit of any exception: they are considered restrictive of competition by their object, and therefore it	There are two exemptions to cartel enforcement in the Indian competition laws. Section 3 (5) 35 provides that reasonable conditions be observed while protecting a person's rights which are conferred upon him under certain acts to be an exception to cartel and export cartels also come under this exemption. The Government of India by notification may exempt any agreement from cartel, it will also not come under the ambit of Section 3 of the act which defines cartel 36 , but as of now there has been no such notification.

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			<p>would be very hard for firms to escape a finding of infringement. In otherwords, cartels are (almost) per se prohibited.</p>	
02	<p><b><u>Conduct outside the territorial limits</u></b></p>	<p>Under the Foreign Trade Antitrust Improvements Act of 1982 and principles of international comity, foreign cartel conduct is not prohibited by the U.S. antitrust laws if it does not result in a “direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce (15 U.S.C. §6a)</p>	<p>The EU has bilateral cooperation agreements with certain non-EU countries, notably the USA, Canada, Japan, Korea and Brazil. These agreements can help the commission to obtain information and evidence located outside the EU territory.</p>	<p>Section 32 of the Competition Act, 2002 we find that it makes provision with regard to extraterritorial jurisdiction of Competition Commission of India. The Proviso of Section 18 states the Competition Commission may enter into any Memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provisions of this Act. A treaty is different from an understanding. Thus the mandate of</p>

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				the Competition Commission extends beyond the boundaries of India.
03	<b><u>Sanctions</u></b>	<p>For each count, a corporation may be fined either:</p> <ul style="list-style-type: none"> <li>• up to US\$100 million; or</li> <li>• twice the gain from the illegal conduct or twice the loss to the victims (15 U.S.C. §1; 18 U.S.C. §3571(d)).</li> </ul> <p>For individuals, the law authorises:</p> <ul style="list-style-type: none"> <li>• fines up to US\$1 million; and</li> <li>• prison sentences up to 10 years.</li> </ul>	<p>Under EU competition law, fines can be imposed only on firms (although national laws in some European countries do allow for criminal penalties, and/or administrative sanctions to be imposed on firms' managers), and Regulation 1/2003 establishes that fines may not exceed 10 per cent of the firm's turnover (although actual fines rarely go anywhere close to such a ceiling), and that they</p>	<p>The Competition Commission of India under Article 27 of the Competition Act, 2002 may impose a penalty up to:</p> <ol style="list-style-type: none"> <li>i. Three times its profit for each year that the prohibited agreement has been in effect; or</li> <li>ii. 10% of its turnover for each year that the prohibited agreement has been in effect, whichever is higher</li> </ol>

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			<p>should be fixed with regard to the gravity and the duration of the infringement of the law.</p>	
<b>04</b>	<b><u>Leniency</u></b>	<p>The policy provides procedures by which a corporation can receive amnesty for confessing its role and fully cooperating with the Division. A corporation is eligible for Type A leniency if it comes forward before an investigation has started and:</p> <p>(1) the Division has not received information about the reported illegal activity from any other</p>	<p>“Leniency programmes” grant total or partial immunity from fines to firms that collaborate with the authorities. They work on the principle that people who break the law might report their crimes or illegal activities if given proper incentives. The EU introduced a leniency policy in 1996. It established that a fine might have been very substantially (75-100%) reduced if a company</p>	<p>The Competition Act, 2002 incorporates lesser penalty (leniency) provisions under section 46 for cartel infringement. For this purpose, CCI has been given power to impose lesser penalty in cartel cases if the requirements of the law as provided under Section 46 are met.</p>

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		<p>source; (2) the company took prompt and effective action to end its participation in the criminal activity upon its discovery;</p> <p>(3) the company reports the conduct with candour and provides full, continuing and complete cooperation throughout the investigation(4) the confession is a corporate act, not the isolated<sup>21</sup></p>	<p>informed the European Commission before an investigation started; and substantially (50-75%) reduced if co-operation took place after an investigation had started, but before the EC had obtained sufficient grounds for initiating the procedure in both cases, the company had to be the first to report,<sup>22</sup> terminate all cartel activities and must not have been the instigator of the cartel.<sup>23</sup></p>	
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➤ **THE ACT WITH REFERENCE TO THE AUTOMOBILE INDUSTRIES:**

*In order to relate, how the present provisions of the Competition Act has been implemented by the CCI, the following case study of the anti-competitive action of 14 car companies and the case of Tata Motors and Mahindra&Mahindra has been presented:*

