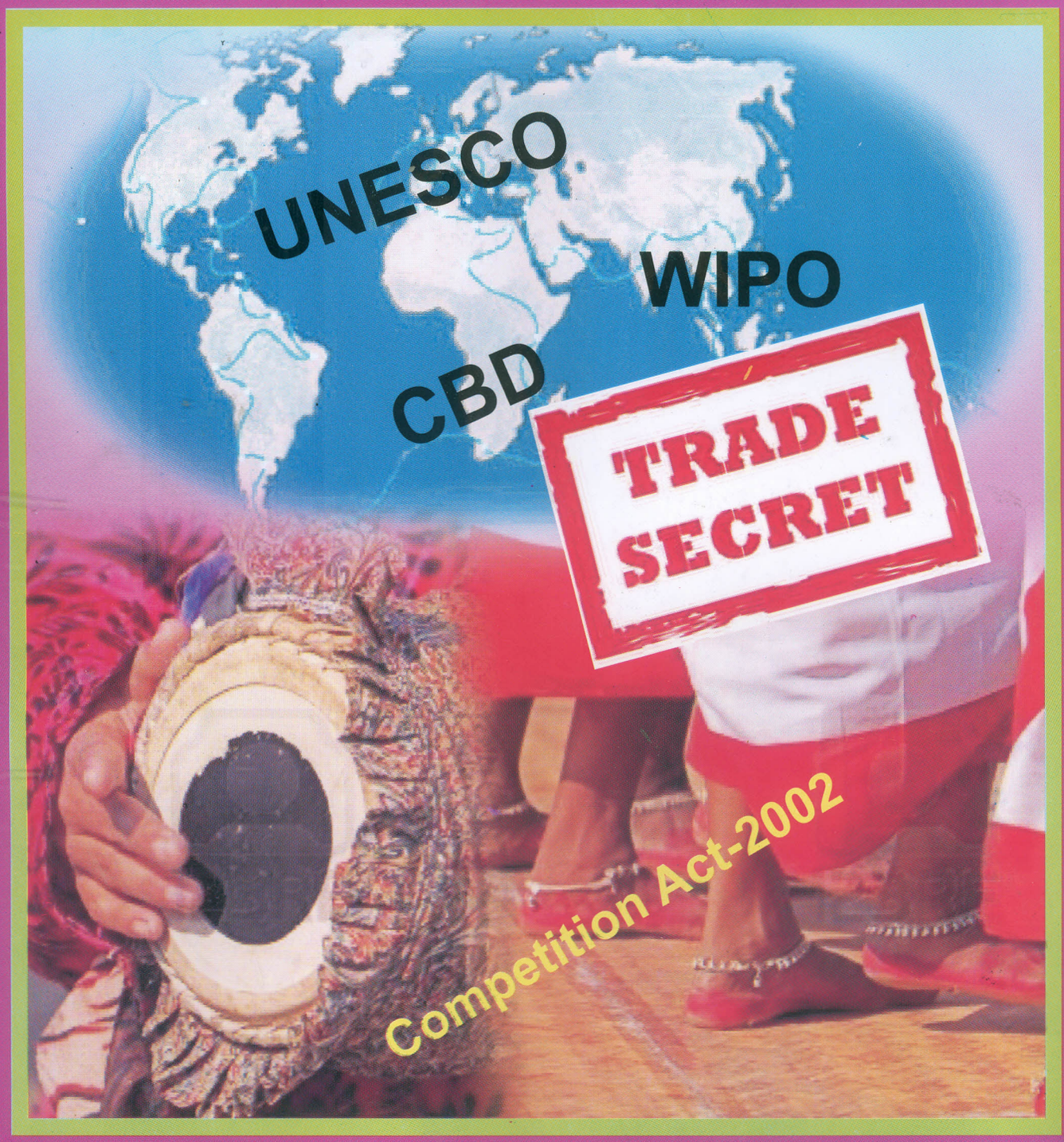
ignou
THE PEOPLE'S
UNIVERSITY

Indira Gandhi National Open University
School of Law

MIP-107
TRADE SECRETS, COMPETITION LAW AND PROTECTION OF TCE



Competition Law

2

"शिक्षा मानव को बन्धनों से मुक्त करती है और आज के युग में तो यह लोकतंत्र की भावना का आधार भी है। जन्म तथा अन्य कारणों से उत्पन्न जाति एवं वर्गगत विषमताओं को दूर करते हुए मनुष्य को इन सबसे ऊपर उठाती है।"

– इन्दिरा गांधी

"Education is a liberating force, and in our age it is also a democratising force, cutting across the barriers of caste and class, smoothing out inequalities imposed by birth and other circumstances."

—Indira Gandhi

ignou
THE PEOPLE'S
UNIVERSITY

Indira Gandhi
National Open University
School of Law

MIP-107
Trade Secrets, Competition Law and Protection of TCE

Block

2

COMPETITION LAW

Expert Committee

Dr. D.P.S Parmar
Technical Member,
Intellectual Property
Appellate Board,
Ministry of Commerce & Industry

Prof. S.K. Verma
Director, ISIL
New Delhi

Prof. Salim Akhtar
Professor of Law,
Aligarh Muslim University
Aligarh, Uttar Pradesh

Dr. Ekbal Hussain
Associate Professor
Jamia Milia Islamia University
New Delhi

Mr. T.C. James
Director,
National Intellectual Property Organisation
New Delhi

Prof. K. Elumalai
Director
School of Law, IGNOU

Dr. Suneet Kashyap Srivastava
Assistant Professor
School of Law, IGNOU

Dr. Gurmeet Kaur
Assistant Professor
School of Law, IGNOU

Mr. Anand Gupta
Assistant Professor
School of Law, IGNOU

Ms. Mansi Sharma
Assistant Professor
School of Law, IGNOU

Programme Coordinator: Dr. Suneet Kashyap Srivastava, School of Law, IGNOU, New Delhi

Block Preparation Team

Unit Writer:
Mr. Saket Sharma
Advocate, New Delhi

Content Editor:
Dr. Sanjeev Kumar Srivastava
Manager (Law), SBBJ

Format & Language Editor:
Dr. Suneet K. Srivastava
SOL, IGNOU, New Delhi

PRINT PRODUCTION

Sh.S. Burman	Sh. Tilak Raj	Sh. Yash Pal
D.R.P (MPDD)IGNOU	A.R.P (MPDD)IGNOU	S.O.P (MPDD)IGNOU

March,2017 (Reprint)

© Indira Gandhi National Open University, 2013

ISBN-978-81-266-6384-2

All rights reserved. No part of this work may be reproduced in any form, by mimeograph or any other means, without permission in writing from the Indira Gandhi National Open University.

Further information on Indira Gandhi National Open University courses may be obtained from the University's office at Maidan Garhi, New Delhi-110 068.

Printed and published on behalf of the Indira Gandhi National Open University, New Delhi by Registrar, MPDD, IGNOU, New Delhi.

Ptd. At: Millenium Offsets Pvt. Ltd, A-49, Naraina Indl. Area Phase - 1, N.D. - 110028

BLOCK 2 COMPETITION LAW

Block 2 of this Course on Trade Secrets and Unfair Competition concept consists of four units. This Block completely concentrates on the concept of competition law. As we understand competition refers to a situation in a market in which firms or sellers independently strive for the buyers patronage in order to achieve a particular business objective for example, profit, sales or market share. Competition in other words means a public good that can potentially spur economic efficiency, growth and competitiveness.

In this Block we have four units.

Unit 5 of this Block will deal with why a need for competition law in India. This unit will discuss issues on competition, competitiveness and economic development, it will also deal with topics like competition policy and competition law. Other issues like the MRTP regime in India, and the need for the change of law, the enactment of the Competition Act, 2002 and amendments thereof are dealt in here in this unit.

Unit 6 of this course deals exclusively with the Competition Act, 2002. Wherein special emphasis is laid on Sec 3,4, and 5 of the Act. Other prominent features of this unit include the authorities under this Act, and issues like competition advocacy, extra-territorial reach, leniency provisions etc.

Unit 7 of this course explains the interaction between competition law and Intellectual Property. In this unit topics like the objectives of Intellectual Property Law and Competition Law are discussed. Issues like multilateral provisions, and the interface between competition law and IP in India are explained and discussed. Also we have tried to explain topics like anticompetitive agreements and IPRs, Combinations and IPRs and cases related to these topics are also discussed and explained.

Unit 8 of this course deals with issues at the interface of IP and Competition Law. In this unit, the TRIPS provisions related to the topics is discussed. Other topics like parallel imports, restraint of trade, the co-operation arrangements between IP holders, issues in online markets, essential facilities doctrine, compulsory licensing, FRAND licensing etc are discussed.

UNIT 5 RATIONALE OF COMPETITION LAW IN INDIA

Structure

5.1 INTRODUCTION

In recent times, countries around the globe are restructuring and reforming their economies through market oriented reforms with competition as one of the central organising principles. An illustrative definition of Competition is "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share" (World Bank, 1999). Competition has also been described as a public good that can potentially spur economic efficiency, growth and competitiveness. It has been noted that competition also serves to diffuse socioeconomic power and broaden economic, social, and political participation while providing opportunities for new entrepreneurs. Competition policy,refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop. An appropriate competition policy must not only enhance competition, but enable efficient allocation of resources, technical progress, efficiency, growth, and innovation to flourish. Competition law being distinct from the competition policy refers to the framework of rules and regulations designed to check anticompetitive conducts in an economy. Competition law aims at protecting

the process of competition for the benefit of consumers. Thus, competition law tends to regulate the conduct of the market players and is aimed at ensuring a level playing field for the competitors and protecting consumers.

As per United Nations Conference on Trade and development (UNCTAD), Competition can be defined as the pressure exerted in the market by different players in search of market shares and profits.The theory of perfect competition has its limitations since the assumptions underlying the theory do not prevail in reality. It has also been noted that competition is not necessarily the best solution in all situations, as in the case of natural monopolies, in some cases in industries with network effects, or in services such as primary health care. But broadly there is agreement that competition is generally beneficial, and the debate between a competitive market economy and the state-controlled economy seem to be settled now in favour of the former. While competition as a concept has coexisted with the markets in the world economy, it is really only in the last quarter of the previous century that it has occupied an important place in international discourse. The first modern expressions of what we now call competition law started in North America with the Canadian Combines Act of 1889 and the US Sherman Antitrust Act of 1890. The origins of modern competition law were a response to abuse by firms of what were called the industrial trusts, which controlled large parts of commerce through collusion and abuse of their huge economic power. Competition laws are now being rapidly adopted in many developing countries, in all continents, and in all types of economies. At the end of the 1980s, there were only about ten countries with well-established systems of competition law. Today, about 120 countries in differing states of development have established varied systems of competition law.

The United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices recognises the development dimension of competition policy, and urges member States to promote competitive markets as channels towards economic development. In this sense, effective competition can be considered as an important element of an economic development strategy. In an attempt to attain this goal, competition laws in many developing countries capture other policies – for example, the promotion of small and medium-sized enterprises, public interest objectives including formally disadvantaged parts of the population, the creation of employment, the promotion of exports, and exemptions for intellectual property rights (IPRs), to name just a few. Thus Competition policy has a broad dimension which includes all other government policies that promote competition in the market. Inter alia, such policies include consumer protection, investment policy; intellectual property rights (IPRs) and industrial policy. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation and the competition law tends to check the abuse of market power and to protect a fair market behaviour thereby protecting the consumers. This Unit will give a brief overview of the importance and rationale of competition policy and competition law while highlighting the emergence of these in India.

5.2 OBJECTIVES

After reading this unit, you should be able to:

- discuss the objectives achieved by framing competition law;
- appreciate the components of competition policy which also encompasses IP policy;
- discuss the background of enactment of competition law in India;

- explain the difference between competition law and competition policy;
- analyse the relation between competition law and economic development;
- explain the need for a change from MRTP Act to Competition Act;
- elaborate the events which led to the enactment of the Competition Act; and
- explain the need for competition policy in India.

5.3 COMPETITION, COMPETITIVENESS AND ECONOMIC DEVELOPMENT

The positive relation between the competition and economic development has been recognised and established across various economies. Competition is also now seen as an important factor to increase the competitiveness of enterprises in an economy. Joseph Stiglitz rightly stated that strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies. The adoption of competition policy and law across various jurisdictions point at the growing realisation the role competition plays in growth and development in an economy.Figure 5.1 shows a positive co-relation between competition law, competition policy and economic development. It clearly shows how competition policy increases efficiency and promotes investment, trade and financial development. This leads to increase in competitiveness, economic development and thus sustained increase in human welfare also.

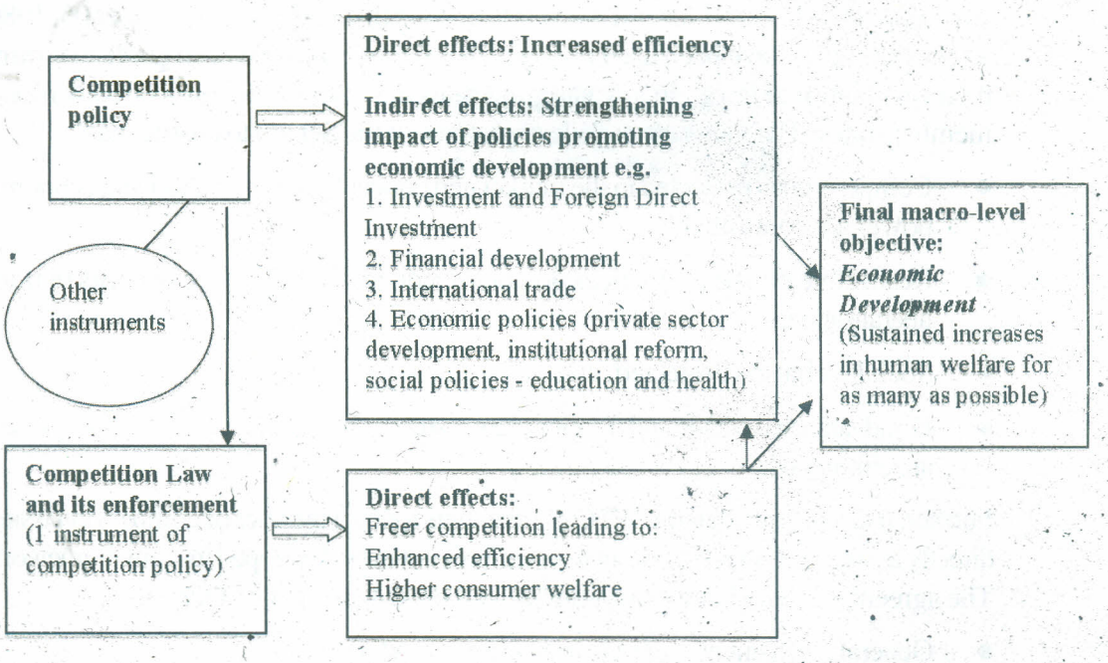


Fig. 5.1: Relationship between competition law, competition policyand economic development

Figure Source: UNCTAD document titled '*The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy.*' 2010

Competition law, which is also an instrument of competition policy aims at promoting an enabling positive economic environment free from anticompetitive practices, also aids entrepreneurship and growth. As noted by Planning Commission, the basic tenets of democracy and of market competition are ingrained in the same value system - freedom of individual choice, abhorrence of concentration of power, decentralised decision making and adherence to the rule of law. The common goal of both democracy

and market competition is the same- to ensure public welfare. Further, it is interesting to note that some scholars regard competition law as the economic analogue of political democracy and in some countries competition law is accorded the status almost of an economic constitution. It can be said that competitive markets and democratic governments are complementary and need to have constant and conducive interaction for the economic development and maximisation of the larger public interest.

5.4 MULTILATERAL REGIME REGARDING COMPETITION LAW

Although there is no such comprehensive multilateral agreement on competition law and policy, but the issue is very much present in some of the existing arrangements in one or other form. The debate on the need for some control of restrictive business practices (RBPs) has a long history and this includes the debate leading to the aborted Havana Charter, in which developing countries were among the members calling for measures on protecting competition to be included on provisions governing international trade. This was largely due to the realisation that trade liberalisation was likely to result in big MNCs, largely from the developed world, having the ability to distort competition in the developing country markets to their advantage. However, despite its rejection, the Charter provided a legacy for future debates, as competition issues under international trade continued to crop up under World Trade Organisation (WTO) negotiations. This led to debate under the United Nations Conference on Trade and Development (UNCTAD) fora, resulting in the creation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (The Set), which was adopted by the UN General Assembly at its 35th meeting on December 05, 1980. These principles have been used by many developing countries as a guide to writing their own national laws. In any case, the rules are not binding on United Nations' member states. The non-enforceable objectives of the Set are to ensure that–

- Competition is protected in the market and concentration of capital and economic power are controlled;
- Restrictive business practices do not impede realisation of the benefits of trade liberalisation;
- Social welfare is protected; and
- Disadvantages to trade and development resulting from restrictive business practices are eliminated.

Further, it can be seen that the WTO Agreements touch a number of competition issues directly as well as indirectly, but such issues have not been developed into any framework. The agreements which refer to competition issues in one or the other way are:

- General Agreement on Trade in Services (GATS),
- Trade-Related Aspects of Intellectual Property Rights (TRIPS), and
- Trade-Related Investment Measures (TRIMs).

During the late 1990s, discussions of the WTO's Working Group on the Interaction between Trade and Competition Policy led to a realisation that most developing countries were uninformed about competition law and policy. National efforts to improve understanding were given technical assistance by the WTO, UNCTAD, and the World Bank. The sum of all these efforts has been a vigorous debate about the kind of multilateral agreement that might be needed to enable developing countries to tackle egregious practices from abroad. Contrary to the wishes of developing countries, the so-called

"Singapore issues" were included in the WTO's November 2001 Doha Declaration of Ministers: these are investment, competition policy, trade facilitation and government procurement. Competition policy was put on the agenda at the Singapore Ministerial meeting in 1996 as part of a review of the relationship between trade and investment. However, this debate has cooled of late with the withdrawal of these issues from the WTO agenda a as a venue for a possible agreement.

Similarly, the OECD countries agreed on guidelines for multinational enterprises. These were first adopted in 1976, and revised in 2000, as part of *The OECD Declaration* and *Decisions on International Investment and Multinational Enterprises*. The guidelines include a competition section, which requires multinational enterprises to refrain from anticompetitive behaviour and to comply with all local competition laws. In 1998, the voluntary guidelines were supplemented by the *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, inspired by the increasing awareness of the existence of cartels and in recognition of the success of the United States Department of Justice's prosecution of international cartels. OECD has done substantial work and research on various competition issues and thus helped in development of jurisprudence for the same.

It is pertinent to mention about the International Competition Network (ICN) also. ICN was created in October 2001 by the competition authority officials from fourteen different jurisdictions. It is the only international body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. Now, ICN is an informal network of 107 of the world's competition agencies with the common aim of addressing practical competition enforcement and policy issues by providing a platform for interactive workshops on various issues and by recommending techniques and best practices. Thus, the ICN facilitates consensus building and convergence toward sound competition policy and practice across the global antitrust community. There are about 120 countries with national competition law regimes and the voices have been raised through various scholarly literatures for the international competition law so that a uniformity and harmonisation can be achieved.

Self Assessment Question **(Spend 3 minutes)**

1) Enumerate the link between competition policy and economic development of a nation.

.....

.....

.....

.....

