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COMPETITION LAW AND ECONOMICS: COMPETITION LAW (INDIAN & EU) AND THE APPLICATION OF PRICE THEORY

By Chinmai Kapri
From Bennett University

ABSTRACT

The author through this paper seeks to discuss the importance of economics while understanding the competition laws. The paper shows that the competition laws in different places are similar to each other because the objectives of such laws are same and to understand the economic reasons behind the same the author has discussed the different economic concepts and tools that have been used and considered by the legislature to bring into force competition laws. This paper seeks to discuss the economics behind the law of the markets, i.e., Competition law (Indian and EU laws), the paper discusses the economic analysis behind the prohibition of anti-competitive agreements and the abuse of dominance, how it affects the market, the economic efficiency and equilibrium in the market while considering the Price Theory to understand the behavior of the market forces, i.e., demand and supply which are further based on the consumer and producer behavior (based on their surpluses). This paper is divided into two parts, the first one gives a brief introduction regarding the topic and the motivation behind selected topic while the second portion deals with the literature review and discussion which would establish that the price theory can be applied in Competition Laws thereby further ensuring the maintenance of equilibrium in the market.

INTRODUCTION

Economics can be defined as, *"an inquiry into the nature and causes of the wealth of nations" (Robert L. Heilbroner)* which can be understood by the invisible hand theory that advocates a free market economy whereby the forces of demand and supply operate freely and lead to an equilibrium. *(Christina Majaski, 2020)*. It is important that the basic concepts of economics and various economic tools are understood for gaining a better understanding of the Competition Law. The competition is the only law that is directly related and affects the market as it is a branch of economics. When we look at the Competition law, we see that all the provisions be it section 3, 4, 5 or 6, despite the fact that they deal with different areas being anti-competitive agreements, abuse of dominance, Combinations and Regulation of combinations respectively, we see that these are the areas that directly affect the markets and the forces that regulate the market (demand and supply). The role of competition law is to assess the actions that either create or have the potential to create an appreciable adverse effect on competition in the market. Economics as a subject is important to understand how the economy as a whole functions and competition law acts as a tool to explain the same. This was the author's motivation while selecting the said topic. The author considers competition law to be an economic tool itself that proves the theory of consumer being the king of the market and the economic theory of how the market forces themselves lead to efficiency in the market, leading to an efficient allocation of the resources. Markets play a pivotal role in the study of Economics because it is an area that is devoted towards understanding the demand and supply or the consumer and the producer behavior. It can be said that economics helps one study the behavior of the consumers and producers through price and game theories. The same is the case with law because, like economics, law also governs the behavior of the individuals, by understanding their reactions to incentives and disincentives. In this paper, the author has dealt with the price theory to understand the behavior of the consumers and the producers along with the various provisions of the Competition law which prevent any distortion in the market through prohibiting various activities that might have an appreciable adverse effect on competition. Additionally, it is imperative that a lawyer is well versed with the markets, the economic issues as well as the behaviors to the consumers for understanding the applicability of the law in a better manner.

LITERATURE REVIEW & DISCUSSION:

Indian & EU Competition Laws: Tools of Government to Internalize the Externality

The Competition Act, 2002 is the act that was passed by the Parliament for ensuring that the nature of competitiveness in the market is not altered due to certain business malpractices like predatory pricing, cartelization, abusing dominance, etc. When we look at the objective of the Competition Act, we see that it strives to establish a Commission, namely the Competition Commission of India (hereinafter referred to as the CCI) in order to sustain as well as promote competition in the market; to protect the interests of the consumers and to ensure that all the participants in the market have the freedom to trade. When we talk about the Competition Law it is important to understand that it is fundamentally drafted keeping in mind the 'doctrine of effects' which provides extraterritorial powers to the CCI to take cognizance of any international matter, if it has an appreciable adverse effect in the domestic markets or even has the potential to do so. The said law provides the power to the CCI to take cognizance of any matter that is in the nature of abuse of dominant position or any anti-competitive agreement provided that such an abuse or the agreement have an appreciable adverse effect on the Competition in the market. ***(Samir Gandhi, Hemangini Dadwal & Indrajeet Sircar).***

The provisions under the Competition law that are important from the point of view of price theory include:

- Section 3 of the Competition Act that deals with the prohibition of any anti-competitive agreements.
- Section 4 of the Competition Act that deals with the prohibition of abuse of dominance.

