

Competition Law Certificate Course

(Free Reading Material)

As we will learn throughout the subsequent modules, competition is a very important part of business, market, and even our daily lives. The enactment of competition law in India is relatively new, but it was much needed, given that in the current society, we are seeing competition not only among businesses within the country, but also from international competitors. First, we will learn the background of what competition actually is.

I am sure you all already have a basic idea of what the word ‘competition’ means in general. Competition happens when two or more people or groups challenge each other to achieve a goal, and only one party can come out as a winner – as in, one party’s loss would be the other one’s gain. But, the concept of competition that we apply to the market and to competition law in general, is slightly different. So, we will only concern ourselves with the kind of competition that exists in the business arena.

In our daily lives, you all can see different examples of businesses that are competing within the same market. For example, when you go out to buy a laptop, you may have a number of companies to choose from – HP, Lenovo, Dell, Apple, Acer, and so on. All these companies can be said to be competing within the

marketplace for laptops. This kind of competition exists for almost all kinds of goods and services that are sold in exchange for money.

Now, when you went out to buy a laptop, you would have in your mind certain criteria. Perhaps you want the laptop to be lightweight, or have a fast processing speed, or a sleek design. The company that can fulfill these requirements well in the best possible price, would probably be the laptop you would choose. In this way, these companies are all competing for a share in the marketplace, so that more and more customers would buy the products or services that they are selling.

This was a simple example of a kind of competition that you are likely to find in your daily lives, but there are a number of factors in the marketplace which often create difficulties for the competitors. For example, if you found a new company named XX is selling the same laptop as HP, which one would you choose? Most people would choose to be customers of companies that are already well established, so goodwill of the companies also acts as a factor in competition. Similarly, laws, regulations, taxes, target market, etc. various features in the market complicate the competitive scenarios. We will gradually learn about these various factors of competition in the subsequent modules.

Nature of Competition Law

So, you can see, competition law is closely related to business and economy. This is because competition in the marketplace is one of the primary factors that decides the efficiency of a country's economy. If the various competitors in the markets fulfill their roles well and there is efficient competition in the market, only then can the economy of the country run smoothly, and the customers, that is the people, remain satisfied. So, competition laws are enacted to make sure that this kind of efficiency is maintained, and that there are no unfair practices that the organizations are taking, just to gain ahead of their competitors.

In this way, competition law protects the competition in the market from unfair practices. As we discussed before, the innovation of competition law in a legislative form is a modern advancement – though there were instances of isolated rules banning anti competitive practices even before. We can see the beginnings of competition law in some form, way back in the Roman Empire. Even back then, the practices of the traders were subject to government scrutiny, and in case someone relied on unfair practices to promote their business, there would be severe sanctions. But we can see competition law gaining traction worldwide, primarily from the 1990s. Right now, most countries across the world have enacted competition law in some form or the other, because in the era of international trade, it is essential to maintain and promote competition in the market.

In the recent times, the development of competition law happened primarily via the United States Anti-Trust Law, and the laws of the European Union regarding the same. In India, the Competition Act of 2002 is current in place, which is implemented by various private and public authorities. Generally, competition laws are country specific, and do not have extra territorial operations¹. Still, there are a number of international treaties and agreements as well, which promote competition. For example, the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS) are two main Agreements on this, which are governed by the World Trade Organization.

Unfair Competitive Practices

Now, we already discussed that the aim of competition law is to promote fair business and free market, and to abolish unfair trade practices. But you may be thinking, how would we know which practices are unfair? We will now learn more on that aspect.

In simple terms, we can describe fair trade as something that promotes healthy competition within the market, and by which a trader is not looking to gain an unfair advantage over its competitors. Unfair competitive practices would

¹ Overview of Indian Competition Law, *available at*: https://www.cci.gov.in/sites/default/files/presentation_document/Overview%20of%20Competiton%20Law%20%26amp%3Bamp%3B%20Economics_Yogesh%20Dubey%40ISEC_06.07.2018_1.pdf?download=1 (Last Modified July 6, 2018).

be the opposite of that, and it has an element of deceptive or wrongful conducts. There can be many aspects of unfair competition, like predatory pricing, passing off, anti-competitive agreements, abuse of dominance, etc.² We will read about all of these aspects in detail in the upcoming modules.

Consider this scenario as an example of an unfair trade practice. You saw a new Adidas shoe that is very reasonably priced, and of great quality, even better than its competitors like Nike and Reebok at a way cheaper price. Of course, many people would flock to the Adidas stores to buy the shoe. Upon going there, you find that there is a condition that when you buy the shoe, you must also buy a pair of Adidas socks together. Would you consider this unfair? For many people, the answer would depend upon the price of the socks itself. But consider this, if they were not mandatorily being sold with the shoes, would you still buy them? The sum may be small, but this is still an unfair trade practice.

² The Competition Act, 2002 (Act 12 of 2003).