5.5 COMPETITION POLICY AND COMPETITION LAW

Generally, there are two elements of a competition policy. The first involves putting in place a set of policies that enhance competition in local and national markets. These include set of policies, such as liberalised trade policy, relaxed FDI policy, de-regulation, etc., that enhances competition in the markets. These policies would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is legislation i.e. competition law which is designed to prevent anti-competitive business practices and unnecessary Government intervention. Such

law aims to prevent anti-competitive practices with minimal intervention. Thus the role of competition law is to check the behaviour of the firms. Competition Law focuses on the behaviour of business, and Competition Policy provides for comprehensive action of government on economic policies.

Together, competition law and policy, make the comprehensive environment for infusing and regulating competition in the market in which the abuse of market power is prevented mainly through competition. Thus, a comprehensive competition policy should ideally be an integral part of the overall economic development plan of the country. It maximizes efficiency, both static and dynamic, as it provides an incentive for innovation and invention. It also generates consumer welfare and brings wider choice, lower prices, and improved services to the common person. Ultimately, an effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation. It has been seen that many jurisdictions, despite having a competition law implementation framework, are still to adopt comprehensive competition policies.

5.6 RATIONALE OF COMPETITION LAW

Competition lies at the heart of a market based economy and competition law is now recognised as a critical element in strengthening market forces and regulating anticompetitive conduct of market players. Competition law has an interface with a broad range of economic policies affecting competition in national markets, including the regulation of transport, power, telecommunications and other sectors. Across some developed jurisdictions it has been seen that competitive pressures have helped suppress inflation, raise living standards, and increased manufacturing productivity. It has brought down real air fares, telephone rates and lot of other costs. A study by Australian Productivity Commission estimates that average Australian household annual income was A$ 7,000 higher on account of competition policy. One example of benefits of competition can be seen in the telecommunication sector in India leading to low fares in the mobile calling.

India's current resource needs require competition, which levels the business playing field and encourages private sector participation in public sector projects. According to Planning Commission, India will require, up to 2012, an estimated $320 billion dollars to fund infrastructure projects and upgrade existing infrastructure. Public-private partnerships have been identified as a means of obtaining the capital required to get things done. If we are to increase private sector participation in public sector projects, we will need to build a stronger competition framework that genuinely levels the playing field between the private and public sectors. For some time, there was a perception that public sectors that were opened to private sector participation such as telecommunications, the private participants competing against the established public company were subject to discrimination. As competition protects the private sector against potentially unfair business practices of the public sector, it likewise protects the consumer from the risk of potentially unfair business practices of the private sector. Private sector monopolies are worse than public monopolies, particularly in infrastructure services, which are generally a natural monopoly. Public-private partnerships (PPPs) could also result in creation of monopolies in the absence of competition. A competition framework can regulate PPPs in order that they do not stifle competition from other private sector groups that invest in the sector where they operate.

The objectives of Competition policy in India amongst others is also to create an active competitive environment and to aid and abet the process of creating globally competitive

firms with enhanced investment and technological capabilities. Competition also addresses the concerns of people who are unfairly subjected to the inconvenience of receiving poor services and overpriced products of low quality on a daily basis, as competition provides for more and better choices for the consumers. The expected benefits of laws that enhance competition are many - stronger market forces, lower costs and prices and an increase in consumer welfare and pressures towards sound business discipline. Developing economies like India tend to be more vulnerable to anti-competitive practices than developed countries. The reasons for this vulnerability include: high 'natural' entry barriers due to inadequate business infrastructure, including distribution channels, dominant position is more prevalent; asymmetries of information in both product and credit markets; a greater proportion of local markets. Thus it may be particularly important to protect, consumers in developing countries like India against cartels, monopoly abuses, and the creation of new monopolies through mergers. This protection is guaranteed by a proper enforcement framework under a competition law. Thus, Competition policy has also the role to play the dual role of raising the power of underprivileged individuals and enterprises to participate in the process of competition and of creating a sound legal framework for free competition.

5.7 OBJECTIVES AND BENEFITS OF THE COMPETITION POLICY AND LAW

It has been seen across jurisdictions that the objectives of competition laws vary from country to country and even within a country they change and evolve with changes in economic situations. The full benefits of economic reforms are felt to be better realised under the conditions of an effective competition regime. Another important goal of the competition law is consumer satisfaction. The main aim of the Competition law is to check the firms and enterprises following anti-competitive practices.As per the judgment by the Hon'ble Supreme Court in Civil Appeal No. 7999 of 2010 pronounced on 9th September, 2010, the main objective and advantages of competition law are:

"The main objective of the Competition Law is to promote economic efficiencies using competition as one of the means of assisting the creation of market responsive to consumer preferences... The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices."

a) Benefits for Economy:

It has been observed that better outcomes in an economy are achieved when trade and investment liberalisation is accompanied by measures to increase competition. This paves way for conducive business environment and thus promotes investment and growth. In principle, competitive markets provide strong incentives for achieving economic efficiency. Competition promotes allocative and productive efficiency. Fair competition ensures that goods and services consumers need are produced in the quantities they want, using the most efficient production methods and are marketed and distributed to consumers who wish to purchase them in the most efficient means possible. As per the statement of objects and reasons to the Act, the Act is India's response to the opening up of its economy, removing controls and resorting to liberalisation.

There are three types of efficiencies to be considered, which are:

i) allocative efficiency, which provides for the effective allocation of resources;

ii) productive efficiency, which denotes the production of goods in the most cost-effective manner, and

iii) dynamic or innovative efficiency, which signals gains through the invention, development, and diffusion of new products and production processes that increase social wealth.

b) Benefits for Consumers:

Competition law/policy ensures that consumers enjoy greater benefits in terms of wider choices and better quality goods and services at competitive prices. Competition policy's implementation serves to reinforce consumer rights. Thus, effective competition leads to lower prices and more choices for consumers.

c) Benefits for business:

Competition ensures that firms will be innovative in order to win business. The innovation and dynamic efficiency mean that there will be better products available on the market.The object is also to curb the anticompetitive practices which harm consumers and the businesses also. The competition policy aims at promotion of an enabling framework in the economy so that there are more entrepreneurial activities and thus job creation, growth and development.

As noted by the report of High level committee on competition policy and law (Raghavan Committee), the competition policy becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. Thus it can be seen that the broad objectives include: ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, ensuring economic freedom, ensuring a level playing field for small and medium-sized companies, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatisation and market liberalisation, and promoting competitiveness in international markets.The competition law should promote the social objectives also keeping in view the socio-economic context of the country. Some of such social and economic goals can be:

a) Promoting economic efficiency, in both a static and dynamic sense.

b) Protecting consumers from the undue exercise of market power.

c) Promoting trade and integration within an economic union of free trade.

d) Facilitating economic liberalisation, including privatisation, deregulation and the reduction of internal trade barriers.

e) Preserving and promoting the sound development of a market economy.

f) Promoting democratic values, such as economic pluralism and the dispersion of socio-economic power.

g) Ensuring fairness and equity in marketplace transactions.

h) Protecting the 'public interest', including considerations relating to industrial competitiveness and employment.

i) Minimizing the need for more intrusive forms of regulation or political interference in a free market economy.

j) Protecting opportunities for small and medium-sized businesses

In a note presented to the Standing Committee on Finance, *Lok Sabha* Secretariat, the benefits gainedin different economies from economic reforms and competition policy,were highlighted. Some of the major highlights were:

a) Australia – The estimated gains from reforms (including competitive markets) were around 5.5 percent of gross domestic product (GDP). The average household income was higher by A$7000 (US$5774), as a result of competition policy. Competition policy also resulted in lower prices for rail transport and energy.

b) US – The real prices of natural gas, long distance telecommunications, airlines, trucking and rail industries dropped by 25-50 percent within 10 years of regulation. The annual consumer benefits were estimated to be approximately US$5bn in the long distance telecom industry, US$19.4bn in airlines, US$19.6bn in the trucking industry and US$9.10bn in the rail road industry. Consumers also benefited from improvements in the quality of services.

c) New Zealand – Pro-competition policy developments added around 2.5 percent to their employment rate over the two decades, 1978-1998.

d) UK – Enforcement of competition law led to lower real prices and better consumer choice in airlines, long distance telephony, replica football kits, etc. As in New Zealand, the employment rate went up substantially due to pro-competition policy.

5.8 MRTP REGIME IN INDIA

The MRTP Act, 1969 was enacted at in the era of licences, permits and controls when the concept of 'market economy' was not fully developed in India. At that time, monopoly in trade and industry was regarded as bad in law.Under the MRTP Act, a regulatory authority called the MRTP Commission (MRTPC) was set up to deal with offences under the purview of the statute.

The MRTP Act was directed towards prevention of concentration of economic power to the common detriment, control of monopolies, prohibition of restrictive trade practices, prohibition of monopolistic trade practices and prohibition of unfair trade practices. The government appointed a high-powered expert committee to review the Companies Act, 1956, and the MRTP Act, under the chairmanship of Justice RajindarSachar to suggest changes required to the MRTP Act in the light of the experience gained in the administration and operation thereof. In 1984, Unfair Trade Practices (UTP) Enquiries were added and in 1991 the Chapter dealing with Mergers and Acquisitions was deleted.

5.9 NEED FOR CHANGE IN THE LAW

As the new paradigm of economic reforms, namely, liberalisation, privatisation and globalisation took root in the mid-'80s and intensively from the early '90s, the MRTP Act proved inadequate to regulate the market and ensure the promotion of competition therein. The MRTP Act suffered from the weakness that it did not give the MRTPC the power to impose penalties and thereby lacked effectiveness. Further, over the years, a large number of judicial decisions had weakened certain aspects of the MRTP Act. For example, in a case involving the American Natural Soda Ash Corporation (ANSAC), the Supreme Court of India directed that the MRTP Commission is not permitted to take actions against international cartels if the cartel meetings took place outside the country. The desire for a new competition law also necessitated from the changes in the international economic environment, in particular from the establishment of the World

Trade Organisation (WTO). Article 9 of the TRIMs agreement provided a built-in agenda to consider the adoption of an investment policy and a competition policy. Further, the TRIPS Agreement came into effect from January 01, 1995, and seeks to achieve reductions of distortions and impediments to international trade, while promoting adequate protective measures for IPRs. The Agreement also contains a number of provisions relating to the use of IPRs with relevance to competition rules. Article 40(2) of TRIPS makes a direct reference to the need to enact competition law so as to discipline abuse of monopoly power by IP holders A working group on the interaction between trade and competition was established pursuant to WTO's Singapore Ministerial Declaration in 1996 to apparently propose the adoption of competition laws by member States.

In India also an expert group was established by the Union Ministry of Commerce in 1997 to study the interaction between trade and competition policy in India, including anticompetitive practices and the effect of mergers and amalgamations on competition. The objective of setting this expert group was to assist the Government of India in discussions relating to the WTO agenda. The expert group submitted its report in 1999. Noting that competition policy is a prerequisite to economic liberalisation, the Expert Group, in its report submitted to the Ministry of Commerce in January 1999 recommended that a fresh competition law be drawn up. Further, the report recommended harmonisation of competition principles, competition policy and objectives, and competition law enforcement efforts.

The Hon'ble Finance Minister of India in his budget speech of 1999 stated that the Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. It was further stressed that the need is to shift our focus from curbing monopolies to promoting competition. The Government thus decided to appoint a committee to examine the related range of issues and propose a modern competition law suitable for Indian conditions. Even in a recent judgment, the Hon'ble Supreme Court noted that the earlier MRTP Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law.

5.10 RAGHAVAN COMMITTEE REPORT, 2002

The Central Government constituted a High Level Committee on Competition Policy and Law. The nine member committee headed by S V S Raghavan submitted its report on the 22nd May, 2000 to the Central Government. In its report, Committee outlined the path that needs to be followed by India in order to liberalise its market, whilst simultaneously increasing competition, for the benefit of the consumer. This report formed the background to the Competition Act, 2002, finding mention in the Statement of Objects and Reasons of the Act.

The major recommendations of the Raghavan Committee report were:

- The MRTP Act, 1969 may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices need not figure in the Indian Competition Act as they are presently covered by the Consumer Protection Act, 1986;
- A new law called the Indian Competition Act may be enacted. The proposed legislation should cover all industries in the public and private sector;

- Competition law needs to have necessary provisions and teeth to examine and adjudicate upon anti-competition practices;
- The economic reforms of liberalisation, deregulation and privatisation need to be further progressed and should be so designed that they strengthen the Competition Policy and vice-versa;
- There should be progressive reduction and ultimate elimination of the reservation of the products for the small scale industries;
- A Competition Law Authority christened "Competition Commission of India" may be established to implement the Indian Competition Act. It will hear competition cases and also play the role of competition advocacy.

During the tenth plan period, the Competition Act, 2002 was enacted. The Act established the CCI to eliminate anti-competitive practices and ensure freedom of trade.

5.11 ENACTMENT OF THE COMPETITION ACT, 2002

From the above discussion, it is clear that a comprehensive and effective competition law was considered the need of the hour. The Competition Act, 2002 is in tune with time and has different approach from MRTP in terms of scope, aims philosophy and application.As per the Statement of Objects and Reasons to the Competition Act, 2002, the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain aspects in the light of international economic developments related more particularly to competition laws and there is a need to shift focus from curbing monopolies to promoting competition.The Preamble, regarded as the key of any legislation as it sets broad objectives of the Act, clearly gives very broad objectives to be achieved through various provision of the Act. The preamble of the Competition Act, 2002, provides for the establishment of a Commission keeping in view of the economic development of the country to:

- promote and sustain competition in markets;
- prevent practices having adverse effect on competition;
- protect consumer interest;
- ensure freedom of trade carried on by participants in Indian markets.

Several factors contributed to the need for a new competition law for India. Most importantly, it was seen that India needed a law reflective of its more open approach to business – protections for competition and the competitive process should replace governmental command and control mechanisms. Competition law comprises general and specific prohibitions administered and applied by an independent regulator, the violations of which would subject the violator to credible, adequate sanctions. On the other hand, competition policy encompasses a much wider scope and addresses all government policies that affect competition. Competition policy is established because various government laws and regulations (including those on foreign and domestic investment; intellectual property; taxation; public and private ownership; small business policy; licensing; monopoly franchises; laws and regulations governing certain sectors such as agriculture, mining, construction, manufacturing, health, education, and social security services) can affect competition in many areas. There have been voices for adoption of competition policy in India, especially after the adoption of the Competition Act. This will be covered in detail under the coming section in this Unit.

5.12 COMPARISON BETWEEN MRTP ACT AND THE COMPETITION ACT

The Table given below succinctly captures the important differences between the MRTP Act and the Competition Act. This will clearly indicate the flexible and comprehensive approach which is in tune with the international practices being followed under the Competition Act.

S.No.	MRTP Act, 1969 (now repealed)	Competition Act, 2002
1.	MRTP Act was based on pre-reforms command and control regime and was reactive and rigid in approach.	The Competition Act is based on post-reforms liberalised regime and is proactive and flexible in approach.
2.	It was based on size/structure as factor for analysing the concept of market factor.	It is more based on conduct and behaviour of the market players.
3.	Competition offences were implicit and were not properly defined.	It defines various anti-competition practices and offences.
4.	Registration of business agreements, such as marketing etc. compulsory.	There is no requirement of registration of agreements.
5.	MRTP Act frowned upon dominance, thus size was bad per se.	The Competition Act frowns upon abuse of dominance and not on dominance per se.
6.	After the 1991 amendment there was no provision for regulating the combinations in the MRTP Act.	There are provisions for regulations of combinations beyond a high threshold limit.
7.	No penalties for offences except resale price maintenance	There are provision for high penalties and fines for offences.
8.	Unfair trade practices were covered under this Act.	Unfair trade practices are not covered under this Act and this function has been now given to authorities under Consumer Protection Act, 1986.
9.	There was blanket exclusion of intellectual property rights	Though there is Exclusion of intellectual property rights, but unreasonable restrictions covered.
10.	There was no role for the competition advocacy for MRTPC.	CCI has been given the role of competition advocacy.
11.	It followed a more structural approach and was not in tune with the international approach.	Rule of reason approach and economic factors are more taken care of and thus follows more comprehensive and contemporary approach.

5.13 AMENDMENTS VIDE COMPETITION (AMENDMENT) ACT, 2007

The Act essentially in the initial stages remained dormant due to the filing of a writ petition before the Supreme Court challenging the constitution of CCI and the rule allowing the government to select the key members of the Commission. The Supreme Court in the decision of ***BrahmDutt v. Union of India*** (January 20, 2005) noted that it would be in the best interest of the Government to create two separate bodies, one

with expertise for advisory and regulatory functions, and the other for adjudicatory functions. Thus, the Competition (Amendment) Act, 2007 passed by the Parliament in September 2007 incorporated some important changes in the Competition Act, 2002 including the establishment of a Competition Appellate Tribunal (COMPAT) to hear appeals from the orders of the CCI. The important changes made by the amendment in 2007 can be summed up as under:

a) CCI will be an expert body which will function as a market regulator for preventing anti competitive practices in the country. CCI to function as a collegium and its decisions would be based on simple majority. Further, CCI would also have advisory role and advocacy functions.

b) The amendments provided for the establishment of COMPAT, a three-member quasi judicial body, to be headed by a retired or serving Judge of the Supreme Court or Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by the CCI.

c) Competition Appellate Tribunal to also adjudicate upon claims of compensation and to pass orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Competition Act, 2002.

d) The orders of COMPAT can be executed as a decree of a civil court. The appeal against the orders of the COMPAT lies to the Supreme Court of India.

e) The amendments made an important change by making notification of all combinations i.e. mergers, acquisitions and amalgamations under Sections 5 and 6 compulsory.

f) Provision for sectoral regulators to make suomoto reference to CCI on competition issues in addition to the earlier provision of making a reference on a request made by any party in a dispute before it. Also, similar powers conferred upon CCI by incorporating Section 21A.

Self Assessment Question **(Spend 3 minutes)**

2) What are the major differences between MRTP Act, 1969 and the Competition Act, 2002?

.....

.....

.....

.....

.....

5.14 TOWARDS NATIONAL COMPETITION POLICY

There is a need for evolving a coherent national competition policy that would lay down certain basic principles of competition to serve as guidelines for government, sector regulators, and other stakeholders, thereby promoting consistency and coherence in sectoral policies and a healthier competition outlook within government. The overarching objective of competition policy lies in creating an active competitive environment, and in aiding and abetting the process of creating globally competitive firms with enhanced

investment and technological capabilities. As discussed earlier, a competition law may be quite narrow in its scope, but a competition policy is much more broad and comprehensive, and hence tries to bring harmony in all government policies that may encourage or adversely affect competition and consumer welfare. The Australian experience in this regard is worth mentioning. A national competition policy review committee called as the Hilmer Committee was established in Australia which paved the way for further reforms there. The National Competition Policy, 1995 of the Australia has been said to be a landmark microeconomic reform program and has helped achieve high rate of growth.