Similarly, when we talk about the competition law in the EU, the authority that has been bestowed with the power to implement the competition law is the European Commission (hereinafter referred to as the EC). Additionally, the EU Competition Law is derived from the provisions of the Treaty of the Functioning of the European Union (hereinafter referred to as TFEU). The most important provisions of the TFEU that deal with the protection of competition in the markets include:

- Article 101 TFEU which deals with the controlling of collusion or cartelization and other anti-competitive practices.
- Article 102 of the TFEU which deals with the dominance of a firm in the market or abuse of dominance in the market.

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If we look at the provisions of the Competition Act and the provisions of the TFEU, we see that both deal with prohibition of abuse of dominance and anti-competitive practices. This is because it is important to keep a check on the activities of the companies to ensure that they let the market forces work on their own accord for the markets to remain efficient. This intervention of the government by passing a legislation that protects the forces of the market helps in internalizing the externality thereby ensuring that an equilibrium is maintained in the market. *(Payel Chatterjee & Shashank Gautam).*

Competition Act, 2002

Anti- Competitive Agreements: The two major types of agreements that the Competition Act regulates includes the following:

- Vertical Agreements (these are between the different levels of the chains of production)
- Horizontal Agreements (these are usually between the competitors)

It is the horizontal agreement that is presumed to have an appreciable adverse effect on competition because it is directly eliminating the competition in the market, thereby disrupting the market forces. Such parties are to provide evidence regarding the fact that their collaboration shall not affect the market by eliminating competition. While dealing with the vertical agreements, the doctrine of Rule of Reason is required to be followed as there is no such presumption regarding the said agreements. (Alan J. Meese, 2003)

Horizontal Agreements (Cartels): There are different types of horizontal agreements, and these are termed as 'cartels' which is specifically prohibited under section 3(3) of the Competition Act. It is imperative to understand as to what cartels are, for understanding the different types of cartel agreements. A cartel can be defined as:

"An association of producers, sellers, distributors, traders or service 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." (Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), Section 2(c)).

Cartels can be of any of the following forms namely:

1. Price fixing agreements, which are the ones created between the competitors with one another and have the effect of affecting the prices (be it sale or purchase) in the market either directly or indirectly.
2. Agreements in restraint of controlling the supply and production in the market.
3. Market sharing agreements, which includes allocation of a geographic location, product allocation, etc.
4. Agreements that have an effect of eliminating or manipulating the competition in the market for bids, also called Bid rigging agreements. The companies decide in advance as to which company would win the bidding. *(Will Kenton, 2021).*

Vertical Agreements: Under the vertical agreements, there is no presumption

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pertaining to the fact that such an agreement will have an appreciable adverse effect on competition. We must look at the test of Rule of Reason for determining the same. Vertical agreements include the following:

1. Agreement for exclusive distribution wherein the place of distribution is pre-determined.
2. Agreement for exclusive supply wherein the seller restricts the purchaser from acquiring the goods of any other seller.
3. Tie in agreement wherein the seller forces customers to buy another product along with the product that the purchaser wishes to buy.
4. Refusal to deal wherein a certain class of people are restricted from selling or purchasing the products in question.
5. Resale Price Maintenance wherein the purchaser (who purchases the product for resale) is mandated to sell the product at a specified price, i.e., a minimum resale value that is specified by the seller.

Abuse of Dominance: A dominant position is a position of strength that is enjoyed by any enterprise in the market. Now, the Competition Act does not prohibit dominance of any company, rather, it prohibits the abuse of such dominance by any enterprise in the market. The competition act defines dominant position as:

"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*
- *to affect its competitors or consumers or the relevant market in its favour." (Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), Section 4(2), Explanation (a)).*

The Competition Act specifies certain factors that help the CCI to understand whether any company has abused its dominant position or not and these factors are based on the market structure, market share, exiting competitors, etc. Under the Competition Act, even predatory pricing is considered as an abuse of dominance and is prohibited correctly as it has a negative impact on the equilibrium price. (**Samir Gandhi, Hemangini Dadwal & Indrajeet Sircar**). Section 4(2) also defines predatory pricing as follows:

"The sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors." (Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), Section 4(2), Explanation).

