

# Law & Economics of Competition Law Part 2 – US Antitrust Law

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# US Antitrust Law

- Competition laws = Antitrust
- After 1880 – large industries combining as trust to control ‘pricing’ & ‘output’
- Legislation provide solution to trust problem, therefore “Antitrust”
- 1890 → The Sherman Act
- 1914 → The Clayton Act
  - The Federal Trade Commission Act
- USA adopted ‘Crime Tort’ model, which prescribed anticompetitive ‘concerted & unilateral conduct’

# US Antitrust Law – Nature

- US law provided a ‘broad structure’ or ‘standards’
- Did not specify ‘detailed rules’
- Entire ‘substantive content’ of law is developed by the judiciary
- US ‘Antitrust Law’ is developed as a common law
- Need to study judgments of mainly the US Supreme Court & Circuit Courts

# US Antitrust Law – Prosecuting Agencies

- ▶ Authority to prosecute/ take action
  - ▶ Department of Justice
  - ▶ Federal Trade Commission
  - ▶ State Governments
  - ▶ Private Individuals
- ▶ In India, single prosecutorial gatekeeper - i.e. Competition Commission of India (CCI) can take action

# Schools of Antitrust

- Different schools of thought had impact on US antitrust policy and development
- Various schools
  - Harvard School
  - Chicago school
  - Post - Chicago school
  - Neo – Chicago school
  - Behavioural school

# Harvard School

- ▶ Its structural approach was influential in the US since 1930 to 1960 and also shape EU policy
- ▶ SCP model - Argues relationship between – Structure, Conduct & Performance
- ▶ Market structure influences firm's conduct, which in turn influences performance
- ▶ Structure –seller concentration, entry barriers, product differentiation
- ▶ Conduct – pricing, advertising, research & development
- ▶ Performance – efficiency, technological progress

# Harvard School contd.

- ▶ This school asserts that high concentration and high entry barriers directly affect conduct of the firm
- ▶ For this school, antitrust has many goals
  - ▶ Distribution of equity
  - ▶ Economic stability
  - ▶ Decentralization of economic power
  - ▶ Optimal factor allocation
  - ▶ Consumer sovereignty

# Harvard School contd.

- Wide range of conduct considered as anticompetitive including
  - Vertical restraints – tying, bundling
  - Exclusive dealings, territorial restraints resale price maintenance
  - Expanded rights of perceived victims

# Chicago School

- ▶ At centerstage since 1970
- ▶ Based on neoclassical economics and price theory
- ▶ Different than Harvard School
  - ▶ Sceptical of SCP paradigm
  - ▶ Single goal of 'economic efficiency'
- ▶ Consumer welfare → improving allocative efficiency  
without impairing the productive efficiency
- ▶ Consumer welfare = total surplus / total welfare  
≠ consumer surplus

# Chicago School contd.

- ▶ In Economies of Scale, high level concentration is natural
- ▶ Predatory pricing – cannot be successful if no recoupment possible
- ▶ Exceptional intervention prescribed
- ▶ 1970 onwards US Supreme Court decisions influenced by this philosophy
- ▶ 1990 influence was almost complete
- ▶ Reversed old precedents, liberal policies

# Chicago School contd.

- Supreme Court's change of approach in following areas
  - Per Se Rule to Rule of reason
  - Tying arrangement
  - Maximum retail price maintenance
  - Predatory pricing

# Post Chicago School

- Deviates and improve Chicago approach
- Considers that certain conduct may have harmful effect
- Support Rule of Reason

# Neo Chicago School

- Combine Price Theory with Game Theory
- Make error analysis weighing relative harm
- False positive – finding violative when not harmful
- False negative – finding no violation when behaviour is injurious

# Behavioural School

- Reject unrealistic assumptions of neoclassical economics
- Adopt inductive approach
- Look to cognitive psychology to understand people's choices
- Considers cognitive biases, endowment effect
- Still underdeveloped

# The Sherman Act

## ➤ Section 1

### Restrictive Agreements

- Contracts, combination or conspiracy, in restraint of trade or commerce
- Is declared illegal
- Punishable with fine &/ or imprisonment

# The Sherman Act contd.

- Section 2
- Every person who shall monopolize
- Or attempt to monopolize
- Or combine or conspire to monopolize
- Is guilty of felony and punishable with fine &/ or imprisonment

# Early Interpretation Per se Rule

- Illegal per se means that act is illegal  
without extrinsic proof of intention or effect
- Earlier domain of per se rule was broad
- Now it extends to - Naked 'price fixing'
  - Market division agreements
  - Certain boycotts
  - Concerted 'refusal to deal'
  - Some tying agreements

# Early interpretation - Rule of Reason

- It is evaluating
- Pro competitive conduct
- Against anticompetitive conduct
- To decide whether practice should be prohibited or not

# Early interpretation

- ▶ In Alcoa case (1932 -1945)
  - 3 element of monopolization provided
    - Relevant market
    - Monopoly power
    - Illegal use
- ▶ In Grinnell case (1966)
  - growth by superior product, business acumen it was lawful
- ▶ Harm by monopolist's conduct
  - Exclusionary abuse – against competitor
  - Exploitative abuse – against customer

# Exclusionary conduct

## Categories

- Exclusionary pricing
  - predatory pricing
  - predatory buying
  - Loyalty discount
- Refusing to deal
  - Essential Facility Doctrine

# Exclusionary conduct contd.

## ► Exclusionary distribution

- Exclusive contract – with supplier, with customer ;
- Tying or bundling

## ► Exclusionary misuse of institution - Frivolous suits; Manipulating rules

## ► Exclusionary innovation – Technology; New product; IPRs

# Predatory Pricing

- Monopolist
  - reduces price for longer period,
  - competitor leaves market,
  - other entrants deterred
  - later – increase price to higher level
- Predator and victim
  - – incur losses
  - - loss is investment for future profit

# Predatory Pricing contd.

- Areeda Turner test
  - price below Average Variable Cost (AVC) – Per se violation
- Intent test
  - now not valid
- Now in Matsushita v/s Zenith, & in Brook Group v/s Brown
- Recoupment test developed
  - To prove predator's ability to recoup

# Essential Facility Doctrine & Refusal to deal

- ▶ Elements
  - ▶ Monopolist controls essential facility
  - ▶ Competitor cannot duplicate but needs it
  - ▶ Monopolist denies
  - ▶ Monopolist can provide/ feasibility
- ▶ 1912 – SC – USA v/s Terminal Rail Road Association
- ▶ 1973 – Otter Tail Power v/s USA
  - electric high voltage transmission lines
  - denial to competitors

# Essential Facility Doctrine & Refusal to deal

- ▶ 1985 – Aspen Skiing Co. – Harvard school influence  
downhill skiing, other 3 resorts, stopped collaboration
- ▶ 1992 Eastman Kodac  
service & parts - separate market, Kodac Monopoly  
exception 'valid business reason' for non cooperation not accepted
- ▶ 2004 Verizon Communications v/s Trinko  
Verizon denied interconnection services to rival in order to limit entry  
SC distinguished Aspen skiing saying that it was limited exception