In India, the Planning Commission in the midterm appraisal of the ninth five year plan recognised the need for a National Competition Policy (NCP) to accelerate economic growth and thereby improving the quality of life of people in the country. It highlighted the need of National Competition Policy in bringing a competition culture amongst economic entities to serve multiple objectives such as maximisation of economic efficiency and improvement of international competitiveness of domestic industry. As per the Report of the Working group on Competition policy, Planning Commission, Government of India, February 2007, the broad objectives of the broad based, overarching National Competition Policy should be:

i) to preserve the competitive process, to protect competition, and to encourage competition in the domestic market so as to optimise efficiency and maximize consumer welfare. This would also make domestic firms competitive globally,

ii) to promote, build and sustain strong competition culture within the country through creating awareness, imparting training and consequently capacity building of stakeholders including law makers, judiciary, policy makers, business, trade associations, consumers and their associations, civil society etc.,

iii) to achieve harmonisation in policies, laws and procedures of the Central Government, State Governments and sub-State Authorities in so far as the competition dimensions are concerned with focus on greater reliance on well-functioning markets,

iv) to ensure competition in regulated sectors and to ensure institutional mechanism for synergized relationship between the sectoral regulators and the CCI,

v) to strive for single national market as fragmented markets are impediments to competition.

A working group on Competition policy was set up by the Planning Commission during the formulation of 11th plan. The Working Group suggested a need for the Government to adopt a broad-based, overarching and comprehensive NCP to promote coherence in the reform process; establish uniform competition principles across different sectors; and harmonise all other policies keeping in view the competition dimensions. The working group recommended a framework comprising of competition principles, government measures and institutional arrangement to implement national competition policy. These recommendations of the working group in chapter 11 titled 'Consumer Protection and Competition Policy' of the 11th five year plan document. The 11th five year plan in Chapter 11 titled 'Consumer Protection and Competition Policy' observers that regulatory laws, such as those for intellectual property or anti-dumping or even capital markets, too have an important interface with competition. The National Competition Policy should be based on the following principles as enunciated in the 11th five year plan document:

i) there should be effective control on anticompetitive conduct which undermines competition in markets in India;

ii) there should be competitive neutrality or a level playing field among all players, whether these be private enterprises, PSEs or government departments engaged in non-sovereign commercial activity;

iii) the procedures should be rule bound, transparent, fair and non-discriminatory;

iv) there should be institutional separation between policy making, operations and regulation;

v) where a separate regulatory arrangement is set up, it should be consistent with the principles of competition;

vi) third party access to essential facilities on fair terms should be available;

vii) any deviation from the principles of competition should be only to meet desirable social, environmental, developmental or other national objectives which are clearly defined, transparent, non-discriminatory, rule based and having the least competition restricting effect.

The above principles of competition should be applicable across all sectors of the economy and be incorporated in policies, which govern them. Further, the Second Administrative Reforms Commission of India in its fourth report titled 'Ethics in Governance' also recommended that all new national policies on subjects having large public interface and amendments to existing policies on such subjects should invariably address the issue of engendering competition.

In June 2011, the Ministry of Corporate Affairs, Government of India set up a Committee on National Competition Policy and related matters. The work of the Committee relates to framing a National Competition Policy and proposing amendments to the Competition Act, 2002 with an object to fine tune it. It is pertinent to note that the Committee has submitted the report on National Competition Policy after various consultations including national level consultations with various stakeholders in the country. The political environment seems also to be in favour of enacting such policy framework as is evident from the speeches at various levels. The objective of such policy framework would be, amongst others, to control inflation, promote entrepreneurship, creating jobs, infusing innovation and to promote equal opportunities for growth.

Self Assessment Question **(Spend 3 minutes)**

3) Briefly enumerate the overarching objectives of a National Competition Policy.

.....

.....

.....

.....

.....

5.15 SUMMARY

- The global trend is that nearly all the major countries have framed a competition law regime. Further, competition laws are being increasingly amended or scrapped

and new ones adopted to bring them in line with current globalisation needs and the political economy of the country.

- In competitive markets prices are kept down, and other benefits such as quality, choice and innovation flow to consumers, whereas in markets which are monopolised output is reduced, prices rise, and consumers are deprived of choice, quality and innovation. Thus, competition is said to produce efficiency, which ultimately benefits all the stakeholders in an economy.
- The tools of competition law are used for policing the conduct of the firms in the market and thus to check anticompetitive practices which affect businesses and consumers as well.
- Competition Policy implies a comprehensive framework and covers competition law within itself. Generally, a competition law should be enacted after incorporating a competition policy framework for infusing competition principles in the economy. The benefits from a competition law can be more effectively achieved if there is an ambitious competition policy framework in the country.
- India, in tune with the times, repealed the MRTP regime and enacted a competition law in 2002. The Act has a wide coverage in terms of scope and application. The need for a competition policy has been voiced from some fronts in India and it seems that a consensus is building up for enacting a comprehensive competition policy in near future.

5.16 TERMINAL QUESTIONS

1) Distinguish between competition law and competition policy. What are the components of competition policy? How intellectual property law interacts and affects the competition policy?

2) Discuss in detail the evolution of modern competition regime in India.

3) Enumerate the objectives of the competition law. How it promotes innovation and competitiveness of an economy?

5.17 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Sections 5.3 and 5.7

2) Refer to Section 5.12

3) Refer to Section 5.14

Terminal Questions

1) Refer to Sections 5.5, 5.6 and 5.7

2) Refer to Sections 5.9, 5.10 and 5.11

3) Refer to Sections 5.3, 5.6 and 5.7

5.18 REFERENCES AND SUGGESTED READINGS

1) High Level Committee on Competition Policy and Law, Government of India, Raghavan Committee Report, 2002.

2) Report of the Working group on Competition policy, Planning Commission, Government of India, February, 2007.

3) Eleventh five year plan Chapter XIth titled 'Consumer Protection and Competition Policy'.

4) Mehta, Pradeep S and Chakravarthy S, Dimensions of Competition Policy and Law in Emerging Economies, Discussion Paper, CUTS CCIER, 2011.

5) Competition Law Toolkit, Asian Development Bank.

6) UNCTAD 'The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy', 2010.

UNIT 6 COMPETITION ACT, 2002

Structure

6.1 INTRODUCTION

In the previous unit, the importance and rationale of competition law and competition policy were explained giving the evolution of new competition regime in India. Competition policy is an overarching policy and thus it interacts and interplays with various policies and laws including intellectual property law. India, keeping in view the requirement of the time, initially followed economic policies based on the command and control regime with the objective of developing a broad industrial base to achieve economic growth and self-reliance in critical areas and social justice.The need to curb monopolistic practices that would lead to unhealthy accumulation of economic power was felt long ago. India enacted its first antitrust law in the form of the Monopolies and

Restrictive Trade Practices Act in 1969, which underwent a number of amendments, most notably in 1984 and 1991. The thrust of MRTP was on the prevention of concentration of economic power and of monopolistic, restrictive and unfair trade practices.

The Indian economy has undergone considerable change since 1991 with progressive liberalisation, private sector participation, emergence of functioning markets in a number of sectors and reduction of trade barriers leading to a new economic environment. Thus, with the change in economic environment of the country, a need was felt to tune this law with the international developments. The terms of reference by the Government for the Raghavan Committee specifically described, amongst others, the purpose of setting up the committee as being "for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law in line with international developments to suit Indian conditions". Thus, the Competition Act, 2002 follows contemporary approach and is in tune with the times. Competition law aims at regulating the behaviour of different players in the market. The Indian Competition Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates combinations (consisting of mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.Further, as discussed in the previous Unit, the Competition Act was amended in 2007 bringing about significant changes to the Competition Law. The provisions of the Competition Act, 2002, relating to anti-competitive agreements and abuse of dominant position by enterprises, have been notified with effect from May 20, 2009, and the Competition Commission of India (CCI) has become operational. The provisions relating to regulating combinations came into force with effect from June 1, 2011. The commission has also issued regulations under the Act on various aspects to carry out effectively various provisions of the Act.This Unit will give a brief overview of the important provisions of the Competition Act, 2002 so that the reader can appreciate the interface between the competition law and intellectual property law in the next unit.

6.2 OBJECTIVES

After reading this unit, you should be able to:

- appreciate the nature and scope of the Competition Act, 2002;
- explain the function and structure of the authorities established under the Act;
- define anticompetitive agreements;
- describe appreciable adverse effect on competition;
- analyse as to what amounts to abuse of dominant position;
- explain how competition law regulate mergers and acquisitions;
- describe the meaning and importance of Competition Advocacy; and
- enlist the factors which CCI takes in to consideration while analysing conduct of market players.

6.3 WIDE COVERAGE AND NATURE OF THE ACT

The preamble of the Act gives wide mandate to the Commission to ensure freedom of trade, promote and sustain competition in India and to protect the interests of consumers.Section 2(h) of the Act has defines the term "enterprise" to mean a person

or a department of government engaged in all the activities of a value chain of products and services directly or indirectly. The definition is very wide and covers every type of engagement in any activity, investment or business. However the activity of the Government relatable to sovereign functions and the activities carried on by the departments of the government dealing with atomic energy, currency, defence and space are kept out of the purview of the Act. Section 2(l) of the Act defines "person" inclusively and also covers every artificial juridical person, not falling within any of the listed categories in the definition. Therefore, reading Section 2(h) along with Section 2(l) of the Act implies that every person, organisation, institution, society, scientific society and the like which can legally be conceived shall fall within the ambit of definition of "enterprise" except the exceptions listed out in Section 2(h).The coverage of the law is based on the activity of the entity rather than the organisational form of the entity and thus it can be seen that there is no discrimination on the ground of ownership of business i.e. principle of competition neutrality has been incorporated in the Act. Further, the Act gives very wide and comprehensive definitions of 'service' under Section 2(u) and 'statutory authority' under Section 2 (w). Section 60 is a non-obstanteclause and provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 61 bars the jurisdiction of civil court to entertain any suit or proceeding in respect of any matter which the Commission under the Act is empowered to determine and further states that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. Thus, the above provisions discussed clearly indicate the wide coverage and mandate which has been given to the CCI by the Act.

The competition law is an economic law and keeping in view the shift towards the rule of reason approach the importance of economic analysis has grown and lie at the very basis of the decision making under this law. The factors listed in the various provisions of the Act, which have to be taken care by the authorities under the Act have linkage to the economic analysis. The concepts like market power, relevant market, appreciable adverse effect on competition etc can be understood and appreciated in the light of cogent economic analysis of the reliable data. For instance, dealing with a case related to abuse of dominance or effect of combinations, the concept of relevant market where the effect on competition has to be seen, is pivotal. The relevant market under Section 2(r) of the Act may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Section 2(s) and 2(t) further define the relevant product market and the relevant geographic market and Sub-section 19(6) and 19(7) respectively enlist set of factors which need to be taken care of while determining the relevant product market and the geographic market. These factors mostly depend on and can be gauged by means of reliable data and thus a proper analysis of the provisions of the Act for a specific case hinges on proper analysis of the economic data. It can be seen that the application of modern competition laws, based on rigorous economic analysis, have wider amplitude and have pervasive effect on society and economy.

6.4 AUTHORITIES UNDER THE ACT

The Competition Act empowers the Central Government to set up a Commission to be called the Competition Commission of India (CCI). CCI was established by the Central Government with effect from 14 October, 2003. As per Section 7, the Commission shall be a body corporate having perpetual succession and may sue or be sued in that name. However, before, CCI could be fully constituted; a Public Interest Litigation was filed in the Supreme Court of India challenging its constitution. This matter was finally

disposed by the Supreme Court in January 2005 after an assurance was given by the Government of India to amend the Competition Act by creating a separate adjudicatory appellate authority while leaving the expert regulatory space for CCI. Accordingly, the Competition Act was amended in September 2007, which, inter-alia, provided for the setting up of an appellate tribunal, to be headed by a judicial member to adjudicate appeals against orders of CCI and also to determine compensation claims arising out of the decisions of CCI. In terms of Sections 53A & 53B of the Act, any person aggrieved by the order or decision of the CCI may prefer an appeal to the Competition Appellate Tribunal ('COMPAT') within 60 days from the date of communication of such order or decision. The second and final appeal under Section 53T lies before the Supreme Court of India from the orders of the COMPAT within a period of 60 days from the date of communication of the order by the COMPAT. The Supreme Court of India, on September 9, 2010 in its verdict in Competition Commission of India v. Steel Authority of India Ltd, inter alia, has effectively defined the limits of exercise of power by both the Competition Commission of India and the Competition Appellate Tribunal.

Section 8 dealing with composition of Commission provides for a chairperson and not less than two and not more than six members which are to be appointed by Central Government. The CCI is vested with inquisitorial, investigative, regulatory, adjudicatory and also advisory jurisdiction. Vast powers have been given to the Commission and under Section 64, the Commission can frame regulations. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and in a time bound manner. The Supreme Court in 2010 observed that keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest; the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. As per the provisions of the Act, CCI may initiate an inquiry:

- on its own motion on the basis of information and knowledge in its possession, or
- on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association, or
- on receipt of a reference from the Central Government or a State Government or a statutory authority.

The Competition Act, 2002 provides for the adjudicative wing distinct and separate from the investigative wing. At the apex level of the investigative wing, there is a senior official designated as the Director General (DG). He is charged with the responsibility of looking into the complaints received from the CCI and submits his findings to it. DG is solely responsible for making enquiries, for examining documents, for making investigations into complaints and for effecting interface with other investigative agencies of the Government including Ministries and Departments. The DG is vested under the Act with powers of summoning of witnesses, examining them on oath, requiring the discovery and production of documents, receiving evidence on affidavits, issuing commissions for the examination of witnesses etc. The DG in terms of Section 16 of the Act will be assisted by Additional, Joint, Deputy or Assistant Directors General, as the Rules under the Act may prescribe. The investigation staff will have to be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation and knowledge of Accountancy, Management, Business, Public Administration, Trade, Law or Economics and such other qualifications as may be prescribed by the Rules under the Act. This requirement is designed to induce professionalism in the investigative wing.

6.5 ANTICOMPETITIVE AGREEMENTS (SECTION 3)

Section 2(b) of the Competition Act defines an agreement to include any arrangement, understanding or concerted action entered into between parties. It need not be in writing or formal or intended to be enforceable in law. This shows the intent of the legislature to cover wider range of activities which can have adverse effect on competition. Section 3(1) of the Competition Act lays down that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.The Competition Act prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. The Act prohibits an anti-competitive agreement and declares that such agreement shall be void.

6.5.1 Horizontal Agreements

The Competition Act does not use the words horizontal or vertical agreements. However, it treats more sternly certain kinds of horizontal agreements, including cartels. There are certain categories of agreements, which have been mentioned under Section 3(3) of the Competition Act, which are presumed to harm competition and are per se illegal as they cause an appreciable adverse effect in India. The use of the words 'engaged in identical or similar trade of goods or provision of services' in Section 3(3) of the Act indicates that the section covers the horizontal agreements. Horizontal agreements (agreements between direct competitors), are:

a) Directly or indirectly determining purchase or sale prices, that is, agreement to fix prices. It may consist of mutual agreement, or arrangement or understanding between competitors to raise, lower or stabilise sale or purchase prices.

b) Agreement to limit production, supply, markets, technical development, investments or provisions of services. This is done on the simple logic that output can be restricted below optimum consumer welfare levels so that prices are maintained above the competitive thresholds.

c) Agreement to geographically allocate markets or source of production or provision of services – by allocation of geographical area, type of goods/services or number of customers. Such agreements have the effect of eliminating competition in respect of competing enterprises customers or markets.

d) Agreements directly or indirectly resulting in bid rigging and collusive bidding. Bidding as a procedure is intended to enable the procurement of goods or services on the most favourable terms and conditions. Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Bid rigging can take various forms including bid suppression, complementary bidding or bid rotation.

These horizontal agreements are presumed to have appreciable adverse effect on competition, which implies the application of per se rule. Thus, the onus of proof is on the person or the enterprise concerned to prove that the agreement does not fall under the prohibited category. However, proviso to Section 3(3) of the Competition Act provides that such agreements shall not be considered as per se illegal if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Further in the Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements.

As per Section 2(c) of the Act, cartel includes an association of producers, sellers,

distributors, traders orservice providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. Cartels are considered as most pernicious form of anticompetitive activities and cartels exist at national and international level also. Cartels which operate in secrecy raise price, restrict supply, inhibit innovation, and result in artificially-concentrated markets, waste, inefficiency and distortions in prices. Fine to the tune of Rs 6,307 crore fine on 11 major cement manufacturers for cartelisation has been the biggest punishment till date by CCI. There have been other cases regarding cartelisation which have been decided by CCI. Other such example relates to the case of liquefied petroleum gas (LPG) manufactures association. This investigation was ordered suo motu by the commission. In this case various manufacturers colluded in responding to tender notices by the public sector oil marketing companies for procurement of LPG cylinders.

Illustration:

Take an example where enterprises X, Y and Z are bidding for some contracts related to procurement of goods. X, Y and Z would be guilty of big rigging if they together decide on any of the following:

- If they quote identical prices.
- If they do not quote below a certain amount.
- If one of them bid the lowest price in order to allow other to win.

6.5.2 Vertical Agreements

Vertical agreements are the agreements between enterprises at different levels of the production chain in different markets, such as agreements between a manufacturer and a distributor or a distributor and a retailer etc.The use of the words 'agreement amongst enterprises or persons at different stages or levels of the production chain' in Section 3(4) of the Act indicates that the section covers the vertical agreements. Although such arrangements are common business and commercial practices but if they reduce competition they fall under the category of anticompetitive agreements. These are:

a) Tie-in arrangement: A tie-in arrangement includes any agreement requiring a purchaser of goods, as condition of such purchase to purchase some other goods. These arrangements may have various forms such as tie-in sale, full-line forcing, fidelity discounts and quantity forcing. An oft cited example of this may be Microsoft's bundling of its web browser Internet Explorer along with the Windows operating system, limiting Netscape's web browser, Navigator, from having a significant presence in the market.

b) Exclusive supply agreement: This implies an agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Market partitioning is one form of exclusive arrangement.

c) Exclusive distribution agreement:This happens Whenever a supplier appoints a distributor to be the exclusive dealer for its products, either for defined territorial boundaries or for a particular or specific class of customers.

d) Refusal to deal: This provision corresponds to restrictive trade practice under the old MRTP Act. The term refusal to deal covers cases wherein there is an agreement not to deal with particular or specific group of suppliers and customers. This is also known as group boycott wherein there is horizontal concerted refusal to deal.

e) Resale price maintenance: Vertical price fixing agreements occur when suppliers set the prices the customer will be charged upon resale of the product by the distributor.

The vertical agreements are generally necessary to maintain good supply chain and are the norm of the industry. But they can raise anti-competitive concerns in some cases and thus have to be deal with 'rule of reason' analysis to see whether the agreement in question adversely affects the competition in the relevant market. As per Section 3(5), reasonable restrictions necessary to safeguard intellectual property rights are not considered anti-competitive. Thus the Act gives due recognition to intellectual property rights, providing that the prohibition against anti-competitive agreements shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights conferred under the listed IP legislations in Section 3(5). This interface between IP and competition law will be dealt in detail in the next unit.

6.5.3 Factors for Determining Appreciable Adverse Effect on Competition

The term 'appreciable adverse effect on competition', used in Section 3(1) has not been defined in the Competition Act. As per Section 19 (3), the Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under Section 3, have due regard to all or any of the following factors, namely:

a) creation of barriers to new entrants in the market;

b) driving existing competitors out of the market;

c) foreclosure of competition by hindering entry into the market;

d) accrual of benefits to consumers;

e) improvements in production or distribution of goods or provision of services;

f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

It is pertinent to note that the first three set of factors can be classified as negative factors which mainly relate to the concept of entry barriers. Broadly, entry barriers can be divided into structural and strategic entry barriers. Structural barriers relate to economic nature of the industry, while strategic barriers relate to behaviour of the incumbent firms in the market. The aim of considering the negative factors is that market players get a level playing field.The rest of the three factors given above can be classified as positive factors which aim at promoting competition. Thus, the consideration should also be given to whether the action leads to benefit to consumers, improvements in production or technical or scientific improvement leading to economic development. Thus, both set of factors need to be taken in to consideration while determining the appreciable adverse effect on competition.