European Competition Law (TFEU)

Anti-Competitive agreements: A ban has been imposed on any sort of anti-competitive agreements as specified under Article 101 of the TFEU because in case the companies agreed to reduce competition by forming cartels instead to competing in the market it would lead to a distortion in the market thereby ultimately affecting the consumers as well as other competing businesses negatively. The anti-competitive agreements can be cartels, concerted practices with the object of price fixing/ limiting production output, or dividing the market among companies, etc., and these are banned without any exceptions. There are certain exceptions provided that such agreements help in contributing with increasing production or distribution of goods, promoting technical and economic progress, etc. Thus, the agreements between two or more undertakings, having an effect of distorting the competition or which could affect the trade between Member States are prohibited and are thereby rendered void on the face of it. Unlike the Indian Law, under the EU law, there are certain agreements are not regarded as infringements if they are of minor importance and have little impact on the market, i.e., *de minimis principle* irrespective of the fact that they do not fulfil the exemption conditions as provided under Article 101(3) of the TFEU.

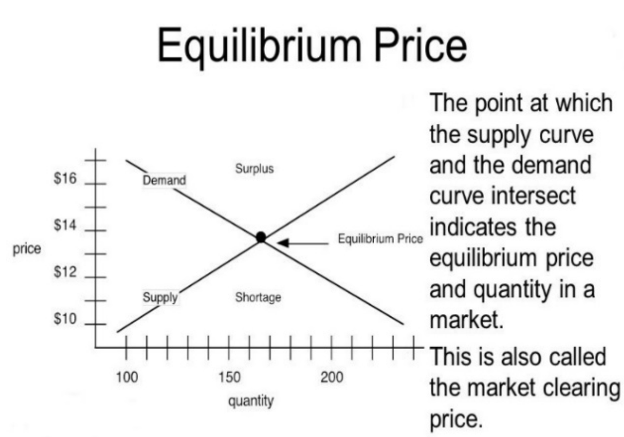
Abuse of Dominance: When a company holding a position of strength, i.e., dominance a specific market abuses the same by either charging exorbitantly high prices or very low prices, in a manner that causes harm both to the competition in the market and the consumers, then such a behaviour is prohibited under EU competition law, the same has also been provided under Article 102 of the TFEU. The definition of the term dominant position under the EU competition law is the same as under the Indian law. It is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." *(United Brands Company and United Brands Continental B.V. v. Commission of the European Communities, Case 27/76, ECLI:EU:C:1978:22).* While dealing with the fact as to whether the company is abusing its dominant position or not is considered taking into account the market value which is further considered based on the product nature, availability to the consumers, etc.

Economic Analysis

Price Theory:

In order to understand the relation between Price Theory and the competition laws it is imperative to understand as to what exactly price theory is. Price theory is an economic tool which states that the price of a commodity is determined based on the interplay of the forces of demand and supply in the market (which is directly related to the behavior of the consumer and the producer). *(Caroline Banton, 2020).*

Figure 1: Equilibrium Price



Source: Equilibrium Price, https://indiafreenotes.com/equilibrium-price/.

The point where the demand and the supply curve intersect is called the Equilibrium price and the quantity at that point shall be the quantity demanded and the quantity supplied as shown in the figure. The price theory also allows any adjustments that might occur on account of any change in the market conditions for instance availability of raw materials, the change in consumer preferences, affordability, change in the value of the product, etc. The objective of price theory is to ensure that an equilibrium point is reached by the demand and supply forces. *(Caroline Banton, 2020).* An equilibrium point is a point wherein all the goods produced by the supplier can be optimally consumed by the buyers at the given time and at a given price, meaning thereby that equilibrium shall be where:

E: QD = QS

Where,

QD is the Quantity Demanded

QS is the Quantity Supplied

E is the point of Equilibrium

To understand the equilibrium price let's take an example,

For instance:

PRICE (Rs.)	**QUANTITY DEMANDED (QD in Kg)**	**QUANTITY SUPPLIED (QS in Kg)**	**SURPLUS (QS-QD)**	**SHORTAGE (QS-QD)**
1000	**5**	**55**	**50**	**-**
990	**10**	**50**	**40**	**-**
980	**15**	**45**	**30**	**-**
970	**20**	**40**	**20**	**-**
960	**25**	**35**	**10**	
950	**30**	**30**	**0**	**0**
940	**35**	**25**	**-**	**10**
930	**40**	**20**	**-**	**20**
920	**45**	**15**	**-**	**30**
910	**50**	**10**	**-**	**40**
900	**55**	**5**	**-**	**50**

Now, considering the afore-mentioned table, we see that the quantity demanded will be equal to the quantity supplied when the price is Rs. 950 (the highlighted part in yellow). The price Rs. 950 is called the equilibrium price because it is at this price that there will be no surplus or shortage in the economy, unlike when the price is Rs. 960 or Rs. 940, as the quantity demanded is equal to the quantity supplied, i.e., both the consumers and the producers are in an equilibrium and there is an allocative efficiency due to the said equilibrium price. If we consider a price lower than Rs. 950, i.e., Rs. 940, we see that the quantity demanded is more than the quantity supplied due to the inverse relation between the price and demand thereby leading to a shortage of the product. On the other hand, if we look at a price that is higher than the equilibrium price, say Rs. 960 we see that the quantity supplied is more than the quantity demanded due to the direct relation between price and supply thereby leading to a surplus in the economy. Now, the said equilibrium price can change in case of any technology advancements, which would lead to an increase in supply due to the reduced production costs, similarly if there is an increase in the production costs, then the supply would decrease leading to a change in the equilibrium price.

Therefore, this is how the price theory works and ensures that an equilibrium is maintained in the market. Now, in an economy that is constantly developing and industrializing, it is important to keep a check on the companies that have the potential to exploit the equilibrium. This is due to one of the most important principles of business, i.e., the objective of making profits in the market.

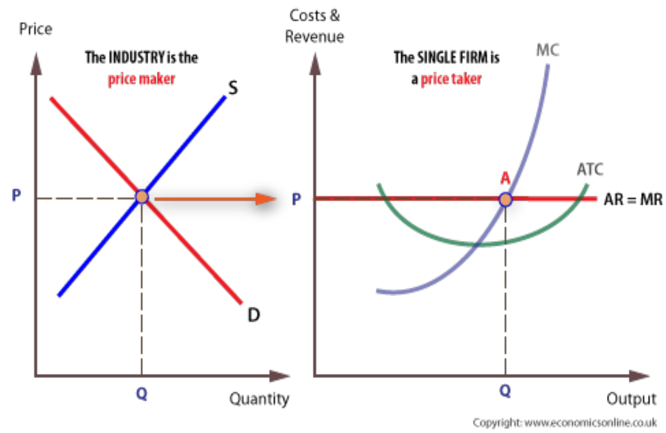
Markets:

The markets can be either monopolistic, oligopolistic, or perfectly competitive in nature. To understand what the different types of markets are, it is imperative that we understand what a 'market' is. A market is not a specific place, rather it refers to any commodity or a service that the buyers and sellers purchase or sale and who are in direct competition with one another, i.e., there is an economic transaction that takes place. *(Jon Violet Robinson).*

Now a perfectly competitive market is one of the forms of market wherein the forces of demand and supply operate freely without any intervention of the government or any other external influence. The distinct features of a purely competitive market are as follows:

- There are a large number of buyers and sellers
- The products sold in the market are homogenous in nature (E.g., the electronic gadgets industry)
- The firms can freely enter and exit the market, which is one of the reasons as to why no firm can gain abnormal profits or incur abnormal losses. *(Dr. Johannes Paha, 2014).* This means that no firm is in a position to gain monopoly in the market.
- The firm is a price taker, and the industry is the price maker, meaning thereby that it is the market that decides the price of the product and not the companies, i.e., the price theory is in action.

Figure 2: Price Determination in a Perfectly Competitive Market



Source: Perfect Competition, https://www.economicsonline.co.uk/Business_economics/Perfect_competition.html.

