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CONSPECTUS OF INTELLECTUAL PROPERTY RELATED ANTICOMPETITIVE BEHAVIORS IN TRADE AND BUSINESS

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I. Introduction

It is widely believed that the presence of strong intellectual property rights spurs innovation, which in turn leads to higher economic growth and increasing benefits for all. The argument seems natural as securing property rights is basic for a well-functioning market economy. No economic agent exercises productive effort without the certainty of controlling its fruits.[1] What is true for physical effort must be true for the intellectual efforts also. Economic propositions justify that ideas should be protected and available for sale, just like any other commodity. There is a general rule that monopoly acquired by IPRs is not bad. There are certain exceptions to this rule. The power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his business. But "intellectual property" has come to mean not only the right to own and sell ideas, but also the right to regulate their use. Consequently, the IP owners tend to indulge inanticompetitive activities. This creates a socially inefficient monopoly, and what is commonly called intellectual property might be better called "intellectual monopoly."

Developing countries and economies in transition like India tend to be more vulnerable to anti-competitive practices. This is due to high entry barriers, less diversified and smaller markets, relatively asymmetric firms, in addition to the general conditions which allow dominant firms to abuse their position. Some developing countries do not have competition laws in place and, in those that have laws; their competition authorities have limited experience and resources for effective enforcement. Fortunately India has

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enacted Competition legislation on par with international commitments and the CCI is doing a tremendous job within the limits of its legislative competence.

In India Government monopolies exist because some services have to exist for everyone with their availability not being subject to market forces or the ability to pay. Other reasons include protecting the public welfare. However, there is argument that subsidizing some businesses creates inefficiencies and can risk producing an inferior product or service for all customers. There is no perfect answer to the issue; government monopolies will continue to be a work in progress subject to political and public interests. Most of these monopolies are utility monopolies. In countries like India, utility monopolies are the most influential of all monopolies, whether private or public. Because utilities are near absolute necessities, people have no choice but to pay in spite of unreasonable price hikes and weak service. As such, unless the economy collapses, utilities have little incentive to improve service and decrease price. To make things worse, the expenses and infrastructure required to provide a utility usually leave few options in terms of choice. This means the dangers associated with a utility monopoly are very real to our modern way of life and our economy while utilities monopolies represent the norm, not the exception.

Anti-competitive practices have implications for the economic growth and development of nations. Such practices restrict competition and deteriorate consumer welfare by creating entry barriers and price increases, which lead to efficiency and innovation concerns. Cartels are one of the most harmful anti-competitive practices and cause significant damage to the economy as well as to consumers. Abuse of a dominant position by firms owning Intellectual Property is another type of anti-competitive conduct, which can be exercised by large firms, both multinationals and state-created monopolies, such as utilities, transport and telecommunications, in relatively smaller markets. However, there are some practical difficulties in this regard. First, developing economies often have smaller markets and, hence, only a small number of firms can benefit from economies of scale and operate efficiently. That is why markets in developing countries are more likely to be concentrated. Secondly, the established large firms in developing countries play an important role in increasing investment. Therefore, these economies are likely to benefit from relatively lax rule son abuse of dominance.

Thirdly, in countries where the priority is on equal income distribution, policies may be designed to support small firms representing poorer parts of the societyvis-à-vis large and dominant companies. These factors should be considered carefully by developing countries in designing their competition law and policy, in particular the rules on abuse of dominance. Economic efficiency concerns should be weighed against public interest concerns in the best way. The objectives of the competition law should be clearly reflected in the law. Further, there are different approaches to abuse of dominance in developed countries, such as the EU and US, arising from different assumptions as to which types of conduct are harmful and how difficult it is to distinguish harmful types of conduct from others. Regardless of the type of approach to abuse of dominance, the assumptions made and the economic factors dominant in a country should be analysed and grounded on economic reality.

IPR protection may endow companies with significant market power. While IPR policies increase incentives to innovate in an economy, they may cause efficiency losses due to abuse of market power by companies protected by IPR regime. This problem is more pertinent in developing countries considering the fact that innovating companies are usually situated in developed countries. Developing countries need to strike the right balance between competition and IPR policies, particularly patent policies, depending on their productive, imitative and innovative capacities as well as their openness to attract foreign direct investment from developed countries.

In an economic system based on free competition, monopoly rights are generally a bad thing. The term “Competition” refers to a situation in a market place in which firms/ entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share etc. The competition is also seen as an ordering force which ensures efficiency of economic

processes, since resources are steered to the most productive supplier. So we find plethora of antitrust legislations in most of the developed world. But it must be acknowledged that without monopoly incentives a nation's stock of intellectual property may suffer. What is therefore required is a balance between these opposing forces—the need for a free economy balanced against the need to stimulate innovation.