6.5.4 Remedies

The following orders can be passed by CCI in case of anti-competitive agreement:

a) during the course of inquiry, the CCI can pass interim order restraining a party from continuing with anti-competitive agreement.

b) impose a penalty up to 10% of the average turnover for the last three preceding

financial years of the enterprise. In case of a cartel, the CCI can impose on each member of the cartel, a penalty of up to three times its profit for each year of the continuance of such agreement or up to ten percent of its turnover for each year of continuance of such agreement, whichever is higher.

c) may direct after the inquiry a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement.

d) may also direct modification of such agreement.

e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and

f) pass such other order or issue such directions as it may deem fit.

Self Assessment Question **(Spend 3 minutes)**

1) What are horizontal agreements? Give an example of such anti-competitive agreement.

.....

.....

.....

.....

6.6 ABUSE OF DOMINANCE (SECTION 4)

Section 4 of the Act deals with the provision related to abuse of dominant position. Section 4(1) prohibits abuse by an enterprise or a group of its dominant position. Sub-section (2) defines when there is abuse of a dominant position within the meaning of Section 4(1). Explanation (a) to Section 4 of the Competition Act defines dominant position as "dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to-

a) operate independently of competitive forces prevailing in the relevant market, or

b) affect its competitors or consumers or the relevant market in its favour."

The substance of the definition is that a dominant enterprise is one that has the power to disregard market forces, that is, competitors, customers and others and to take unilateral decisions that would benefit itself and also, in the process, cause harm to the process of free competition, injuring the consumers by setting higher prices, limited supplies etc. The concept of group dominance has been introduced in the Competition Act by amendments made in 2007. Thus group as defined in the Act means two or more enterprises having some legal relation and therefore the concept of group dominance introduced by 2007 amendment is different from the concept of collective dominance under the EU law.

In contrast with MRTP, dominance per se is not considered bad by the Competition Act. It is the abuse of this position of dominance that is prohibited. The Act lays down an exhaustive list of actions which will be considered to be abuse of dominance. These are:

a) Imposing unfair or discriminatory condition or price in purchase or sale of goods or services; or

b) Limiting or restricting:

i) production of goods or provision of services or market therefore;

ii) technical or scientific development relating to goods or services to the prejudice of consumers;

iii) Indulging in practices which amount to denial of market access;

iv) Making unrelated supplementary obligations a condition precedent for entering into a contract; and

v) Using the dominant position in one relevant market to enter into or protect its position in another relevant market.

It can be said that the abuses as specified in the Competition Act fall into two broad categories: exploitative (e.g. excessive or discriminatory pricing restrictive contractual terms, refusing to supply or refusal to deal with business partners or customers,) and exclusionary (e.g. denial of market access and predatory pricing). Exploitative abuse is when a firm is exploiting customers by ignoring their needs as well as those of its competitors. Exclusionary abuse involves driving out competitors from the market. Though there can be cases where there is overlapping between exploitative and exclusionary abuse. There can be various forms of abuses. For instance, full line forcing occurs when a firm agrees to sell its products only when the customer agrees to buy the full range of products manufactured by the firm. Predatory pricing is the practice of offering goods or services at exceptionally low prices, even at a loss, in order to drive out competitors or deter the entry of new players in the market. Another such abuse listed in the Competition Act is denial of market access. The denial of market access is mostly seen in the cases pertaining to essential facilities. Cases implicating the Essential Facilities Doctrine arise when an enterprise that is a natural monopolist in one market refuses to provide the monopolised input which is essential facility to a rival/competitor in the same/an adjacent market. However, the Act does not specifically mention the essential facilities doctrine, which has been invoked by the courts in the US and EU in a number of cases. This doctrine will be dealt in detail in one of the next Units.

In *Belaire Owner's Association* case, CCI imposed a penalty of Rs. 630 crore on India's largest real estate developer, DLF Ltd, for imposing unfair conditions and holding out false representations and exploiting the dominant position in the relevant market.

6.6.1 Factors to Determine Dominant Position

As per the Raghavan Committee report, the key questions for adjudication on abuse of dominance could include:

a) How will the practice harm competition?

b) Will it deter or prevent entry?

c) Will it reduce incentives of the firm and its rivals to compete aggressively?

d) Will it provide the dominant firm with an additional capacity to raise prices?

e) Will it prevent investments in research and innovation?

f) Do consumers benefit from the lower prices and/or greater product and service availability?

Section 19 (4) of the Act provides a list of the factors which the Commission shall, have due regard to while inquiring whether an enterprise enjoys a dominant position or not. The Commission can take into account all or any of the factors provided in this section. The factors are:-

a) market share of the enterprise;

b) size and resources of the enterprise;

c) size and importance of the competitors;

d) economic power of the enterprise including commercial advantages over competitors;

e) vertical integration of the enterprises or sale or service network of such enterprises;

f) dependence of consumers on the enterprise;

g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

i) countervailing buying power;

j) market structure and size of market;

k) social obligations and social costs;

l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

m) any other factor which the Commission may consider relevant for the inquiry.

Thus there is a list of factors provided under the section and CCI can take in to account all or any of them for the purpose of inquiring whether an enterprise enjoys dominant position or not.These factors mainly relate to factors indicating the strength of the enterprise in question, related to characteristics of the market, related to the position of other competitors, the social obligations and effect on consumers. Further, as provided in the Act, CCI can take in to consideration any other factor which it deems fit to analyse as to whether the enterprise enjoys dominant position in the relevant market. The dominance is defined based on array of factors which are both structural and behavioural. The structural perspective looks at factors like market share, the behavioural perspective looks at the ability of the enterprise to raise price above normal levels and the ability of the enterprise or group to act independently of competitors and consumers in the market. The structural criteria are practical and easy to apply than the behavioural criteria. But, modern competition laws are moving towards behavioural criteria or a mix of both the criteria. In Competition Act itself, though market share is an important factor but it has not got that relevance which it was having under the MRTP regime; because now a set of other criteria regarding behaviour of the firm have also to be taken care of while determining the dominant position of the firm. Further, it has also been found that reliance on behavioral approach is theoretically more exact and is also more suited to developing country circumstances, as are in India.

6.6.2 Inquiry into Abuse of Dominance

Three distinct steps to the analysis are required for determining the abuse of dominant position under the section.

a) First, defining the relevant market.

b) Second, determine whether the enterprise under investigation has a dominant position.

c) Finally, evaluate the specific activity of the firm to determine whether that amounts to an abuse of the dominant position.

6.6.3 Remedies

The remedies which can be ordered by CCI in case of abuse of dominance are:

a) during the course of inquiry, the CCI can pass interim order restraining a party from continuing with abuse of dominant position.

b) impose a penalty up to 10% of the average turnover for the last three preceding financial years of the enterprise.

c) may direct after the inquiry a delinquent enterprise to discontinue and not to abuse its dominant position (cease and desist order).

d) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any.

e) pass such other order or issue such directions as it may deem fit.

f) may direct division of enterprise in case it enjoys dominant position as provided in Section 28 of the Act.

6.7 COMBINATIONS (SECTIONS 5 AND 6)

Sections 5, 6, 20, 29, 30 and 31 of the Act dealing with the definition of combinations, regulation of combination, power of the Competition Commission of India (CCI) to inquire into combinations, procedure for investigation of combination and procedure in case of notice under sub-section 2 of Section 6 of the Act and orders of the CCI on certain combinations, respectively, have been brought into force with effect from June 1, 2011. The term combination as broadly defined in the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. Thus Combination, for the purposes of the Act means:

a) an acquisition of control, shares or voting rights or assets by a person;

b) an acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; or

c) a merger or amalgamation between or among enterprises;

that exceed the 'financial thresholds' prescribed under the Competition Act. Generally, mergers can be broadly classified into three categories:

a) Horizontal mergers, which take place between competitors which produce or supply similar or identical products

b) Vertical mergers, which take place between enterprises at different levels in the chain of production, distributors etc. like manufacturers and distributors

c) Conglomerate mergers, which take place between enterprises engaged in unrelated business activities.

Also combinations taking place outside India but adversely affecting Indian competition are covered under the Act. In other words, even if the party to such combination is residing outside the boundary of India but its activity violates the provisions of the Act, fall within the scope of the Act. Thus, in the event of foreign enterprises being involved in a combination, domestic nexus also needs to be established for the transaction to fall within the definition of combination. As per Section 6 of the Act entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination would be void.

Financial thresholds' prescribed under the Competition Act for determining 'combinations' are as follows:

a) An acquisition/ merger where the transferor and transferee jointly have, or a merger or amalgamation where the resulting entity has, (i) assets valued at more than INR 15 billion or turnover of more than INR 45 billion, in India; or (ii) assets valued at more than USD 750 million in India and abroad, of which assets worth at least Rs. 7.5 billion are in India, or, turnover more than USD 2250 million of which turnover in India should be at least Rs. 22.5 billion.

b) An acquisition/ merger where the group to which the acquired entity would belong, jointly has, or a merger or amalgamation where the group to which the resulting entity belongs, has (i) assets valued at more that INR 60 billion or turnover of more than Rs. 180 billion, in India; or (ii) assets valued at more than USD 3 billion in the aggregate in India and abroad, of which assets worth at least Rs. 7.5 billion should be in India, or turnover of more than USD 9 billion, including at least Rs. 22.5 billion in India.

CCI on May 11, 2011 issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations"). These Combination Regulations will now govern the manner in which the CCI will regulate combinations.The regulations also provide for certain kinds of combinations that are excluded from the ambit of combinations and are likely to have an appreciable adverse effect on competition in India.

6.7.1 Merger Notification

A firm proposing to enter into a combination, shall notify the CCI in the specified form disclosing the details of the proposed combination within 30 days of the approval of the merger or amalgamation by the board of directors of the enterprises. The proposed combination cannot take effect for a period of 210 days from the date it notifies the CCI or till the CCI passes an order, whichever is earlier. If the CCI does not pass an order during the said period of 210 days, the combination shall be deemed to have been approved. It is also pertinent to mention here that if a party does not notify or fails notify any such combination to the Commission, the Commission can suomoto take cognisance of any combination which may come to its knowledge or information and can initiate the inquiry as stated above. However as per proviso to Section 20, the power of the Commission to suomoto take cognisance is a limited power as such cognisance cannot be taken after the expiry of one year from the date on which such combination has taken effect.

As per Section 6(4) of the Act, the share subscription or financing facility or any acquisition, inter alia, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement are exempt from notification. The concerned institution is, however, required to make disclosure to the Commission within 7 days by way of filing details of such transactions. It is good that the Act itself provides for revision of the threshold limits for the combinations every two years by the government, in consultation with the Commission, through notification. This revision of the thresholds will be based on the movement in Wholesale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies. Any enterprise which proposes to enter into a combination may request in writing to the CCI, for an informal and verbal consultation with the officials of the CCI about filing such proposed 'combination' with CCI. Advice provided by the CCI during such pre-filing consultation is not binding on the CCI.

6.7.2 Factors to Determine Effect of Combinations

Section 20 (4) of the Competition Act sets out the factors that the CCI, shall have due regard to, in determining whether a combination would have such an adverse effect on competition. For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:

a) actual and potential level of competition through imports in the market;

b) extent of barriers to entry into the market;

c) level of combination in the market;

d) degree of countervailing power in the market;

e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

f) extent of effective competition likely to sustain in a market;

g) extent to which substitutes are available or arc likely to be available in the market;

h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

j) nature and extent of vertical integration in the market;

k) possibility of a failing business;

l) nature and extent of innovation;

m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Thus the test for analysing a combination is whether such combination has appreciable adverse effect on competition (AAEC test) in the relevant market in India and the above listed factors are to be taken care of by the CCI while analysing the effect of

combination in the relevant market in India. In US significant lessening of competition (SLC test) is followed under Section 7 of the Clayton Act while analysing the proposed mergers. In EU, under EC Merger Regulation (ECMR) 2004, the test followed is that if the proposed transaction significantly impedes effective competition (SIEC test) in the relevant market. Thus, mainly a balancing approach is followed where pro-competitive effects of merger are analysed against the probable adverse effects on the competition in the relevant market.

6.7.3 Procedure for Investigation of Combinations

In order to avoid any delays, a time bound procedure has been prescribed under the law for the CCI related to investigation of combinations.Merger assessment being ex ante is a complicated process involving economic analysis at every stage. Since merger control is mainly about predicting the possibility that a merger will lead to the market being less competitive in the future, it has to be theoretical and the competition regulator has to analyse it with regard to appreciable adverse effect on competition to intervene as to why market will be less competitive after the merger. The competition regulator, therefore, need to produce evidence in support of effect on the competition by use of common empirical tests such as determination of correct relevant market, market shares and measure of pre-merger and postmerger concentration by using economic tests like Herfindahl–Hirschman Index, assessment of the closeness of competition between the merger parties through survey evidence, price concentration studies, impact analysis etc. At the same, mitigating factors such as increase in efficiency as a result of the merger will also have to be kept in view in support of the proposed merger.

There are at least four preconditions in the law before a notification of merger may be taken up for investigation and inquiry by the CCI. The preconditions are:

a) combination exceeding thresholds as given in Section 5

b) establishment of 'prima facie' case under Section 29

c) establishing appreciable adverse effect on competition in relevant market – vide Section 20(4)

d) the said effect has to be in the relevant market only - Sections 19(5) to (7)

The process of merger evaluation by the competent authority involves the following:

a) Identification of the relevant market, consisting of relevant product market and relevant geographic market

b) Consideration whether the merger has appreciable adverse effect on competition in the relevant market in India

c) Approval, rejection, or approval with modification of the merger

6.7.4 Remedies

Section 31 specifies the nature and scope of orders that may be passed by the Commission on certain combinations if not deemed permissible under the guidelines/ provisions of the Act.On evaluation of the combination by CCI, the Commission may decide to approve the merger, reject the merger or approve the merger subject to certain modifications.Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect. In a case where the Commission is of the opinion that adverse effect can be eliminated by suitable modification to such combination, it may

propose appropriate modification to the combination, to the parties to such combination. The parties, if agreed, have to carry the modification with in the time specified by the commission. If the parties do not agree to the proposed modification then the parties can propose modifications which then will be considered by the CCI. Again there can be two possibilities, CCI approving the modifications or CCI will be giving a time of thirty days to parties to modify the combination as directed by CCI earlier. If the parties fail to modify at this stage then the combination will be treated as having appreciable adverse effect on competition.

Self Assessment Question **(Spend 3 minutes)**

2) Briefly describe the provisions of mandatory notification of combinations under the Competition Act, 2002.

.....

.....

.....

.....

6.8 OTHER IMPORTANT PROVISIONS OF THE ACT

The above sections in this unit gave an overview of the constitution of administrative structure of the competition authority and three important areas of the competition law in which the law regulates the conduct of the market players. It is not possible to delve in to the details of the law due to the paucity of space. Some of the other important provisions of the law are discussed succinctly hereunder.

6.8.1 Competition Advocacy

As per UNCTADCompetition advocacy has been defined as "activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition". During the formative stages of a competition authority, competition advocacy is primarily used to inform stakeholders of the existence of the law and policy, and its associated obligations and rights. As time progresses, the role of competition advocacy changes, shifting towards generally advocating competition issues to government in the areas of privatisation, sector regulation and other policies. The Act in Section 49 (3) lays down the advocacy function of CCI and lays down that the CCI shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. Competition advocacy being an important pillar of the proper implementation of the competition law and such role has been undertaken by various competition authorities across the jurisdictions in imbibing a spirit of competition and protection of consumers in the various stakeholders in the economy.

Further, Section 49 (1) of the Act provides for reference to CCI by Central Government or State Government in formulating a policy on competition or on any other matter, as the case may be, for its opinion on possible effect of such policy on competition. The Central Government can also make reference regarding review of laws related to competition. The Commission shall, within sixty days of making such reference give its

opinion and the opinion given by the Commission under Sub-section (1) shall not be binding. This advisory and advocacy role of CCI is very important and will be helpful in infusing and promoting a culture of competition in the country.

6.8.2 Extra-Territorial Reach

Section 32 of the Competition Act expressly provides for extra-territorial reach of the statute. Thus CCI can inquire into any agreement, abuse of dominant position, or combination if it has or likely to have an appreciable adverse effect on competition in India even if it takes place outside India. Thus, any anti-competitive activity taking place outside India but having an appreciable adverse effect on competition within India shall be subject to the application of the Competition Act.The CCI in such cases can pass such orders as it deems fit. An enabling provision under Section 18 has been provided whereby the Commission, with the prior approval of the Central Government, may enter into arrangements and memorandum of understanding with foreign agencies and enforce the law by way of globally accepted 'effect theory'. It is pertinent to note that Section 14 of the MRTP Act also provided for a similar provision related to extra-territorial reach, but for non-availability of corresponding enabling provision toenter into arrangement/memorandum of understanding with foreign agencies, Section 14 could not fulfil the purpose for which it was enacted.

6.8.3 Reference to Other Sectoral Regulators

After the adoption of market reforms in India, like other developing countries, sector regulation laws and their respective regulatory authorities were put in place to control anticipated market failures. Since competition policies and laws were not prevalent then, it has been seen that part of the sector regulator's mandate was to ensure fair competition in their respective sectors. With time, the need for regulation of competition in the entire economy was recognised. This led to the enactment of competition law and with the mandate to regulate competition in all sectors of the economy. There would be a possibility of an overlap of responsibility and thus the need to coordinate mechanisms to allow a proper alignment of authority between sector regulators on one hand and competition authorities on the other.

Under Section 21 of the Act, any statutory authority can suo motto or on request of a party in the course of a proceeding before it can make a reference to CCI. CCI shall give its opinion within sixty days of receipt of such reference by such statutory authority. Under the provisions of the Act, the authority which made reference shall consider the opinion of the Commission and thereafter, give its findings recording reasons on the issues referred to in the said opinion by CCI. Section 21A in the same language provides for such reference by CCI to any statutory authority. These provisions help in regulatory coordination and thus help in proper resolution of cases which have overlapping dimensions.

Further, Section 60 of the Competition Act states that the provisions of the Competition Act shall override all other provisions contained in any law. However, Section 62 states that the provisions of the Competition Act are in addition to and not in derogation of any other law. Thus the need in such a case is to apply the principle of harmonious construction, where there is a direct conflict between the provisions of the Competition Act and any other law, the former shall prevail, and where there is no repugnancy, provisions of both laws shall apply together.

6.8.4 Leniency Provisions

In many jurisdictions with developed competition law framework, the leniency provisions

have been proved to be a powerful tool in the hands of competition authorities for detecting, investigating and proving the existence of cartels. The Competition Act also provide for such provision in Section 46 of the Act. It provides for imposition of a lesser penalty, if any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated the provisions of the Competition Act, with respect to anti-competitive agreements:

a) has made a full and true disclosure in respect of the alleged violation;

b) such disclosure is vital;

c) such party continues to co-operate with the CCI till the completion of the proceedings before the CCI.

d) the disclosure should be made before the report of the investigation by the Director General, as directed by the CCI, has been received.