Need for Competition Law

Without the existence of a competition law, unfair trade practices would flourish in the country, which is why in the current times, almost all of the nations have enacted competition law in some form or the other. Now, you may be thinking that even though without a competition law, there would be unfair trade practices, that would not matter much for people like us, in the context of our daily lives. But, in reality, the effects of such a scenario would be devastating. Competition law essentially prevents the existence of monopolistic and restrictive trade practices, and promotes free trade throughout the market. We can divide the needs for competition law under the following heads:

- **Providing a level playing field:** In a country that has a good competitive policy and enforcement for the same, the business of all the concerned companies can flourish. This is because in such an environment, the businesses can focus on working hard and efficiently to promote the business, and not worry about how to sabotage the business of its competitors, or about how the competitors might be sabotaging its business. Essentially, it provides a just and equitable playing field for all the competitors, where the businesses can provide their best possible efforts in order to bring out new and innovative products and services for their customers, and gain customer loyalty. Essentially, this provides an

efficient working system, and works as a motivator for the businesses to innovate.

- **Opportunity for growth:** Without an effective competition law in place, it would be extremely hard for new and small businesses to enter the market, and even thrive. On the other hand, in such a situation, we, as consumers, would have significantly less choices. Consider this, Dabur is one of the primary competitors in the honey market. But that does not mean that all the customers like Dabur honey, and want to keep buying the same. There are also a number of small businesses and sellers selling various artisanal honey like Litchi honey, Eucalyptus honey, etc., that are well loved by customers. Without an effective competition law, the small brands would be driven out of the market by the unfair practices of the larger brands. Plus, every large brand that we know and love today, was one day a small entrant in the market. So, it is necessary to protect the entry of new businesses in the market, and to allow them a fair opportunity to expand their business.
- **Efficiency of the economy:** As we mentioned before, healthy competition also allows the economy of the country to thrive, and for the resources to be used in an efficient way. If there is no competition in one market, think the market for perfumes, the one perfume maker can charge an exorbitant price for his products, even at an insane profit margin, and the consumers would still have to buy from the same company. Effective competition

ensures that every business is trying to utilize the available resources in the best possible way, to provide quality products to the customers at a reasonable price.

- **Benefit to customers:** Of course, as customers, the biggest benefit we get from competition law is the benefit of choice. It is because a strong culture of competition law exists in India, that we have so many businesses booming in the economy, with thousands of new businesses entering the market each year. For the same reason, we have a number of choices for anything that we want to buy – if we want to buy something even as simple as a water bottle, we have tens if not hundreds of brands to choose from. Truly, under the current competition regime, customer is king³.

³ United National Conference on Trade and Development, The Benefit of Competition Policy (April, 2014).

Origin & Major Developments

- In this module, we will learn more about how competition law originated, and how it was developed through the years. As we mentioned before, the origin of competition law was seen in as early as the Roman Empire. Even though these rules were not formulated as formal legal aspects, there were various features like tariffs, restrictive practices, monopolies, combinations, etc., that are very similar to modern competition law.
- The first evidence that we have found regarding the existence of competition law, was the Lex Julia de Annona, which was enacted in the Roman empire more than two thousand years ago, around 50 BC. During this time, to inflate the prices of corn, someone was intentionally harming the corn supply ships. To protect the supply of an essential element such as corn, heavy fines were imposed on anyone who would be found to harm or stop these supply ships, directly or indirectly. In 301 AD, a law was found which put a ceiling on maximum prices (as you have surely already seen, exists on most products), and there were severe punishments provided for unfair trade practices. For example, if a person was buying and hoarding some goods to inflate their price in the market in an unfair way, they could be punished even with death. A number of competition

related legislations were passed under the Constitution of Zeno, during 483 AD as well⁴.

- During the middle ages, we can see examples of legislation in England, which were meant to control monopolies and restrictive trade practices. The habit of buying up some goods to inflate their price in the market was punishable under the rule of King Edward as well. There was also a prominent attempt to maintain fair prices of products throughout the country, and on this note, an Act was passed under King Henry III, fixing the prices for bread and ale (which were considered to be the most essential elements during those times). Under King Edward III as well, the Statute of Labourers was enacted, which mandated foodstuff to be sold at a reasonable price⁵.
- During the 15th century onwards, trade was gradually beginning to turn global, with new and improved transportation methods and increased communication throughout the world. Moreover, for the colonizing nations, there was an abundance of wealth that they were gathering from the colonized countries (similar to what England did in case of India). During this time, to facilitate trade, a system of Industrial Monopoly Licenses was granted in England, which acted similarly to the modern patent system, allowing only selected business owners to take part in

⁴ R Wilberforce, *The Law of Restrictive Practices and Monopolies* (Sweet and Maxwell, 1966).

⁵ *Ibid.*

certain kinds of business processes. But this turned out to be counterproductive for the society. Due to the inherent privilege, the businesses were not investing in inventing new products or improving their quality, and they were not concerned with providing the products to the people at a reasonable price either. The system was temporarily abolished during the reign of Queen Elizabeth I, but they were beginning to crop up again by the time King James I was in his reign. To prevent this scenario, the New Law was passed in 1710, which finally put an end to the existing monopolies, and made the practice illegal in itself⁶.