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*“The Competition Commission of India (‘the Commission’) found the action 14 Car Companies in contravention to the provisions of the Competition Act, 2002 (‘the Act’). Shri Shamsher Kataria had approached the Commission alleging anti-competitive conduct by 3 Car Companies in refraining from allowing the spare parts and after sale services market to add on to the detriment of consumers and independent repairers.<sup>24</sup> The Competition Commission subsequently directed the DG to conduct investigation against the car companies for it was apprehended by the anti-competition actions prevailing in the business arena.<sup>25</sup> In pursuance of the detailed investigation, the Commission found that the conduct of the Car Companies was in violation of the provisions of section 3(4) of the Act with respect to its agreements with local Original Equipment Suppliers (OESs)<sup>26</sup> and agreements with authorized dealers whereby it imposed absolute restrictive covenants. The 14 car companies were found to be indulging in anti-competitive practices resulting in denial of market access to independent repairers as the latter were not provided access to branded spare parts and diagnostic tools which hampered their ability to provide services in the aftermarket for repair and maintenance of cars. Having a monopolistic authoritative control over the spare parts and diagnostic tools of their respective brands, the car companies charged arbitrary and high prices for their spare parts. The car companies were found to be using their dominant position in the market for trading over the spare parts and diagnostic tools to protect their market for repair services, thereby distorting fair competition.<sup>27</sup>*

*The Commission has prescribed corrective measures to make the automobile market more competitive and to put an end to the present anti-competitive conduct of the car companies. While deciding the case, the Commission was guided by two prime motivations i.e. (i) consumers should have the free access to the spare parts and they should have the liberty and the freedom to exercise their free choice (ii) to enable the independent repairers to participate in the aftermarket and provide services in a competitive manner.<sup>28</sup>*

*Accordingly, Commission, under Section 27 of the Act, directed the car companies to cease and desist from indulging in conduct which has been found to be in contravention of the provisions of the Act.<sup>29</sup> The car companies were also directed to adopt appropriate policies which shall allow them to put in place an effective system to make the spare parts and diagnostic tools easily available in the open market to customers and independent repairers.<sup>30</sup> Further, the Commission directed the car companies not to put any restrictions or impediments on the operation of independent repairers/garages.<sup>31</sup> Other behavioural remedies to ensure a competitive market conditions were also prescribed by the Act. Commission also imposed a penalty calculated at the*

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<sup>21</sup> Copperweld Corp. v Independence Tube Corp., 467 U.S. 752, 768-769 (1984)

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<sup>22</sup> Supra, FN 15

<sup>23</sup> Dr. Alok Ray, "Globalisation and Competition: The Role of a Professional", March 2007

<sup>24</sup> Malathi Anant, The Competition Act Overview, Nishith Desai Associates, The Chamber's Journal, SS-VI 13, March 2014

<sup>25</sup> Supra, FN 1

<sup>26</sup> Supra, FN 24

*rate of 2% of the average turnover of the 14 Car companies amounting to Rs. 2544.64 crores in aggregate. The penalty is to be deposited within 60 days of receipt of the order.*"<sup>32</sup>

*The 14 car companies included Tata Motors, Mahindra and Mahindra and Honda Motors.*

### ➤ **CONCLUSION**

India enacted Competition Act, 2002 and it is the country's first comprehensive law dealing with unfair competition and it deals with anti-competitive practices particularly cartelization, price-fixing and other abuses of market power and should regulate mergers. *The objective of the Competition Act is not only to prevent practices which have an adverse effect on competition, but also to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade.* It is truly reflective of the changing economic conditions. Therefore, proper care and protection should be taken to ensure that the measures taken upon under the garb of refraining such kinds of anti-competitive practises does not go to the extent of interfering with the liberty of the traders and businessmen. A co-operative spirit should be adopted to safeguard the interests of both the producers, traders and the consumers. That way, it would truly promote the larger public interest. The State monopolies, government procurement and foreign companies should be subject to the Competition Law. The Law should bring within its purview all consumers who purchase goods or services regardless of the purpose for which the purchase is made. Bodies conducting and delivering the various professions should use their independence and privileges for regulating the standard and quality of the profession and not to limit competition. The competition law should be designed and implemented in terms of competition policy of the State which is dynamic. This Act is a step forward in the direction towards harmonising the Competition policy with International trade and policy with a scope that Cartels which prove detrimental to economic growth will be controlled with the enforcement of this legislation.

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<sup>27</sup> Boulting v Association of Cinematograph, Television and Allied Technicians (1963) 2 W.L.R. 529

<sup>28</sup> R.W. Ride out: Trade Union Membership, The 1890 Style: M.L.R. vol.26 p. 436

<sup>29</sup> Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd.(1959) Ch. 108

<sup>30</sup> R. v Disciplinary Committee of the Jockey Club, ex parte Agar Khan (1993) I.W.L.R. 909.

<sup>31</sup> Farnaus v Film Artists' Association (1964) AC 925.

<sup>32</sup> Miller v Amalgamated Engineering Union (1938) Ch. 669.

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