In terms of the Competition Commission of India (Lesser Penalty) Regulations, 2009, the first applicant would be granted up to 100% immunity, the second applicant up to 50% and the third applicant up to 30% immunity. The provision provides an incentive to parties to disclose the existence of cartels to the competition authority.

Self Assessment Question **(Spend 3 minutes)**

3) Briefly describe the role of Competition Commission of India in Competition Advocacy.

.....

.....

.....

.....

6.9 WAY FORWARD

The design and enactment of laws is not enough; what matters is judicious and efficient enforcement. The compliance of competition law also lies in its deterrent effect and on market player's perception of the effectiveness of its implementation. For example, while Thailand has had a competition law for years, its enforcement has been weak and generally ineffective due to lack of adequate resources, political will, and independence of the competition authority. A recent positive example can be seen in Korea. There, the government endowed the Korea Fair Trade Commission (KFTC) with significant powers to tackle anti-competitive practices and to force the economic restructuring of large business groups. The chairman of the KFTC answers directly to the prime minister and sits in the cabinet of the national government. These institutional arrangements provide the chairman of the KFTC with the mandate as well as the means to help ensure that any new legislation will be consistent with the principles of competition.

Thus, it is very important that there should be proper implementation of the law. The compliance of competition law by the market players depends on the proactive role played by the commission itself. Commission has been given a wide mandate and thus it should initially play a more proactive role in advocacy so as to build an effective competition culture in the country. The development of the effective jurisprudence by the interpretation of the Act will pave way for the achievement of the objectives enshrined in the Act. It has been seen that with times in countries with developed competition law

regimes, such as the United States of America, the European Union and Australia, there has been also a gradual change in objectives to be achieved by the competition laws. Further, these countries have developed several sector and issue-specific guidelines to enable better application of the respective competition law. While, it is no doubt that the experience of other countries can be a guiding factor, given that competition law relates to a particular socioeconomic milieu, the CCI would itself need to incrementally develop the jurisprudence related to effective application of the law.

6.10 SUMMARY

- Three main areas of the concern for the Competition Act are anti-competitive agreements, abuse of dominant position and regulating the combinations.
- Competition Act provides for setting up a Commission to be called the Competition Commission of India and an appellate tribunal called Competition Appellate Tribunal.
- The Act more follows the rule of reason approach and implementation of the various provisions of the Act depends upon the economic analysis of various set of factors, some of which are defined in the Act itself.
- Anticompetitive agreements having appreciable adverse effect on competition in markets in India are declared to be void under the Act. Such agreements include agreements for bid rigging, collusive bidding and cartel formation.
- The Act does not frown upon the market power unlike its old counterpart MRTP Act. Thus dominance itself is not bad in law, but abuse of that dominant position is bad in law.
- The Act also regulates the mergers and acquisitions and there are provisions for mandatory notification above the notified thresholds.
- Other provisions like extraterritorial reach of the law, competition advocacy and leniency programme makes law in tune with time to deal with the situations in the contemporary era and thus in tune with international approach.

6.11 TERMINAL QUESTIONS

1) Briefly write about the authorities established under the Competition Act, 2002 in India.

2) What do you understand by dominant position of an enterprise? State the provisions ofthe Competition Act which frown upon abuse of such dominant position.

3) What are the factors prescribed under the Act to be taken in to account while determining that a proposed combination is likely to have an appreciable adverse effect on competition in the relevant market?

6.12 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Sub-section 6.5.1

2) Refer to Sub-section 6.7.1

3) Refer to Section 6.8

Terminal Questions

1) Refer to Section 6.4

2) Refer to Section 6.6 and Sub-section 6.6.1

3) Refer to Section 6.7

6.13 REFERENCE AND SUGGESTED READINGS

1) The Competition Act, 2002.

2) High Level Committee on Competition Policy and Law, Government of India, Raghavan Committee Report, 2002.

3) Law And Policy Reform at the Asian Development Bank 'Report and Proceedings from The Competition Law And Policy Roundtable', 16–17 May 2006, New Delhi, India.

4) Advocacy booklets by Competition Commission of India, available at www.cci.gov.in

UNIT 7 INTERACTION BETWEEN COMPETITION LAW AND IP LAW

Structure

7.1 INTRODUCTION

In this innovation driven era, more and more countries depend on science and technology to drive their economies. Intellectual Property has become part of the sophisticated legal strategies adopted by various enterprises in achieving growth and is critical in achieving and sustaining a competitive advantage in the marketplace. Intellectual Property Rights are increasingly becoming important for ensuring competitiveness of the enterprises. They are the foundations of the knowledge-based economy and their usefulness pervades all sectors of the economy. Intellectual property rights such as copyrights, patents, trademarks and industrial designs play a very pivotal role of economic growth of a country as well as fostering innovation. These days' countries and different enterprises incur a significant expenditure for the research and development to attain the desired results. The absence of an intellectual property would lead to a situation wherein firms in a market would be in position to free ride on the successful results of the research and development of another competitor firm. Thus in the absence of protection given under the intellectual property law, there would be a market situation wherein any firm would be able to exploit any new invention of its rival firm in the market. It has been noted, especially in case of developing countries, that the protection

of intellectual property is not an end in itself, but can also be used as a tool to help society to attain higher public interests. It has been well said that the objective of intellectual property law, amongst other objectives, is to limit "imitation competition" and to promote "substitution competition", in other words, the functions is to promote discovery of new innovative technical solutions.

The need to grant property rights on intellectual assets amongst others is the reward effect, which induces investment by ensuring that the inventor can reap significant benefits from the invention.Other purpose served by granting such rights is the information diffusion or disclosure effect, whereby the inventor is induced into divulging useful information about the invention. The mere fact that Intellectual property rights exclude rival firms from exploiting the property rights does not necessarily lead to a situation where in the property right holder can abuse his or her dominant position. This is mainly because of the available substitutes, which act as constraints to the ability of the intellectual property right holders to price their products above competitive prices and thus abuse their dominant positions. IP law grants the right of exclusivity to the innovator and the competition law ensures that the right granted by IP law is not exercised in an anti-competitive way.It can be seen that there can be some inbuilt provisions in the intellectual property laws themselves which regulate the abuse of IPRs and seek to prevent anti-competitive effect emanating from the exercise of the IP. Although, intellectual property law also contains some provisions to contain the abuse of the exclusive rights granted by it, yet those provisions are not wide enough to check the anti-competitive conduct from a larger perspective. Thus, as has been observe by Anderman, Competition law can also be seen as a second tier of regulation for the rights granted under the various intellectual property laws. The relationship between the two regimes is not always easy to comprehend and even some scholars doubt that competition law is well suited to contain the abuse of IPRs.

Innovation and competitiveness have a symbiotic relationship and thus the firms invest a lot in research and development (R&D), so as to bring out new products in the market to remain competitive. This relation between innovation and competitiveness also provides the basis for the interaction between these two branches of law, that is, IP law and competition law. The IPRs are protected under law, like any other form of property. They can be a subject matter of trade, that is, they can be owned, bequeathed, sold or bought. The major features that distinguish IPRs from other forms of property are their intangibility and non-exhaustion by consumption.It is also important to appreciate the fact that intellectual property law and competition laws tend to intervene at different stages of the economic lifecycle of an asset. Intellectual property rights are generally assigned soon after the asset has been created, while competition law only intervenes after that asset has been used as the basis for some abuse of market power which affects the competition in the market. In particular, competition law authorities are likely to have much better information about the economic importance of a given invention and about the structure of the markets where the invention is used.The major concerns of competition law in regard to intellectual property rights relate to the detrimental effects and abuse of market power caused by the anti-competitive exercise of IP rights. Thus there is need to properly define and harmonise the relation between these two branches of law. In Indian context, though the jurisprudence related to branch of intellectual property law has developed up to certain extent, but the jurisprudence regarding modern approach to competition law at this stage is in infancy. Of course, keeping in mind this technology driven competitive era, more complex issues will emerge at the amorphous interface of both these branches of law. This Unit will focus on this new emerging interface and interaction between IP law and Competition law.

7.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the complex interface between Competition law and IP law;
- appreciate the common objectives of both fields of law;
- describe the provision of TRIPS Agreement related to Competition law;
- explain about anti-competitive agreements related to IP;
- analyse as to what is IP induced abuse of dominance;
- determine the relation between intellectual property and combinations; and
- analyse as to how harmonise the objectives of both the fields of law.

7.3 OBJECTIVES OF IP LAW

Generally speaking, Intellectual Property is understood to cover the results of intellectual activity in the literary, industrial, scientific, and artistic fields and is traditionally divided into two branches, namely industrial property and copyright. It is a form of intangible property which can be incorporated in, or associated with, goods or services, thereby producing new goods or services, or adding value to the already existing products.The main rationale underlying the IP system is that it acts as an incentive to invent and encourages development of, and innovation in, new products and services for the benefit of society. Further the reward effect of granting the exclusive rights for a defined timeframe paves way for more intellectual creation and innovation. IP system through its provisions like that of licensing also helps in commercialisation of technology and converting the intangible/tangible intellectual assets in to tangible products and services for the welfare of the society. IP system also encourages the disclosure and diffusion of knowledge by making the grant of rights conditional upon the disclosure of essential characteristics of the innovation for which the protection is sought. This facilitates access by other follow on innovators to the knowledge embodied in the innovation. One view is that the IP system is based on the principle that private rights are granted in order to serve the public good.

Thus mainly IP system serves to act as an incentive to invent by rewarding inventors, IP licensing helps in commercialisation of technology and disclosure requirements help in diffusion of knowledge.

7.4 OBJECTIVES OF COMPETITION LAW

Although the earlier Unit discussed in detail the rationale and objectives of the Competition law, yet it will be appropriate to discuss briefly the objectives of Competition law especially in promoting dynamic efficiency. Particularly in relation to intellectual property law, the objective of the Competition law relate to promoting dynamic efficiency productive efficiency and maintaining allocative efficiency. Productive efficiency implies production of output at the lowest possible cost, whereas, allocative efficiency refers to optimal allocation of resources. There is thus a basic complementarity between IPR law and competition law. IPR law provides for intellectual property to be valued and exchanged while competition law ensures that market assigns a fair and efficient value to IP. Thus, what is needed is to give equal weight to risks of under-protection and over protection of IPRs.

Earlier it was thought that there is an inherent conflict between the two laws. A preliminary inference which can be drawn is that intellectual property protects individual interest, while competition protects the market. It was also thought of earlier that IP law grants monopoly and the competition law is against monopoly, thus the objectives of both are at loggerheads. This view has been changed now. Competition law usually has a wide mandate to oversee and regulate the imperfections in the market economy which have adverse effect on the competition. Competition law accepts the achievement of an economic monopoly by means of research and development and consequent IPRs as valid. It is the abuse of that economic monopoly or the anti-competitive conduct which is to be regulated by the competition law. As has been rightly noted by Anderman, both these branches of law are now widely recognised to be complementary components of a modern industrial policy. Both pursue a common aim of improving innovation and consumer welfare although they do so by using rather different means.

7.5 MULTILATERAL PROVISIONS

The Havana Charter of 1948, which never entered into force, also contained competition rules related to IPRs. Article 46 (3) of the Charter provided for the practices preventing the development or application of patented or unpatented technology or inventions by agreement, as well as the extension of the use of IPRs to matters, products or conditions of production, use or sale not within their scope or subject matter. IPR protection is addressed by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS agreement provides for minimum standard of protection to Intellectual property rights in the international trading system, which should be followed by all member countries of the WTO who have signed the TRIPS agreement. India is a signatory to the agreement on TRIPS which covers nine categories of Intellectual Property.

TRIPS agreement, as such does not contain rules on competition law, but authorises member states to frame rules to prevent anti-competitive practices related to intellectual property law. The provisions relating to competition policy in the TRIPS are mainly of a permissive nature.Articles 6, 8, 31 and 40 of TRIPS deal with treatment of anti-competitive practices. Article 6 deals with the principle of exhaustion of IPRs and Article 31 deals with provisions related to compulsory licensing, which also have bearing on the competition in the relevant market and will be discussed in the next unit. Article 8 of the TRIPS enshrining basic principles in Article 8.2 states that 'appropriate measures, provided that they are consistent with the provisions of this agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.' Developing countries can follow their own approach to competition law and IPRs since there are no other international rules than Article 40 of the TRIPS that constrain their capacity to discipline IP-related anti-competitive behaviour. Article 40.2 in the TRIPS agreement states that: Nothing in this Agreement shall prevent members from specifying in their legislation licensing practices or conditions that may in particular case constitute an abuse of intellectual property rights having adverse effect on competition in the relevant market. Therefore, the TRIPS agreement allows member countries to adopt appropriate measures to prevent and control such anti-competitive practices in light of the relevant laws and regulations of the member countries. They could, for instance, include provisions in national competition law to address situations in which IPRs are used to charge excessive prices for or to prevent access to protected technologies.

As noted in earlier Unit, the World Trade Organisation (WTO) dropped negotiations

on the issue of Competition policy in 2004. Thus, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted in 1980 by the United Nations General Assembly are the only official multilateral code addressing competition policy as such. There is a comprehensive international framework regarding intellectual property protection for various forms of intellectual property. But, keeping in view the diversity of competition standards at national level and still no comprehensive international framework of competition law, a global harmonisation of the interface between Competition policy and IPR seems unlikely in the near future.

It is worthwhile to note here that there had been initiatives to develop an international framework for transfer of technology. UNCTAD Draft International Code of Conduct on the Transfer of Technology (1985 version) lists out fourteen restraints which can be anti-competitive in nature depending on the nature of the IP licensing agreement. The fourteen restraints given in draft UNCTAD Code are:

1) Exclusive Grant back provisions
2) Unreasonably refraining the challenges to validity of patents
3) Exclusive dealing
4) Restrictions on research
5) Restrictions on use of personnel for research
6) Price fixing
7) Restrictions on adaptations or innovations
8) Exclusive sales or representation agreements
9) Tying arrangements
10) Export restrictions
11) Patent pool or cross-licensing agreements and other arrangements
12) Unreasonable Restrictions on publicity
13) Payments and other obligations after expiration of industrial property rights
14) Restrictions continuing even after expiration of arrangement.

Though, this code never came in to existence, yet the list of restraints mentioned there serves as a good indicative list of anti-competitive practices. It is not always that such restraints will be anti-competitive. There are times when such restraints are necessary to achieve the objectives of the licensing agreement and thus such clauses need to be inserted.

7.6 INTERNATIONAL EXPERIENCE FROM DEVELOPED JURISDICTIONS

Some developed jurisdictions like United States (US) & European Union (EU) have framed guidelines which are helpful in analysing the interface between IP and competition law. It will be relevant to briefly discuss the position in US and EU related to the interface between these two branches of law. The *Antitrust Guidelines for the Licensing of Intellectual Property* (*"IP Guidelines"*), issued jointly by the Federal Trade Commission (FTC) and Department of Justice(DOJ) in 1995, describe the current

complementary approach followed in US for applying antitrust principles in cases involving intellectual property rights. The *integrated* approach of the *IP Guidelines* embodies three basic principles.

- First, the antitrust authorities apply the same general antitrust principles to conduct involving intellectual property as to conduct involving any other form of property. However, it must be noted that the agencies recognise that intellectual property has important distinguishing characteristics from other property, such as ease of misappropriation. The antitrust analysis undertaken in cases involving intellectual property takes such differences into account. Nonetheless, the governing antitrust principles are the same.
- The second principle is that the authorities do not presume that intellectual property creates market power in the antitrust context. This is important because it represents a refinement of the thinking, that IP confers monopoly power, which characterised earlier periods of antitrust enforcement.
- The third principle is that the authorities generally consider intellectual property licensing to be procompetitive. The authorities recognise that intellectual property licensing often allows firms to combine complementary factors of production and helps in commercialisation of IP.

In addition to discussing general principles, the IP Guidelines apply the principles of particular licensing practices, such as arrangements that involve the cross-licensing, pooling, or acquisition of intellectual property. These examples are useful in assessing the analysis that might apply to other practices.

In EU, Section 1 of Article 101 (ex Article 81) of the EU treaty prohibits all agreements 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. However, Section 3 of the same Article provides for individual and block exemptions for agreements, which contribute to improving the production or distribution of goods or to promoting technical or economic progress. The policy has evolved from a permissive approach, to a more interventionist and formalistic one, to the current more economic approach reflected in a 2004 block exemption for technology transfer agreements (TTBER) and accompanying guidelines. The TTBER lies on the basis that technology transfer agreements which do not incorporate hard-core restraints and which are concluded between undertakings which do not exceed the given thresholds of the market share are compatible with Article 101. The cases under the abuse of dominant position are covered under Article 102 of EU treaty.

7.7 INTERFACE BETWEEN IP LAW AND COMPETITION LAW IN INDIA

It would be pertinent to first discuss the emerging discourse at policy fronts related to the emergence of interface between intellectual property law and competition law in India. The eleventh five year plan in Chapter 11 titled 'Consumer Protection and Competition Policy' notes that regulatory laws, such as those for intellectual property or anti-dumping, too have an important interface with competition. Further, Raghavan committee report noted that all forms of Intellectual Property have the potential to raise Competition Policy/Law problems and there is a need to curb and prevent anti-competition behaviour that may surface in the exercise of the Intellectual Property Rights. It further noted that competition authorities are normally concerned with anti-competitive practices such as abuse of dominant position whatever be the source of such practices,

rather than with the abuse of IPRs. It is relevant to note that the report of the High Level Committee on Competition Policy and Law, Government of India, 2000 in para 5.1.8 observed that:

"There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law....There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/ Law."

Concerns often arise when rights conferred under IP laws are used to violate the provisions of Competition laws. The earlier Monopolies and Restrictive Trade Practices (MRTP) Act exempted from its purview of application to any monopolistic or restrictive trade practice necessary to safeguard the rights of patentees under the Indian Patents Act with regard to certain infringements and conditions that may be laid down in the licence.(Section 15(a) & (b)).The conflict between IPRs and the Competition law came up before the Monopolies and Restrictive Trade Practices Commission (MRTPC) in 1994 in ***Vallal Peruman and another v. Godfrey Phillips (India) limited***. The MRTPC in this caseruled that manipulation, distortion, contrivances and embellishments etc. by way of misuse of trademark invite the application of the MRTP Act.

As discussed in earlier Unit, Competition Act regulates three basic type of conducts i.e. anti-competitive agreements, abuse of dominance and anti-competitive combinations. It is possible that IPR holders would engage in conducts falling under these three areas, as a way of trying to enjoy market power and super-normal profits. Thus, the existence of IPRs may not be challenged by Competition law but the exercise, or even in some cases non-exercise, of IPRs which produces anti-competitive outcomes will be challenged under Competition law. The following sections will discuss, with relevant cases and instances from different jurisdictions, the interaction of the IP law with the three major provisions of the Competition Act viz. anti-competitive agreements, abuse of dominant position and regulation of combinations.

Self Assessment Question **(Spend 3 minutes)**

1) Briefly describe as to what are the common objectives of intellectual property law and competition law.

.....

.....

.....

.....

.....