IPRs are, by definition, exclusive marketing rights (monopolies) which States grant for a limited or extendable period of time. Motives vary, but the tool essentially serves the purpose of stimulating innovation and investment by securing the potential of appropriate returns on the investment of time, financial and human resources. Exclusive rights, by definition, amount to a limitation of competition. They are therefore seen at variance with principles of market access and level playing fields sought by competition rules, in particular the restrictions on horizontal and vertical restraints, or on the abuse of dominant positions.The interface between IPRs and competition law has evolved several types of restraints on competition. While no one has sought to contend that licensing agreements are per se anticompetitive, the focus of these restraints is typically a licensing agreement which could adversely affect competition by artificially dividing markets among enterprises and possibly impeding the development of new goods and services.

More specifically, the phenomenon of exclusive licensing, manifested through several unilateral market tactics by enterprises such as tie-in arrangements, exclusive dealing, licensing restrictions (covering grant back clauses, extensions of IPR terms and field of use restrictions) as well horizontal agreements (like pooling and cross-licensing by parties collectively possessing market power), have attracted the attention of competition regulation authorities across the world.

II. Rationale behind the regulation of ACTPs

Anticompetitive practices lead to undesirable price controls and diminished individual initiatives towards quality enhancement. This may result in markets to stagnate. This in turn may hamper economic growth.

Importance of free and fair competition

Market economy can function[2] properly only if there is free and fair competition. In a competitive market all the competitors will try to gain consumer confidence and increase its market share by continuously trying to improve the quality of the goods, look to reduce prices and find more efficient means of production. Competition is believed to

[2]Cottier, Thomas and Meitinger, Ingo, The TRIPs Agreement Without a Competition Agreement?. Fondazione Eni Enrico Mattei Working Paper No. 65-99. Available at SSRN: http://ssrn.com/abstract=200622 or http://dx.doi.org/10.2139/ssrn.200622

yield consumer surplus. The difference between the price that consumers are willing topay for a good and the market price that they actually pay for a good is called as the consumer surplus**.** The determination of consumer surplus is illustrated in the following figure. A WTO report observes: "There are reasons to believe that developing economies tend to be more vulnerable to anti-competitive practices than developed countries. The reasons include: high 'natural' entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; asymmetries of information in both product and credit markets; and a greater proportion of local (non-tradeable) markets. Thus it may be particularly important to protect, consumers in developing countries against cartels, monopoly abuses, and the creation of new monopolies through mergers. Bid rigging in public procurement markets (i.e. collusive tendering) is also pervasive in many developing economies, and merits vigorous enforcement initiatives".

In this figure the consumer is ready and willing to pay price 9 for 1 unit of good but he actually pays 5.

Generally the consumers possess poor information regarding product, its current market price, the price range or the quality of the suppliers, and comparable products or services. Over a period of time, traders acquire the power to manipulate the market. They intend to retain the fixed percentage of profits, and this is possible only by restraining or eliminating competition. The means to achieve that objective are infinite and that is why any legislative definition of anti-competitive practice or conduct is general, inclusive and also states that the practices prescribed as anti-competitive are not exhaustive.

Competition and Consumer welfare

Competition in market enhances consumer welfare and creates an effective allocation of resources. As stated in the foregoing that most business enterprises attempt to enhance market power and monopolize the market, as such competition does not arise automatically in all markets. Governments and statutory regulators are well placed to take steps to rectify adverse effect of monopolization of markets by few. A balanced amount of regulation does not mean that the benefits of free competition in the market are entirely eroded. Individuals and other businesses that may be adversely and unfairly affected by anti-competitive activities in a market can more effectively seek redress if clear regulatory regime is in place. One more valid argument for the prohibition of anti-competitive agreement is that it will prevent international cartels from indulging in anti-competitive practices in our country. Hence keeping in view the interest of the consumers and to promote a healthy competition in the market the anticompetitive agreements are required to be prohibited. These prohibitions acts as a check on enterprises or persons who may indulge in anti-competitive agreements or have tendency to manipulate the market, and therefore, prohibits them from entering into agreements, which may have the potential of restricting competition in the market.

III. Regulation of ACTPs under TRIPS

It is true that the TRIPS envisage protection of IPRs across the nations on some well defined uniform norms. But the protection of IPRs has no end in itself. It has end to achieve viz., technological and economic development.

Integration of National Economies with World Economy

While consumers were envisaged as the ultimate beneficiaries of the liberalized markets this premise holds only when consumers are responsive to price and output and thus able to seek the best price-quality combination on offers. If demand is inelastic and switching costs are high or unfair trade or abusive practices prevent them acting in their best interest they will not be able to enjoy the advantages of a competitive market.