Modern Developments

- In the modern times, the origin of competition law is found in the United States Sherman Act, 1890, and Clayton Act, 1914. During the same time, even though some other nations like Canada, Brazil, etc. were also formulating similar laws, the laws formulated by the United States are considered the most comprehensive and groundbreaking. During this time, many European countries also had some form of laws regarding monopolies and cartels, which are covered under competition law in the current times, US was the first country to codify these aspects, which had a widespread impact.

⁶ William Searle Holdsworth, 4 *History of English Law* (3rd edn.).

- As the name itself mentions, the anti-trust law was enacted in the United States to combat the malicious workings of the Trusts. The large business ventures in the nation were concealing their true motives under the guise of a trust, while they were in reality running a business and not a trust. During this time, such trusts began to gain the status of monopolies, which was harming the free market to a great extent. The newly enacted laws of Sherman and Clayton acts were brought into force mainly to combat such a tricky scenario. Still, you can see that the basis of these laws was in the common law itself.
- Initially, the Sherman Act was not as effective as it was hoped, and to complement the same, the Clayton Act was enacted. In the Sherman Act, the focus was mainly upon combination and monopolies – but the Clayton Act dealt with many newer aspects such as price discriminations, exclusive dealings, mergers, etc.⁷
- While these developments were going on the United States, a worldwide development was still not happening during this time. A global rise in competition laws was only seen after the First World War, after which, a wave of change could be seen in the global legal system. During the 1920s, nations like Canada and France brought into force various laws related to anti-competitive practices. After World War II, regulations regarding

⁷ S. C. Tripathi, *Competition Law*, (Central Law Publications, Prayagraj, 2nd edn., 2019).

cartels and monopolies were implemented in Germany and Japan. It was believed that the cartel system of Germany, that was widely prevalent during that time, was actually what had helped the Nazis to rise into power – due to the widespread culture of corruption and bribery.

- Still, it was not until the 1950s and later, that a true global adoption of competition laws could be found. The Restrictive Practices Act was introduced in England in 1956, and in 1974, Australia enacted the Trade Practices Act. However, during the 1950s, competition law in the European nations went through a major reformulation. In fact, in the 1957 Treaty of the European Community (EC Treaty) itself, provisions were enacted under Article 81 and 82, to ensure a free and fair competition in the market. If you see the text of Article 81, it has prohibited “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 common market”. The various sub sections of the article also provide examples of such scenarios, like price fixing, anti-competitive agreements, market sharing, etc., which were expressly prohibited⁸.

⁸ Treaty of the European community, art. 81, 82.

- During this time, many international agreements and treaties were also entered into, which governed the areas of competition law. The first comprehensive effort regarding this was the 1947 General Agreement on Tariffs and Trade, which till now acts as a benchmark of fair practices in terms of international trade. The World Trade Organization was established in 1994, along with the enactment of other various treaties. The WTO has gone through a number of developments in the recent years, and acts as the primary enforcer of these agreements and fair practices in international trade.

Important Statutes in India

- In India, the first effort regarding competition law was the Monopolies and Restrictive Trade Practices Act (MRTP), enacted back in 1969. This Act was brought into force based on the then social and economic conditions of India, and it went through various amendments throughout the years, based on the recommendations of many scholars and the Sachar Committee. In the later amendments, various important aspects were integrated in the Act. For example, during that time, it was a common practice for the businesses to put forward something we would call fake advertisement today, as in, they simply lied on their advertisements. This was a practice that was banned by the recommendations of the Sachar

Committee, and the businesses were forbidden to put forward such lies or half-truths in their advertisements⁹.

- However, as the society changed and international trade and communication grew, the need for a better and more comprehensive competition legislation was felt. Particularly during the 1980s and 90s, there was a tremendous change in the Indian society, in terms of new economic policies, globalization, and global trade. During this time, the government was also significantly drawing back from its roles in businesses, and more and more business sectors which were exclusively reserved for the government, were now being opened up for private businesses. Even though certain restrictive trade practices were banned under the MRTP Act, it was not proactively taking any efforts that would benefit competition in the market, and as such, was found to be ineffective to combat the modern competition related challenges that were rising in the economy.
- For that reason, in 1999, the Raghavan Committee was formed to advise upon the changes needed in a modern competition law for the nation, and the Committee submitted its recommendations in 2000. It was based on the Raghavan Committee's recommendations, that the modern Competition Act, 2002, was passed.

⁹ *Supra* note 4.

- We will discuss the various aspects and features of the Competition Act in detail in the later chapters, but the Act primarily deals with anti-competitive agreements, abuse of dominant position, and combinations – which are the three kind of practices that are most harmful for competition in the marketplace. The Competition Act also established the Competition Commission of India (CCI), as a quasi-judicial body which can adjudicate and apply based on the various provisions of competition law. With the enactment of the Competition Act, the MRTP Act stands repealed, and the MRTP Commission that used to exist under the Act, was also wound up.