7.8 ANTI-COMPETITIVE AGREEMENTS AND IPRs

As discussed in the previous Unit, Section 3 of the Competition Act deals with the anti-competitive agreement. Section 3(5) states that agreements entered into for imposing reasonable conditions or restraining infringements of IPRs conferred under respective IPRs laws would not be actionable under the Competition Act. Section 3 (5) of the Act is reproduced below:

Nothing contained in this section shall restrict-

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

a) the Copyright Act, 1957 (14 of 1957);

b) the Patents Act, 1970 (39 of 1970);

c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trademarks Act, 1999 (47 of 1999);

d) the Geographical Indications of Goods(Registration and Protection) Act, 1999 (48 of 1999);

e) the Designs Act, 2000 (16 of 2000);

f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

Section 3 (5) covers all the intellectual property laws in force in India, except for Protection of Plant Varieties and Farmers' Rights Act, 2001. The objective of not enlisting one law in this section seems to be not clear and it seems that this sections needs to be amended appropriately. It would be better to follow a general approach and provide a general clause covering all forms of intellectual property law in force in India under the purview of the Act. Thus the Section makes provision for imposing reasonable conditions necessary for protecting the rights of the person granted to him under the enlisted intellectual property laws. Thus the test is of the reasonable conditions. If the conditions imposed are not reasonable then the said agreement will be anti-competitive and thus void under the Act. For instance, a licensing agreement may include restraints that adversely affect competition in the market by market allocation or by other means. Thus it will depend on the circumstances of the case and the behaviour of the entity exercising the rights provided under the intellectual property law. This section thus also is based on the rule of reason and case by case approach seems to be more feasible.

The right to give licences to others to exploit the invention is one of the most important rights bestowed upon individuals as a result of possession of IPRs.The licensing of intellectual property is one of the most effective ways for an innovator to be rewarded for its innovation. But licensing practices have their limits. IP and antitrust laws work together to deter IP owners from gaining an unlawful advantage over their competitors or consumers. Licenses are anti-competitive as regards to restraints on the basis of licensing pattern. There can be various types of anti-competitive restraints that can be built-in to a licensing agreement. Generally, these restraints can be divided into two main forms under competition law. These are horizontal restraints and vertical restraints. Generally, a licensing agreement has a vertical dimension when it affects activities that are in a complementary relationship, e.g. the case of a licensing agreement between IPRs holders and firms using those rights as inputs for their activities. Generally, vertical IPRs licensing arrangements are treated rather leniently under the antitrust rule of reason in most jurisdictions.

It can be seen that intellectual property laws also contain some provisions to regulate the misuse of the rights granted under the IP law. These provisions can include the provision to not to put restrictive conditions while licensing the intellectual property law. Example of such provision can be Section 140 of the Patents Act, 1970 which declares

certain conditions as restrictive and prohibits their incorporation in the contracts related to licensing of patents or sale or lease of patented articles. This provision will also be dealt in detail in the next Unit under the heading restraint of trade. It is pertinent to note that the Patents Act provides that conditions of a licence that prevent challenges to validity of a patent shall be void. The Patents Act prohibits licence agreements that provide for exclusive grant backs. The Patent Act Section 141 similarly prohibits restriction of the licensee's ability to exploit its own IP. The Patents Act similarly prohibits tie-in arrangements with respect to patent licences (Patents Act, Section 140(13)).

IPR-related anti-competitive practices may involve collusion, suppression of incentives to innovate or exclusion of competitors. Some specific restrictions in licensing agreements may involve territorial restrictions or exclusivity which might violate the provisions of competition law. Anti-competitive behaviour related to the exercise of IPRs between direct competitors clearly occurs, for example, when holders of substitutable technologies enter into cross-licensing arrangements which can be compared tocartel agreements aimed at setting commonly agreed prices for the products and services incorporating those technologies. Cross-licensing can be detrimental to competition if the patent-holders coordinate the prices, as this could also raise entry barriers to market access for incoming competitors. Section 19(3)(f) of the Act lays down that promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services should be one of the factors in determining whether an agreement has an appreciable adverse effect on competition. The use of the term technical and scientific development also covers the domain of intellectual property.

Various examples of unreasonable conditions which might have anti-competitive effect in the relevant market are:

a) patent pooling (locking technology)

b) tie-in arrangements (acquire particular goods solely from patentee)

c) royalty payment after expiry of patent

d) prohibit licensee to use rival technology

e) prohibit licensee from challenging validity of IPRs

f) grant back requirement (any know how or IPRs acquired back to the licensor)

g) fixing prices for the licensee to sell

h) territorial and customer restriction

i) coercing licensee to take licenses in IP even if he does not need them (package licensing)

j) restricting sale of product to those other than designated by licensor (often found in licensing of dual use technology)

k) imposing trademark use requirement

l) indemnification of licensor to meet expenses in infringement proceedings

m) undue restriction on licensee's business

n) condition on licensee to employ/use staff designated by licensor

o) limiting the maximum amount of use of the invention

7.8.1 Unreasonable Restrictions in IP Agreements

The provision in the Act allows that reasonable restrictions can form part of the licensing agreement in order to protect the rights granted under the IP laws. This clearly implies that unreasonable restrictions will come under the purview of the Competition Act. Advocacy booklet of the CCI on the interface between IPRs and Competition Act notes following to be the unreasonable conditions:

- Patent pooling can also take the form of restrictive practice. It happens when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. In particular, if all the technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete. This pooling help the involved firm in earning supra normal profits and further act as a barrier to new firm.

- Tie-in arrangement is yet another such restrictive practice. A licensee may be required to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers. There could be an arrangement forbidding a licensee to compete, or to handle goods which compete with those of the patentee.

- An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.

- There could be a clause, which restricts competition in R & D or prohibits a licensee to use rival technology.

- A licensee may require to grant back to the licensor any knowhow or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.

- A licensor may fix the prices at which the licensee should sell.

- The licensee may be restricted territorially or according to categories of customers.

- A licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them. This is known as package licensing which may be regarded as anti-competitive.

- Restricting the right of the licensee to sell the product of the licensed know-how to persons other than those designated by the licensor may be violative of competition.

- Imposing a trade mark use requirement on the licensee may be prejudicial to competition, as it could restrict a licensee's freedom to select a trademark.

It is important to note that some of these conditions would not be unreasonable per se and thus a comprehensive analysis under rule of reason needs to be done to ascertain that the condition is anti-competitive or not. Some of these conditions need to be incorporated in the licensing agreements to achieve the objectives of the licensing agreement. In ***Multiplex Association of India v. United Producers/ Distributors Forum***, vide order dated 25th of May 2011,CCI discussed about the precedents in US and EU law related to the interface of IP and Competition law. Further, CCI noted in the light of the facts of the case and the evidence gathered in this case neither any question of infringement of rights of producers/distributors conferred under the Copyright Act, 1957 arises nor does the question of imposing reasonable conditions to protect such right arise. CCI further observed that the intellectual property laws do not have

any absolute overriding effect on the Competition law. Regarding Section 3(5), CCI in this order noted that the extent of *non obstante* clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement by imposing reasonable conditions.

7.9 ABUSE OF DOMINANT POSITION AND IPRs

The owner of an IPR is not automatically placed in a dominant position. Establishing the fact of dominance in case of intellectual property cases also varies from case to case basis. As monopoly conferred by IP being legal monopoly, thus cannot be equated with dominant position in the market which generally implies economic monopoly. Further IP induced monopoly can be seen in circumstances where there are no substitutes and the market is narrowed to consist of only product covered under the IP. The exercise of exclusive rights conferred by IP in a way which leads to refusal to license, or charging excessive pricing will be covered under the provisions of abuse of dominant position. Therefore, abuse of dominance due to an IPR is liable for action under the Indian Competition Act just as IP related dealings in anti-competitive agreements leading to an anti-competitive effect.

As per the Competition Act, the expression "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market, or affect its competitors or consumers or the relevant market in its favour. The expression 'position of strength' which implies dominant position can also be achieved due to the intellectual property in relevant cases. Further Section 4(2)(b)(ii) of the Competition Act of India states that for the purpose of determining whether an enterprise enjoys a dominant position, the concerned authority would take into account inter-alia technical or scientific development relating to goods or services to the prejudice of the consumers.Section 19(4)(d) of the Act provides that economic power of the enterprise including commercial advantages over competitors needs to be taken care while inquiring whether an enterprise enjoys a dominant position or not under Section 4. The trademarks are a tool to achieve economic power and thus trademark and brand name also can be a factor in determining the economic position of an enterprise in the relevant market.

Further, an important aspect is given in Section 19(4) (g) which again is a factor to be taken care of while inquiring whether an enterprise enjoys a dominant position or not under Section 4. This sub-clause covers the monopoly or dominant position acquired as result of statute. IPRs are but legal monopolies and thus they ought to be covered under this provision. Factors which need to take care will include the extent to which ownership of IP puts the holder in a dominant position and the circumstances in which the exploitation of that IP can cause abuse of the position induced by IP. This dominant position will go against the provisions of Competition Act only if that position is abused. That position can be abused by charging excessive prices, applying restrictions on end users, applying restrictions on consumers or refusal to deal etc.

The case law and the analysis in the EU will help to understand the abuse of dominant position in case of IP. In *Magill's Case* (1995), the European Court of Justice (ECJ) declared refusal to licence an abuse because in that case the IP was indispensable for a new product for which there was demand. In *IMS Health's Case* (2004), the ECJ stated that the conditions to establish exceptional circumstances sufficient to declare refusal abusive should be established cumulatively. The four conditions needed to prove exceptional circumstances in which refusal to license the IP is an abuse of dominance:

a) Refused input must be indispensable input for competition in a related market

b) Competition must be eliminated in the related market by that refusal

c) Absence of an objective justification for the refusal

d) Refusal prevents innovation i.e. introduction of a new product, to the detriment of consumers

7.9.1 Illustrated Case Law

- In a case related to Mahyco-Monsanto, the company was found guilty of pricing its product above the market price as no alternative retailer was available. This case related to Bt cotton was filed by the Andhra Pradesh Government and some civil society organisations before the Monopolies and Restrictive Trade Practices Commission of India. Mahyco-Monsanto was charging an excessively high royalty fee for its Bt gene, which made the seed too expensive for the farmers. As there was no competition due to their IPR on Bt cottonseeds, Mahyco-Monsanto had a monopoly and acted arbitrarily in deciding the high prices. This is the clear case which shows how intellectual property induced monopoly can be used to achieve dominant position and then that dominant position is abused by charging high prices from the farmers.

- In 2004, European Commission decided that Microsoft had abused its dominant position in the PC/OS market by refusing to supply competitors in the work group server operating system market interface information necessary for their products to interoperate with Windows, and hence to compete viably in the market. The Commission decided that withholding the information necessary to design competing programmes for work group servers compatible with the Windows was an abuse and risked eliminating competition from the server market, stifling innovation and reducing consumers' choice by locking them in. The Commission's decision required Microsoft to make available the necessary interface information to its competitors in servers on reasonable and non-discriminatory terms. Further, it was found that Microsoft was harming competition through the tying of its separate Windows Media Player product with its Windows PC operating system. The Decision hence ordered Microsoft to provide a version of Windows, which did not include Windows Media Player.

Self Assessment Question **(Spend 3 minutes)**

2) Give an example of a case of intellectual property induced abuse of dominance in the relevant market.

.....

.....

.....

.....

7.10 COMBINATIONS AND IPRs

In today's largely information and technology based economy, tremendous value is placed on inventions, discoveries and knowledge of the same, as industrial production, growth and market share depends on these innovations. Therefore, Intellectual Property (IP) is the latest form of wealth and IP assets ranging from well-known forms like

patents, copyright, trademarks, know-how and trade secrets to newer variations like internet domain names form a substantial part of company assets.

Mergers and acquisitions (M&As) can increase the efficiency of firms by enabling them to attain efficient levels of manufacturing, research & development, or distribution more rapidly than the firms could accomplish by internal growth. Further, the companies have realised the value in the IPRs and thus there has been a consistent rise in number of cases where M&As specifically aim at acquiring IP. As per Explanation (c) to Section 5 of the Competition Act, the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trademark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of Section 3. Thus, the Competition Act recognises the importance and value of IP assets and provides that the value of assets shall include the value of IP assets as described above. Prior to acquisition of intellectual property through a merger or acquisition, a due diligence must be performed to ascertain the validity of the assets, their value, ownership and rights over them, adequacy of protection available, popularly called IP Audit & IP portfolio management. For quite some time now, they have played a key role in mergers and acquisitions both at the national and global level, many of which take place with the sole aim of acquiring IP assets belonging to the transferor/target company and all rights therein. One reason for this is the fact that given the rapid pace at which technology is developing, most companies find it more economical to purchase newly developed intellectual property. Also, developing one's own technology may be too expensive, time consuming and uncertain which means acquiring others IP is a pragmatic approach of staying competitive. Further, doing so helps to expand and improve business performance depending on factors like the value of the IP assets and rights in them, potential benefits etc. Thus proper IP audit and valuation are very important from the perspective of mergers and acquisitions. After the merger/acquisition process, the relevant IP assets have to be recorded as belonging to the transferee/takeover company in all jurisdictions where they exist for the company to be conferred with valid rights of ownership and use under law.

Section 20(4) (b) providing extent of barriers to entry into the market and Section 20(4) (g) providing extent to which substitutes are available or are likely to be available in the market are some of the factors which need to be taken care while analysing the relevance of IP in the proposed combination and for determining the appreciable adverse effect on competition in the relevant market. Section 20(4)(l) of the Act provides 'nature and extent of innovation' as one of the fourteen factors which the CCI shall have due regard to while determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market. Thus, even in analysing combinations the Act foresees a possible relation with the intellectual property and thus provides that nature and extent of innovation ought to be taken care of while analysing the effect of combinations. IP is an important asset of an enterprise and thus firms go for IP audit also. Further, it has to be seen that while combining, merging or acquisition; is there any possible danger of stifling ongoing research and development or innovation. The acquisition can limit competition by reducing the number of players in the market or preventing entry of substitutes in the market. There have been instances where concerns have been raised that there are chances of stifling innovation and delaying or negating entry of new products in the market. Take for example case of 1996 related to the merger of Ciba and Sandoz to form Novartis AG. In this case both companies were developing gene therapy technology. At the time of the merger, no gene therapy product was on the market, but potential treatments were in clinical trials. The Federal

Trade Commission of US reached a consent agreement, before clearing the merger, with the parties to address the competitive impact on the innovation of gene therapies after the merger. A recent example from India can be the trend of mergers and acquisitions in India regarding the Indian pharmaceutical companies. That led to constitution of Arun Maira Committee and the recommendations of the committee included that there can be different thresholds for acquisitions in case of acquisitions in pharmaceutical sector as this being a sensitive sector.

7.10.1 Illustrated Case Law

- The merger between The Boeing Company and McDonnell Douglas Corporation attracted much attention. This merger created the world's largest aerospace company and second largest defence supplier, and combined the last two remaining commercial jet airplane manufacturers in the United States. This merger was cleared by the United States Federal Trade Commission (FTC) only on condition that other aeroplane manufacturers obtained non-exclusive licences to patents and underlying know-how held by Boeing.
- In a decided case of 2000, the US Department of Justice (DOJ) decided to challenge the proposed acquisition by Franklin Electric Co. of United Dominion Industries not only because the proposed transaction appeared likely to reduce competition in the market for submersible turbine pumps, but also because Franklin Electric's patent portfolio appeared likely to deter new entry into the market. After trial, the district court granted the DOJ's motion for a permanent injunction.

Self Assessment Question **(Spend 3 minutes)**

3) How far the value of intellectual property of a firm is taken in to consideration during the process of mergers?

.....

.....

.....

.....

.....

.....

7.11 WAY FORWARD

IP policy can contribute to development if properly formulated to respond to national needs and stages of development, and should promote innovation, creativity and entrepreneurship. Keeping in view the contemporary co-governance and networked era driven by technology and innovation, there will be various issues which will emerge at the interface of these two regimes. In this innovation driven era, intellectual property law and competition law have been used as strategic tools amongst various developed jurisdictions to infuse innovation and growth in the economies and to boost entrepreneurial activities.

As has been seen in developed jurisdictions like US, it seems that the peculiar situations arising at the interface between these two regimes could be better taken care of by promulgating guidelines for the harmonisation of these two branches of laws. As such this interface is amorphous and volatile and thus rule of reason approach will be best

suited to answer the peculiar problems. Yet a general guiding framework should be devised which aims at harmonisation of these two branches of law.The jurisprudence related to the interface is yet to develop in India and it is hoped that in near future there will be such issues being dealt by the CCI. The next Unit will deal with the emerging and thought-provoking issues emanating from this interface.

7.12 SUMMARY

- This unit discussed the issues with respect to the relationship between competition law and IPRs, and the treatment of IPRs under the competition law regime in India.
- It can be seen that there are some provisions in the IP law themselves which tend to regulate the anti-competitive behaviour originating from the exercise of IPRs.
- In this technology driven era, the interface between these two laws is volatile and raises some challenging issues.
- Section 3(5) exempts the application of competition law to specified IP laws when the conditions incorporated in the agreements are reasonable to protect the position of IPR owner.
- Intellectual property can also be a tool to acquire significant market power to be dominant in the relevant market. Thus there can be cases of IP induced dominance.
- In the contemporary era, intellectual property is regarded as an important and valuable asset of the enterprises. Thus intellectual party forms an important consideration in the merger and acquisitions framework.

7.13 TERMINAL QUESTIONS

1) What are anti-competitive agreements under the Competition Act? How far the agreements related to intellectual property are covered under the provisions of the Competition Act?

2) What do you understand by intellectual property induced dominance? Explain with an example of abuse of such dominance.

3) Briefly describe various provisions in TRIPS related to the treatment of anti-competitive practices. How far these provisions provide flexibility for addressing the concerns of the developing nations?

7.14 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 7.3 and 7.4

2) Refer to Section 7.9

3) Refer to Section 7.10

Terminal Questions

1) Refer to Section 7.8 and 7.8.1

2) Refer to Section 7.10

3) Refer to Section 7.5

UNIT 8 ISSUES AT THE INTERFACE OF COMPETITION LAW AND IP LAW

Structure

8.1 INTRODUCTION

The previous Unit dealt with the interface of Intellectual Property law with the Competition law and gave an overview of the issues related to exercise of IP which fit in to the abuses under the Competition law. There are various other important issues which lie at the multifaceted and amorphous interface of the IP law and competition law. It has been seen that the rights granted under the IP laws have innovation generating incentive as well innovation stifling effect. Thus there is need to check the innovation stifling effect and, as discussed in the previous Unit,competition law has to play the role of second tier of regulation to check that innovation stifling effect due to abusive exercise of IP rights. Thus it is important even for developing countries to have a competent and effective competition law. The abuses coming out of IP monopoly can be in nature of

high prices, non-working or insufficient working and restrain on parallel imports. There has been a slow adoption of competition laws in developing countries. This slow adoption was due to the lack of a perceived need for competition law and policy since most of the developing economies felt to some extent that a similar role could be played by other forms of state intervention like that of trade policies. This scenario is changing as now more and more countries have competition law framework. Yet most of the developing countries are still at different stages of adopting a comprehensive competition policy. Taking the example of India, it can be seen that most of these issues have been dealt in a piecemeal approach and thus as discussed in the earlier Unit there is a case for adoption of comprehensive competition policy.