As national economies integrate into the world[3] economy through liberalization, barriers to trade are normally eliminated. In such an open international economy, no country can escape the effects of anticompetitive practices originating outside their national borders, such as international cartels or mergers and acquisitions, which may restrict competition. Further small and medium-sized firms in developing economies are facing practical problems. These include business networks providing support for the 'insiders' and making it more difficult for 'outsiders' to enter particular activities or markets. Such practices restrict the development of entrepreneurial capabilities due to lack of competition. For these reasons, it is becoming particularly important to tackle these problems both at regional and national levels. This can be achieved by including competition provisions in regional trade agreements, especially between developing countries.

The very essence of IP rights entails a trade-off. On the one hand, IP rights provide economic incentives to innovate, but on the other, the exclusive rights that they confer to achieve is likely to result in monopoly prices and associated welfare losses and prevent access by other innovators. In the short run, this information is largely privatised. In the long run, information protected by IP rights falls into the public domain and enables follow-on innovation. So there is a trade-off between incentives on one side and costs to consumers and limited access for follow-on innovators on the other. It is therefore crucial to have the right balance in the system.

Treatment of Anticompetitive Trade Practices under TRIPS

TRIPS contain the following provisions regarding anti-competitive practices in contractual licenses:

a) The rights of members to act against abuse of IPRs are acknowledged, provided such actions are consistent with the agreement.

b) Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

[3]Cseres K.J., What Has Competition Done for Consumers in Liberalised Markets? (2008) Vol.4, Issue 2, *The Competition Law Review,* pp.77-121

c) Nothing in this Agreement shall prevent Members from specifying in their domestic legislation licensing practices or conditions that may in particular cases what constitute an abuse of intellectual property rights having an adverse effect on Competition inthe relevant market. As provided above, a Member mayadopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

1. The agreement also provides for compulsory licenses under a scheme. This agreement provides grounds for compulsory licensing as a remedy correcting anti-competitive practices in general and IPR-related anti-competitive practices in particular.
2. There are also procedural rules concerning consultation and cooperation between a WTO Member enforcing its measures regarding licensing-related competition control and another Member whose national or domiciliary is alleged, under[4] the former's competition law, to engage in licensing-related anti-competitive practices.
3. TRIPS establish minimum standards for intellectual property protection and the competition provisions are (as a concession) an exception. If minimum IPR standards are ensured, no affirmative obligation exists to introduce competition rules to promote trade or dissemination of technology. A complaining Member must prove that a private firms' anti-competitive conduct is the effect of an action,i.e. direct[5] involvement, rather than a non-action by another Member. It is left to Members' domestic law to determine which practices are forbidden as anti-competitive. When a country introduces competition rules Articles 8.2 and 40.2 require that the measures must be "consistent" with TRIPS (consistency requirement), and "appropriate" (appropriateness requirement).

The above list makes it clear that international trade legislation and especially TRIPS contain the elements of a competition law system. Developing countries have

[4]Articles 40.1 and 40.2 of TRIPS Agreement

[5]Article 31 of TRIPS Agreement deals with compulsory licensing in case of patents, although it is phrased as 'other use without authorization of the right holder'.

been encouraged to apply these rules to counter balance the strong IPR protection system mandated by TRIPS. The road ahead is bumpy as international competition rules lack precision and require some form of guiding interpretation. Some advantage lies in the fact that the present flexibilities create substantial discretion for any implementing country. The likelihood that the WTO dispute mechanism will preclude a country from taking action against anti-competitive practices affecting technology transfer themselves thus far appears remote. Still, discretion has its limits. Developing countries may lack experience or be subject to pressure that may prevent balanced and consistent handling of the available competition law opportunities. The risk of both over- and under-enforcement should not be overlooked. Either may prove harmful to developing countries.

The TRIPS Agreement contains limited set of illustrative anticompetitive licensing practices.[14] From the point of view of developing countries there is need to expand this list as they are likely face such trade practices from MNCs operating from developed countries.

CONCLUSION

The following conclusions are reached after a thorough discussion of the research topic in the foregoing chapters. However, the conclusions drawn are not absolute as the study involves doctrinal verification of the research questions. The conclusions drawn in this chapter are based on theoretical discourses. It is further submitted that all conclusions drawn are based on facts available at the time of completion of this thesis.

First chapter of this research work contains an analysis of the process of globalization and its features like the IP regime. The creation and adoption of knowledge is essential for commercial success. Knowledge economy is one in which production and utilization of knowledge play a crucial role in creating wealth. Knowledge becomes thecore of economic development in knowledge societies. Economic activities in knowledge societies are triggered by information, which form the basic input for producing wealth. Higher growth rates of service sector in relation to manufacturing and agriculture characterize the present knowledge economy. Services generated in knowledge economy are increasingly integrated to all productive activities in knowledge economies.

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