The TRIPS Agreement recognises abuses inherent in the IP monopoly along with the fact that competition policy plays a significant role in dealing with such abuses. Therefore TRIPS itself contain flexibilities and expects member states to enact appropriate legislation to check anti-competitive practices. The relationship of competition policy with intellectual property rights (IPRs) has three important dimensions: (a) where the abuse originates from the IPR per se and the remedies lie in the intellectual property law itself, (b) where the IPR abuses originate from the IPRs but the remedy lies in the anti-competitive implications and the (c) the situations where the patenting monopoly is used to extend the areas of exclusivity which can be remedied by the use of competition policy although quite often such distinction is blurred. Due to the diversity of national competition standards, a global harmonisation of the interface between competition policy and IPR seems unlikely in the near term. For example, in 2004 the World Trade Organisation (WTO) dropped negotiations on the issue of competition policy. Thus, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted in 1980 by the United Nations General Assembly remains the only official multilateral code addressing competition policy as such. The issues briefly discussed above will be discussed in detail in this Unit and these issues which have international ramifications need to be dealt comprehensively through development of a multilateral framework regarding the same.

The pivotal role of IP can be prominently seen in sectors like pharmaceutical, and e-commerce and telecommunication markets, where IP assets can help achieve significant price premiums, increase in market power and can act as a barrier to entry for other enterprises. The relationship between competition policy and intellectual property rights has been extensively debated and most of the discussions are in the area of licensing and contractual aspect of the relationship such as tie-ins, grantbacks, vertical price restraints, etc. Some measures have been adopted to prevent such practices. These measures include compulsory licensingand parallel imports. The doctrines like essential facilities doctrine and principle of exhaustion have also been developed by courts across various jurisdictions to ensure that essential infrastructure does not become an entry barrier. The usage of essential facilities doctrine has been extended to the field of intellectual property also. Compulsory licensing can also be related to essential facilities doctrine. Further the intellectual property laws also contain some inbuilt provisions to regulate the anti-competitive conduct of IP holders. But, as you will see further in this Unit that there are now different areas which can come under this debate.

It has been seen that in information and telecommunication technologies, different component manufacturers require combination of a large variety of patents to achieve interoperability of all elements. This has led to patent-based standardisation and various standard setting organisations can be seen now formulating technology standards. This process is aimed at cooperation, but sometimes may lead to collusion and thus can have anti-competitive implications. Some of the issues originate from the IP based

standardisation in technology related fields. This can be more seen in areas related to information and communication technology which require interoperability of various elements. Further there is issue of so called patent thickets which have been formed to deter innovation and companies indulge in cross-licensing and patent pools to overcome such difficulties. Although, patent pooling and cross-licensing have been used to overcome the problems of patent thickets,but it has been seem that such cooperative arrangements can also lead to collusion and thus can raise some anti-competitive issues. Thus there is need to ensure that the licenses are provided on "fair, reasonable and non-discriminatory" (FRAND) terms.

As discussed in the earlier chapter, in both US and EU, there have been well defined antitrust guidelines and block exemption rules respectively regulating the exercise of IPRs so that they are not abused and the objectives of granting IPR can be achieved while maintaining a competitive framework in the economy. Most of these issues are new to a developing economy like India. Keeping in view the complexity and importance of these issues in the coming times, it is important to look for a suitable and comprehensive policy response for these issues. The major concerns to be taken care of relate to consumer welfare in the knowledge based economy, promoting investment in research and development and enhancing innovation and productivity as a common purpose for welfare for all. There are various terms like patent thicket, patent ambush, patent pooling, patent hold up, etc. which will be discussed at appropriate places in the Unit. This Unit will thus explore some of the important issues lying at the interface of competition law and intellectual property law and will give reader an outline of such emerging issues and the tools to overcome such anti-competitive concerns.

8.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the emerging issues at the amorphous interface of IP law and competition law;
- describe the essential facilities doctrine and its application to IP;
- appreciate the provisions like that of compulsory licensing;
- explain the issue of parallel imports and the principle of exhaustion;
- appreciate how these two branches of law interact in case of online markets;
- analyse as to when cooperative arrangements and standard setting arrangements between various IP rights holders can have anti-competitive effect; and
- define and understand terms like patent thickets, patent pools, patent hold up.

8.3 TRIPS PROVISIONS

Intellectual property protection at international level is addressed by the WTO Agreement on TRIPS. The TRIPS Agreement recognises in its preamble and Article 8.2 the abuses and distortions that can be created by the IPR monopolies. It is worthwhile to refer to preamble of the TRIPS Agreement which mentions as follows:

"Desiring to reduce distortions and impediments to international trade and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".

As discussed in the previous Unit, TRIPS also grants certain flexibilities for developing countries. Article 8.2 of the TRIPS Agreement says "Appropriate measures, provided that they are consistent with the provisions of this Agreement may be needed to prevent abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." Article 8.2 reflects the view adopted by Indian delegation and some other countries during the Uruguay negotiations that the TRIPS should also provide a means of restraining anti-competitive abuses of IPR protection. This article provides substantial discretion while applying competition rules to arrangements covered under the TRIPS agreement.

Some provisions explicitly address competition-related questions, namely Article 40 (1), where it is agreed that some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology and can therefore be defined as illegal. TRIPS recognise compulsory licensing under national law, and provides for a procedure to precede compulsory licensing as well as exceptions. Further, specific mention has been made in a separate Article in TRIPS regarding public health and nutrition and public interest in sectors of vital socio-economic sectors of the member countries. Actions to prevent restrictive licensing arrangements from adversely affecting competition in a domestic market are a matter left to individual member countries, although consultation and cooperation between members is encouraged through the agreement. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime of such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4 of TRIPS.It has also been seen that a firm having IP rights can have a dominant position and the abuse of dominant position can happen in a number of circumstances such as non-working of the patent.Sometimes the use of an IPR in certain circumstances can be anti-competitive, the solutions to which are provided by the compulsory licensing provisions in Article 31 and Article 40 of the TRIPS Agreement.

8.4 RESTRAINT OF TRADE

In general the law recognises the freedom to enter into any contract that can be lawfully made. It can be said that the common law doctrine of 'Restraint of Trade' has played a crucial role in the development of modern competition law. The common law does not favour agreements that prohibit or restrain a person in the exercise of a lawful trade, employment or profession. Simply put, the doctrine holds that contractual limitations on the parties freedom to trade are prima facie void unless justified as reasonable. The essence of this doctrine is that it is contrary to public policy to enforce contracts that are in the nature of unreasonable restraints of trade. Sherman Act, 1890, which is an important antitrust legislation of US provides in Section 1 that contracts, combinations or conspiracies in "restraint of trade" are illegal. The doctrine of restraint of trade has also been incorporated in Indian Contract Act. An agreement in restraint of trade under Section 27 of the Contract Act and the prohibited agreements under Section 3 of the Competition Act both aim at curbing such agreements which result in detrimental restrictions on the trade and profession in the market. The terminology used in relation to the two approaches is noticeably similar, and both use public interest as a touchstone to determine reasonableness of the restraint. Generally under the contract law doctrine of restraint of trade, the courts are more focussed on the effect of the restraint between the parties whereas in case of competition law the focus is more on the effect on the market. As discussed in earlier Unit, in Competition law the restraints have been generally classified as horizontal restraints and vertical restraints.

8.4.1 Restraint of Trade and IP Licensing

The rights granted under the intellectual property law can be abused and thus can be an instrument of restraint of trade. To cover these situations, the intellectual property laws also have some inbuilt provisions which prohibit the use of restrictive conditions in the contracts to be made for assigning rights or licensing the intellectual property law. Sometimes there are situations where restraint is necessary to realise the true value of the intellectual property in question. The duration of a restraint is also an important factor in determining whether it is reasonably necessary to achieve the putative pro-competitive efficiency. As per, US Antitrust Guidelines for the licensing of intellectual property, 1995, if the restraint has, or is likely to have, an anti-competitive effect, then it has to be seen whether the restraint is reasonably necessary to achieve pro-competitive efficiencies. If the restraint is reasonably necessary, then the need is to balance the pro-competitive efficiencies and the anti-competitive effects to determine the probable net effect on competition in each relevant market.

Take the example of the provisions in the Patents Act. Section 140 of the Act list out some of the licensing practices which can act as restraints in the licensing agreements and thus such practices are not lawful. Some of such restrictive conditions mentioned in the section are to provide exclusive grant back, prevention to challenges to validity of patent and coercive package licensing. As per the provisions of the section, if such restrictive conditions are incorporated in the contract then such conditions would not be lawful.

8.5 PARALLEL IMPORTS

Parallel imports in connection with IP occur when the goods meant for one market are re-exported/ exported by a third party to another market with parallel or corresponding IP rights e.g. equivalent patents to get the products on the basis of price differentials. Parallel imports which are a normal commercial activity in the national context acquired a degree of market segmentation in the international context when the nations adopted different principles of IPR exhaustion. Some other terms which are used to refer to parallel imports are grey market for imports, first sale, and principle of exhaustion. Under international law individual Countries are free to determine the issue of Exhaustion and Parallel imports. Under Article 4bis and 6(3) of Paris Convention principle of territoriality is applied for patents and trademarks. Thus marketing of products abroad will not entail exhaustion. Article 6 of the TRIPS Agreement states that for the purpose of dispute settlement under TRIPS, subject to the provisions of Articles 3 and 4, nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights. Article 6 of the TRIPS Agreement was strengthened in the Doha Declaration which declared that each Member is free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Article 3 and 4.

It can be seen that the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted in 1980 by the United Nations General Assembly also touch upon the issue of parallel imports. The Set provides that enterprises should refrain from imposing restrictions on the importation of goods legitimately marked abroad with a trademark identical or similar to the protected trademark protected on identical or similar goods in the importing country, where the trademarks in question are of the same origin, and when the restrictions limit access to markets or otherwise unduly restrain competition. The issue of parallel imports, in generic sense, tends to have been more taken as an issue of regulation of cross-border movement of goods rather than associating it with the competition policy of a nation. But, the

ramification of such imports can also be seen on the competition in the relevant market. The parallel import provision became a major issue because developing countries perceive it advantageous for them to obtain the cheapest drugs from anywhere in the world. Thus, regulation of parallel imports should be treated more in a broad framework as this issue lies in the borderline between IPRs provisions and competition policy.

8.5.1 Principle of Exhaustion

The practice of parallel importing occurs because companies, either the manufacturer or the distributor, set differential prices for their products in different markets. This perception essentially boils down to the international exhaustion of patenting rights which is a normal commercial practice followed all over the world except the EC which follows regional exhaustion policy in case of Trademarks only through its Trademark Directive.The exhaustion can be national, regional or international. Most countries, including most developing countries, provide for national rather than international exhaustion in their national legislation. This seems to be consistent with the view that Article 28.1(a) of the TRIPS Agreement confers on the patent owner the exclusive right to prevent others from importing patented products. Article 6 of the TRIPS Agreement is extremely relevant for members, especially developing countries, and particularly the least developed and smaller economies among them. Article 6 provides that Members are free to incorporate the principle of international exhaustion of rights in national legislation. Consequently, any Member can determine the extent to which the principle of exhaustion of rights is applied in its own jurisdiction, without breaching any obligation under the TRIPS Agreement.

For developing countries, in particular, least-developed countries and smaller economies, "parallel importation" can be a significant way of increasing access to medications, where the prices charged by patent holders for their products are unaffordable. Moreover, in situations where the local manufacture of the product is not feasible and therefore compulsory licenses may be ineffective, parallel importation may be a relevant tool to ensure access to drugs. Whenever Governments deem it appropriate, adoption of the principle of international exhaustion of rights can be a useful tool for health policies. Where the prices of pharmaceutical products are lower in a foreign market, for instance, a Government may decide to allow importation of such products into the national market, so as to allow offer of drugs at more affordable prices. Such measures may be beneficial to prevent anti-competitive practices on behalf of patent owners who offer their patented products at unreasonably high prices in the domestic market. In this case, patent owners would compete with other legitimate products: given that their exclusive rights would be exhausted, the interests of the patent owner would not be damaged.

It can be said that one has to look into the circumstances of a particular geographical area and state of economy before giving a definitive answer to the question regarding the parallel imports. For example for the developing economies this practice seems favourable in short run but in long run it might go against their economic interest and jeopardizes their welfare.

8.5.2 Treatment to Parallel Imports Across Jurisdictions

The issue of parallel import has not been dealt in directly under any multilateral binding agreement. As discussed above, under international law provisions individual countries are free to determine the issue of exhaustion and parallel imports Thus, the treatment to parallel imports varies widely across various jurisdictions as the countries deal with the issue in the manner they feel appropriate. It will be good to provide here the examples of some jurisdictions to make the issue clear. US policy on parallel imports is mixed and

different treatment is given to different form of intellectual property. Restrictions on parallel imports exist only for certain types of goods. As such, the owners of US patents and copyrights are protected against parallel imports. In case of trademarks, a 'common-control exception' is maintained and trademark owners are permitted to block parallel imports except when both the foreign and US trademark owners are in a parent-subsidiary relationship. In Japan the parallel imports in patented and trademarked goods are permitted unless contract provisions explicitly bar them or unless their original sale was subject to foreign price regulation. The EU provides an oft cited case of a regional exhaustion regime. Simply put the regional exhaustion regime applicable in EU implies that the proprietor of an IP is prevented from taking infringement action against parallel imports that come from another member State of the European Union. However, the proprietor may act against parallel imports from outside the European Community.

Despite the commitment to multilateral solutions in TRIPS, it has been seen that many developing countries continue to subject themselves to unilateral demands of some of the developed countries. Some of the developed jurisdictions like US and EU often ask for 'TRIPS-plus' protection; that is, levels of protection beyond the minimum standards as required by the TRIPS agreement. A relevant example on this point is the attempt by the pharmaceutical industry and the US government to block the use of parallel imports and compulsory licensing provisions by the South African government to obtain access to cheaper HIV/AIDS drugs.

Self Assessment Question **(Spend 3 minutes)**

1) What do you understand by the principle of national exhaustion in context of IP rights?

.....

.....

.....

.....

.....

8.5.3 Treatment to Parallel Imports in India

In India, Section 30 (3) (b) of the Trademarks Act, 1999 provides that where the goods bearing a registered Trademark are lawfully acquired, further sale or other dealing in such goods by purchaser or by a person claiming to represent him is not considered an infringement by reason only of the goods having been put on the market under the registered Trademark by the proprietor or with his consent. However, such goods should not have been materially altered or impaired after they were put in the market.Section 107A (b) of the Patents Act, 1970 provides that importation of patented products by any person from a person who is duly authorised under the law to produce and sell or distribute the product shall not be considered as an infringement of patent rights. Hence, in so far as Patents are concerned, Section 107A (b) provides for parallel imports.

Section 51 of the Copyright Act provides that the copyright in a work is infringed when any person imports into India any infringing copies of the work except two copies for persona use (other than cinematograph films or records) without the license from the copyright holder. Section 2(m) defines the term 'infringing copy' to include any copy imported in to India in contravention of the Copyright Act. Further Section 53 precludes

importation of infringing copies made outside India that, if made in India by the same person whom made them outside India, would infringe copyright. In ***Penguin Books, England v. India Distributers*** (AIR 1985 Del 29) the provisions of Copyright Act were successfully used to prevent parallel importation of copyrighted works into India which were manufactured and sold oversee by a foreign licensee. With regard to copyright law in India, the status regarding the parallel imports still seems to be a grey area due to different interpretations of the Courts and recently a policy discourse has been started to settle the position in this regard. In a circular dated 8th May, 2012 the Central Board of Customs & Excise instructed that the IPR (Imported Goods) Enforcement Rules, 2007 will not apply to 'parallel imports' under the Patents Act, 1970 and the Trademarks Act, 1999. These rules have been notified under the Customs Act, 1962. The circular defines parallel imports as import of original/genuine products (not counterfeit or pirated) which are sold/ acquired legally abroad and imported into the country, by persons other than the intellectual property right holder without permission/authorisation of the IPR.

8.6 COOPERATIVE ARRANGEMENTS BETWEEN IP HOLDERS

With the globalisation of intellectual property and the use of it as a defining strategy for the enterprise, the role of IP has grown manifold. There is continuous interaction amongst various IP held by different holders and it has become norm now amongst the entities to cooperate so that the IP can be put to best use. The fragmentation of IP rights necessary for successful commercialisation of a product is due to the reason that such rights are held by multiple holders. This can increase thecosts of bringing products to market dueto the transaction costs of negotiating multiple licenses and greater royalty payments. The oft used 'tragedy of commons' implies that a resource can be overused if it is not protected by property rights. Shapiro has related this phenomenon with the 'tragedy of anti-commons', implying that there are multiple gatekeepers to the patent commercialisation and thus permission has to be sought from each before a patent can be used. As you will also see further, there can be areas where commercialisation of IP is subjected to other IP and thus there is need to have fair access to such IP. From the competition law perspective, it is important to note that cooperation may also lead to collusion and thus a cooperative arrangement per se might be an arrangement which can raise anti-competitive concerns. This section will cover some of the emerging issues and the strategies applied to solve such issues in this area.

8.6.1 Cooperative Standard Setting Arrangements

The issue of standard setting, especially in industries where network effects are more visible, is also important. Standard-setting organisations ("SSOs") are industry groups that set common standards in a variety of significant areas. Generally, the owners and users of patents agree to establish standards that make possible the production of interoperable end products that use patented technologies as inputs. Especially technical standards are introduced into the market through private standard setting which can be through agreements or through certification. Taking the example of standards are GSM, GPRS, 3G, JPEG which are common these days. The promotion and completion of industry standards can provide significant benefits for consumers; these include product uniformity, interoperability, longer-life products, lower development costs for standards-based products, efficiency, consumer choice, increased competition because of lower barriers to entering a specific market with standardised products, lower marketing costs for bringing products to a particular market, and the fostering of public health and

safety. In particular, industry standards are accepted as being one of the engines of the modern economy because they can make products less costly for firms to produce and more valuable to consumers, and can serve as a fundamental building block for international trade. On the other hand concerns have also been raised that a standard may also slow innovation by locking in an inferior technology, and it may reduce consumer choice by reducing the number of differentiated but incompatible products.

In most of the cases, technology is the basic criteria for the adoption of the standards by the industry players. It has been seen that once a standard is chosen, any patents or copyrights necessary to comply with that standard become necessary. In event of the said standard gaining popularity, such essential intellectual property assumes significant market power. Further, patent owners can "hold up" patent users by demanding high royalties for a patented input after the SSO has adopted the patented technology as an industry standard. This can be more problematic when manufacturers within the SSO have incurred sunk costs to design end products that incorporate that standard.

The European Commission has recently investigated a number of high-profile cases in the field of standardisation. For instance, in the Rambus case, following a complaint set forth by a number of Dynamic random access memory (DRAM) manufacturers, the European Commission accused Rambus of infringing competition rules by deceptively lying or withholding information aboutits patents from the Joint Electron Device Engineering Council (JEDEC) standard setting process. Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market was locked in. Only after adoption of the standard did Rambus reveal its patents through patent infringement lawsuits against JEDEC members who practiced the standard. It was noted that the Rambus deliberately engaged in a pattern of anti-competitive acts to deceive an industry-wide standard-setting organisation, which caused or threatened to cause substantial harm to competition and consumers. In December 2009, the European Commission accepted commitments proposed by Rambus, which were considered adequate to address the identified competition concerns.

8.6.2 Patent Thicket

The interaction between IP law and Competition law as discussed in the earlier Unit also dealt with the application of provision of the competition Act to the licensing agreements and the exemption related to reasonable exemptions provided in Section 3(5) of the Act. It is unquestionable fact that licensing of intellectual property has a pivotal role in today's economy. Invariably the creator of IP himself is unable to utilise it to the fullest. Thus the vehicle of licensing acts as a facilitator to bring in new innovations in economy through new products and services. In recent times a new problem has emerged especially in the area of production and commercialisation of technology. This phenomenon has been named as patent thickets. Carl Shapiro defines patent thicket as an overlapping set of patent rights requiring that those seeking to commercialise new technology obtain licenses from multiple partners. Simply put a patent thicket is used to describe the concentration of a large number of patents in the hands of a single firm.Patent thickets are an overlapping set of patent rights forcing those seeking to commercialise new technologies to obtain licenses to use multiple patents, thus potentially considerably raising costs. One example of patent thicket can be seen in the development of 'golden rice' with Vitamin A. The development of such rice can help solve the Vitamin A nutrition deficiency in poor countries. But marketing of such rice would require clearing a huge 'patent thicket' made up of about 70 patents held by 30 different patent holders. Thus it becomes difficult to navigate through a patent thicket and sometimes unreasonably royalty rates are charged thereby hampering proper commercialisation of new products.

8.6.3 Patent Trolls

Worldwide, there has been dramatic rise in patent litigation which some scholars attribute to rapid growth in the number of patents with unclear or unpredictable boundaries. There are instances where some entities collect and amass patents related to a particular area of a technology. Generally they collect patents from entities not actively seeking to enforce them. Such entities do not produce goods; rather they acquire patents in order to license them to others.These entities acquire a patent, sit on it, do nothing, and in a sense attempt to place a private tax on the actual innovators by threatening them with law suits. The term which is gaining significance in IP literature for such entities is 'patent troll'. Some other names which are used for patent troll are non-practicing entity, patent holding company, patent licensing company, patent squatter, etc. Thus, a patent troll is just a collector of patents with the intention to sue or threaten to sue other businesses with lawsuits so as to earn by damages awarded by court or by payments in the form of 'out of court' settlements. Most infringement suits by patent trolls are frivolous because in most cases ultimately the defendant is found to have not infringed or the troll's patent is found invalid.

Generally, the patent infringement suits are technical, very slow and expensive. This significantly adds to the cost of innovation in the hands of the companies that wish to commercialise the technology. This is the reason why most of such infringement suits are settled before trial. This suggests that target companies would rather pay off trolls than fight them in court and ultimately the burden will be shifted to consumers and new innovators. For example, in 2006, NTP Corp., a patent holding company, settled a patent suit with Research in Motion, the maker of the BlackBerry device, for $612.5 million. They received this sum even though questions were raised about the validity of NTP's patents. This came to $6 for each of the device ever sold. It may also involve a loss of consumer welfare as the costs of defending patents are passed along to consumers in the form of higher product prices which may then become unaffordable, and that way law suits by trolls hamper technology innovation.

8.6.4 Patent Pools

Patent pools and cross licensing practices have been used to clear the problem of blocking patents and patent thickets. Patent pools refer to multiple patent holders pooling their patents and, through a joint entity, granting licenses to third parties. Patent pools can reduce transaction costs by allowing a party to negotiate simultaneously for multiple licenses to use multiple patents. Patent pools may take various forms in accordance with the purpose of the pooling. Patent pooling is different from the general licensing transactions on the ground that the licensing relates to the effective use of the licensed technology in production whereas the pooling merely constitute agreements on the licensing of technology (as a package) to third parties. Patent pooling arrangements are often seen as pro-competitive because these arrangements can promote the dissemination of technology. Possible pro-competitive effects result from:

- integrating complementary technologies;
- clearing blocking positions;
- avoiding costly infringement litigation; and
- reducing transaction costs.

Concerns arise, however, when a pooling arrangement harms competition among entities that are actual or potential competitors. Some of the potential anti-competitive effects

which might arise can be in the form of price fixing between pool members when setting the royalty rates, collective bundling and from hindering market penetration by alternative technologies and thus affecting innovation and new products.The US Antitrust Guide Lines for the Licensing and Acquisition of Intellectual Property (1995) note that inclusion of complementary or essential patents in a patent pool is pro-competitive, but assembly of substitute or rival patents in a pool can eliminate competition.The US DOJ/FTC IP Report of April 2007 ("Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition") concludes that a patent pool is unlikely to raise competition concerns if:

a) The pool is limited to essential patents for a standard.

b) The pool grants non-exclusive licenses that do not prevent licensees from developing alternative technologies.

c) Patentees retain the right to license their patents separately outside the pool.

The two main points for analysing the patent pools are whether the patent pool is likely to incorporate complementary patents and if yes then whether the resulting competitive benefits will outweigh the competitive harms if any.

8.6.5 Cross-licensing

An agreement between two intellectual property holders that grants each of them the right to practice other's intellectual property is referred to as cross-license. This agreement may involve some of the IP rights from the patent portfolio held by the IP holders. Cross-licensing generally has the positive effect of enabling firms operating in a patent thicket of overlapping patents to combine use of different patents to develop technologies. But they could help (anti-competitive) price coordination and could raise barriers to market access of other competitors, since they could be forced to negotiate with all firms involved or impose terms that are abusive to non-members. Anti-competitive elements emerge, for instance, when holders of substitutable technologies enter into cross-licensing agreements, aimed at setting commonly agreed prices for the competing products incorporating those technologies.

8.7 ISSUES IN ONLINE MARKETS

Information and communication technology took a giant leap with the advent of internet which is now the backbone of the processes and procedures adopted by the governments and the enterprises. Advent of e-commerce with benefits like ease of access, wide and quick outreach has changed the way the business or services are rendered to the people. The online markets are the emerging markets and the trend is gaining importance with more social networking and other web services providers using it more and more. Further, the small businesses are also targeting people through online markets and these initiatives help them to reach lot of people with minimal efforts. There are various regulatory issues which are emerging at the interface of these markets especially in way of regulating data privacy, cybercrimes and abuse of intellectual property rights which affect the process of competition in the online markets as well. There have been various issues at the interface of competition law and IP law also but till now they are mainly reported in developed jurisdictions. Such issues relate to the anti-competitive conduct, abuse of dominant position and mergers and acquisitions. There seems to be a paradox in the online markets especially related to the nature of online players. The online space is mainly controlled by few big players and there are a varied number of small and medium players with main objective of promoting their business. It has been

seen that the small players use the services of the big players to reach out to the people. These two sided markets pose a great challenge as at one end are the customers and other side are the other businesses. Sometimes these markets are called multisided markets also. As has been held in some decisions in EU, dominant undertakings bear the special responsibility of not hiding behind IP rights and of not exercising them in a manner that forecloses secondary markets and eliminates competition therein.

Take the example of the recent case in India, where Consim Info Pvt. Ltd. alleged that the Google had used ad words and ad texts in the keyword suggestion tool which were identical or deceptively similar to Consim's registered trademarks. The contention of the plaintiff was that the defendants, who also have matrimonial web portals, rendering online matrimonial services in the internet, advertise their services in the search engine "Google", by adopting adwords and texts, which are exactly identical or deceptively similar to the registered trademarks of the plaintiff. In the interim ruling, Court dismissed all charges of contributory trademark infringement against Google as the protected words (i.e. Tamil & Matrimony) were 'descriptive' of the trade and it lacked the intention to infringe Consim's trademark.The decision of the Court was greatly influenced by the fact that the trademarks in dispute were generic in nature. The Court also observed that an intermediary, Google, cannot be made liable for infringement arising out of a third party's actions since it is not possible to always check every advertisement posted online. However, this observation will be subject to Section 3(4) of the Information Technology (Intermediaries Guidelines) Rules, 2011, which mandates intermediaries, who receive a complaint of infringement, to act upon it within thirty six hours of receipt, failing which they may be held liable. In March 2012, Consimalso filed another complaint against Google before the Competition Commission of India (CCI) for 'engaging in discriminatory and retaliatory practices relating to ad words.This is just one Indian example in the new emerging scenario of some of the issues at the interface of IP and competition law. Further, this unit will briefly cover some of the approaches to overcome the above discussed issues.

Self Assessment Question **(Spend 3 minutes)**

2) What do you understand by 'Non-practising entity' in context of patents?

.....

.....

.....

.....

8.8 ESSENTIAL FACILITIES DOCTRINE

The doctrine of "essential facilities" first enunciated in the case of ***US v. Terminal Railroad Association of St. Louis***, (1912) was not directly associated with the exercise of intellectual property rights. As per this doctrine, an 'essential facility' is a facility or infrastructure without access to which competitors cannot provide services to their customers. In 1983, a four-part test was first developed regarding the Essential Facilities Doctrine in US in the case of MCI v. AT&T. According to that test, a facility is to be considered as essential with the presence of following factors:

- Control of the essential facility by a single company,
- The competitors must be actually or reasonably unable to duplicate this essential element,

- The refusal of use of the facility to a competitor, and
- Possibility of providing access to it.

Thus the essential facilities doctrine requires a monopolist or a dominant firm to provide access to a facility that the monopolist controls and that is deemed necessary for effective competition.Traditionally, the doctrine has been applied in network industries (such as telecom, electricity etc.), and has been used to provide access to infrastructure. However public policy, public benefit and welfare models make it an important tool to be applied in other important sectors like pharmaceuticals, particularly in the context of patent and access to drugs.

8.8.1 Application of Essential Facilities Doctrine in Case of IP

The market power obtainable from intellectual property and the scale and network economies associated with some forms of intellectual property, as for instance in telecommunication sector, places such IP comfortably within the domain of essential facilities definition. The doctrine has been applied in developed jurisdictions like US and EU to provide access to IPRs. For instance in ***US v. S C Johnson and Sons*** (1994), the Court ordered Bayer AG , a major supplier of pesticides which granted the patented technology by way of licensing only to Johnson in US, to grant access of such also to the small firms accelerating competition. After the inception and application of the essential facilities doctrine in the United States, however, it has been the European Commission that has been most pro-active in applying the doctrine. European Commission has applied it in case of IPRs also and more so, when it comes to ensuring access to standards and essential technologies. From the various decisions of the cases in Magill, IMS Health, and Microsoft a depiction has now emerged whereby the European Court of Justice has sanctioned and developed a doctrine that deals with the abuse of a dominant position consisting of a refusal to license intellectual property, where innovation is stifled through such a refusal.

The concept of compulsory licensing can also be linked with the principle of "Essential Facilities Doctrine", whereby the monopolist/dominant firm is required to grant access to a facility that it controls and that is necessary for effective competition provided that a refusal of access would have significant anti-competitive effects. As discussed earlier, the European Commission (EC) had adopted this doctrine in the compulsory licensing of intellectual property rights in downstream markets in the Magill case discussed in the previous Unit. Another example of its adoption is found in the famous Microsoft case.

8.9 COMPULSORY LICENSING

Compulsory licensing is when the Government allows third parties, other than the patent holder, to produce and market a patented product or process without the consent of the patent owner. Article 5 A(2) of the Paris Convention of 1883 provides that "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work." Compulsory licence is also provided as one of the flexibilities under TRIPS that allows companies to manufacture generic versions of a patented drug before its expiry on certain grounds provided three years have passed since the grant of patent. The Indian Patent Act provides that an application for the grant of compulsory licence can be made after three years from the date of grant of the patent unless exceptional circumstances like national emergency or extreme emergency can be used to justify the grant of a licence on an

earlier date.Three broad grounds for the grant of the compulsory licences have been provided in the Act viz: (a) reasonable requirements of the public with respect to the patented invention have not been satisfied, (b) the patented invention is not available to the public at a reasonably affordable price, and (c) the patented invention is not worked in the territory of India. The Patents Act also sets out the circumstances under which 'reasonable requirements of the public' would not have been met. In India, Copyright Act also contains provisions for the grant of compulsory licenses in cases where the work has been withheld from the public. Section 31 of the Copyright Act states that if an applicant under the section demonstrates that the owner of copyright has refused to grant a license to it for the purpose of broadcasting the same to the public then the Copyright Board may grant such a license, when a prima facie case is made out.The recent application of compulsory licensing can be seen in India itself. In March 2012, India issued its first compulsory licence under Section 84 of the Indian Patents Act, 1970. The licence was granted to Natco for making the generic version of the anti-cancer drug Sorafenib (bearing brand name Nexavar), by a German multinational pharmaceutical company, Bayer. The Patent Controller's decision has given due recognition to generic competition as one of the most important tools to enhance access to medicine.

8.10 FRAND LICENSING

Licensing as a tool for the commercialisation of technology can also help integrate complementary intellectual property and realisation of new products. Consumers may benefit from licensing because it can expand access to intellectual property and thus increase the speed and reduce the cost of bringing innovations to market.It is very important to see that the pro-competitive tool of licensing do not lead to anti-competitive effects. Thus it is important to see that there are some commitments in the licensing contract which ensures that the licensing agreement is reasonable and non-discriminatory. In this sense in various jurisdictions the terms FRAND and RAND are generally used interchangeably.The acronym, "FRAND, licensing" stands for fair, reasonable, and non-discriminatory licensing. There is no universally agreed upon definition of the FRAND commitments.The term implies that the license terms should be fair. The word 'reasonable' in this context implies that the license terms must not be excessive or extreme and if there is some unusual term in any license then there must be a valid objective reason for the inclusion of that term. Non-discriminatory means that the patentee cannot discriminate, without the objective reasons, about the firms it licenses to and the royalties it charges from the firms regarding licensing of IP. The FRAND licensing requirement is a prime example by which competition law is used to check the abuse of market power by the patent holder and to promote competition.

Self Assessment Question **(Spend 3 minutes)**

3) What is 'Essential Facilities Doctrine'? Briefly express as to how this doctrine can be used to provide access to intellectual property.

.....

.....

.....

.....

.....

.....

8.11 WAY FORWARD

In conclusion, it can be said that IP law cannot be designed and applied in isolation from other legal disciplines, particularly competition law. The competition policy approach suggests that creating and preserving the conditions for competition and market contestability in the area of IPRs, is not only the task of IP law and competition policy and law can play an important role.Competition law has a wide ambit across the economy and thus as previously discussed it plays a role of second tier of regulation for checking the abuses of IPRs. Defining the right balance between competition and IPRs is an objective to be achieved through a diversity of policies and regimes. In this regard, a number of recommendations can be made for framework of developing countries like India, namely:

a) strengthen competition laws in order to control, inter alia, possible abuses emerging from the acquisition and exercise of IPRs;

b) consider the competition implications of various policies and regimes that determine market entry, such as marketing approval of pharmaceutical and agrochemical products;

c) ensure an adequate coordination among the competition law agency, intellectual property related agencies and other agencies whose decisions may influence market structure and operation, with the aim of maintaining a competitive environment;

d) fully use the flexibilities allowed by the TRIPS Agreement to determine the grounds for granting compulsory licences to remedy anti-competitive practices relating to IPRs;

e) consider, in particular, the granting of compulsory licences in cases of refusals to deal;

f) conceptualise and apply the essential facilities doctrine as required to address situations of control of essential technologies, taking into account the relevant market conditions and public needs;

g) develop policies, including guidelines, to prevent and correct abuses in the acquisition and enforcement of IPRs;

h) address situations that may normally lead to anti-competitive conduct such as patent thicket;

i) adopt guidelines for use at the patent offices to prevent the granting of frivolous or low quality patents, as well as patents containing overly broad claims, which may be used to unduly restrain legitimate competition and block innovation;

j) competition authority will have to develop a coherent policy on matching the basic tenets justifying intellectual property rights with competition law, where the long-term interest of innovation and public good is common to both branches of law; and

k) the competition authority and the appropriate regulatory authority need to be more actively involved in the interface issues and should set guidelines for certification of standards, especially for the creation of appropriate licensing (FRAND) terms.

The strengthening of intellectual property laws must go hand-in-hand with contextualising competition law according to the socio economic milieu of the country. Taking into

account the complex socioeconomic setup and vastness of our country, one has to be careful while emulating even the best practices from around the world. For instance, the Peruvian competition authority called The National Institute for the Defence of Competition and Protection of Intellectual Property – INDECOPI – was created in November 1992, has responsibilities to implement consumer protection, competition, and intellectual property laws. These international examples can serve as good reference point, but they have to be applied judiciously and adapted according to the specific needs of India. The provisions in the Indian legislation regarding these issues are sketchy and still there is dearth of decided case law on such issues in India. The jurisprudence regarding the interplay of IP laws and competition law in India will take time to develop. As discussed in this Unit and the earlier Units, the complex and amorphous interface between IP and competition law has seen the emergence of debates in India across various quarters. Further, initiatives like Protection and Utilisation of Public Funded Intellectual Property Bill 2008, and the draft bill titled National Innovation Act, 2008 indicate that the government is also mulling some new legal initiatives to boost competitiveness, innovation and entrepreneurship in the country. But it is also important to devise a framework or guidelines so as to check the abusive practices related to the intellectual property. As has been done in various other jurisdictions, it is important to frame guidelines for the harmonisation of these two branches of law so that the common goals of both can be effectively achieved for the good of all. This is important keeping in view the range and complexity of issues like that of related to online markets or related to health and life saving drugs. Although, one can see initial policy discourse at some levels regarding these issues; it seems that it will take some time in India for effective jurisprudence to develop in this regard.

8.12 SUMMARY

- There are many emerging issues in contemporary technology driven era emanating from amorphous interface of the intellectual property law and competition law.
- The issue of parallel imports gets different treatment across various jurisdictions and its application depends on the national priorities.
- Technology transfer agreements and licensing agreements are also an important aspect and it is important to see that such agreements do not inhibit innovation by restricting research and development activities.
- The standardisation of technology helps the consumers and the companies but it is very important that the patent standardisation process is not abused to the detriment of other businesses, market players and the consumers.
- The nature and extent of the above discussed issues clearly indicate that such issues affect a varied nature of the activities in the economy and thus need a comprehensive policy response.
- In order to address public concerns and to see that the ultimate objective of public good is achieved; provisions like compulsory licensing and concepts like essential facilities doctrine should be used so that balance can be achieved between the objectives of IP law and competition law.

8.13 TERMINAL QUESTIONS

1) Enumerate the TRIPS provisions which provide flexibilities to the developing countries.

2) What is compulsory licensing? Explain the relevant provisions given under the Patents Act, 1970 in light of decision of Natco v. Bayer.

3) How cooperation amongst the intellectual property holders can lead to collusion and thus have anti-competitive outcomes? Illustrate with the help of case in standard setting organisations.

8.14 ANSWERS AND HINTS

Self Assessement Questions

1) Refer to Sub-section 8.5.1

2) Refer to Sub-section 8.6.3

3) Refer to Section 8.8 and Sub-section 8.8.1

Terminal Questions

1) Refer to Section 8.3

2) Refer to Section 8.9

3) Refer to Section 8.6 and Sub-section 8.6.1

8.15 REFERENCE AND SUGGESTED READINGS

1) Anderman, Steven D '*The Interface between IPRs and Competition Policy*' Cambridge University Press, (2007).

2) Mittal Raman '*Licensing Intellectual Property: Law & Management*' Satyam Law International , 2011.

3) Correa, C.,'*Intellectual Property and Competition Law: Exploration of Some Issues of Relevance to Developing Countries*', International Centre for Trade and Sustainable Development, Geneva, Switzerland. (2007).

4) Shapiro, Carl, *'Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting'*, (2001).

5) MA Lemley & C Shapiro, '*Patent Holdup and Royalty Stacking*' 85 Texas Law Review, (2007).

Notes:

MPDD/IGNOU/P.O.1K/MARCH 2017 (REPRINT)

ISBN: 978-81-266-6384-2