It is important that in a perfectly competitive market the nature of competitiveness is maintained, but due to certain malpractices the forces of demand and supply are unable to reach an equilibrium which is the reason as to why the government intervenes and once it intervenes in the market, the demand and supply forces, despite the fact that they reach an equilibrium, they create a dead weight loss, but it helps in internalizing the externality. *(Dr. Johannes Paha, 2014).* The manner in which this externality is internalized is passing laws that ensure that there is no *appreciable adverse effect on the competition* in the market. *(Dr. Johannes Paha, 2014).* Competition, can be defined as *"a form of rivalry that arises whenever two or more parties strive for something that all together cannot obtain." (Vickers, 1995).*

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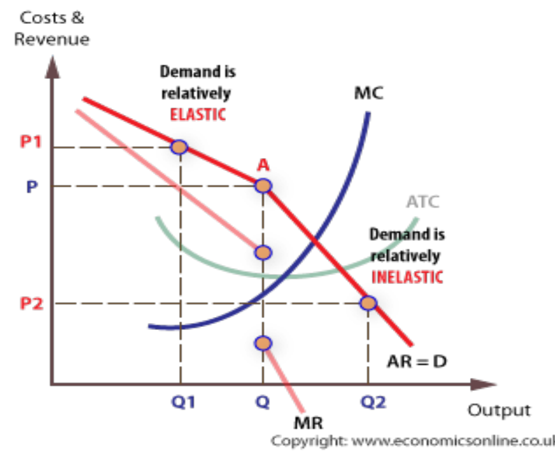
When we talk about two companies forming a cartel, it leads to creation of an Oligopoly market, which is not an efficient market structure. It is an extension of the Monopoly market structure and an example of same can be the Telecom sector or the Aviation sector. The features that make an Oligopoly market inefficient include the following:

- An oligopoly market has only a limited number of firms or a few firms. Few here means that the number of firms are manageable enough to make an idea regarding the reaction of the rival firm in the market.
- The firms, in the market are interdependent in taking the price and output decisions. Thus, the firms seldom wage a price war between each other, and this is one of the reasons why the cost of marketing and advertising for such firms is very high. If the firms increase the price, then they will have to leave the market as a new firm would take over and in case the firm decides to lower the price, the cost of production would increase leading to decreased revenue, which will again force the firm to exit the market.
- There are barriers to entry of new firms. Factors like patent, capital, control over the management of raw materials are some of the reasons for fewer firms in the market.

Figure 3: Price Determination in an Oligopoly Market



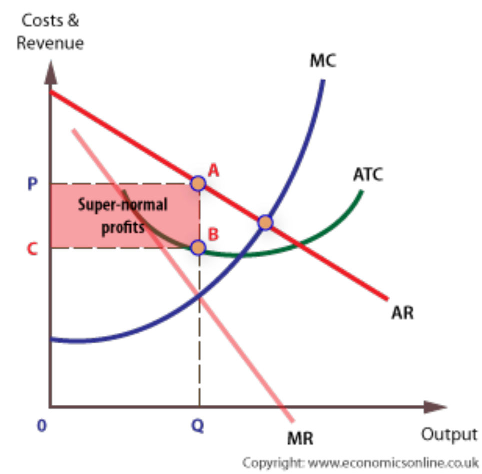
Source: Oligopoly, https://www.economicsonline.co.uk/Business_economics/Oligopoly.html.

As shown in the figure, the firms in an oligopoly market resist any kind of change in price because even a slight change in the price of one firm leads the other company to lose its market share and this is the reason why the firms might form cartels (there cannot be any price war). In one of the cases namely the ***Siemens Led Electronic Equipment Cartel case*** wherein the European Commission had imposed a fine on 11 power equipment firms that formed a cartel and was led by Siemens. Here the firms had 'carved up' the market along the geographical lines via a quota system that disrupted the market. Cartels affect the customers negatively because it restricts the supply and raises the prices of the products in the market which leads to some buyers leaving the market and their paying a larger amount of money.

An abuse of dominance creates a Monopoly in the market, which, like the oligopoly, is not an efficient market structure. The features of the said market structure that make it inefficient are as follows:

- In a monopolistic market, the firm is a price maker rather than a price taker, meaning thereby that it directly affects the price theory. The seller would prefer to impose a price that would benefit him the most and thus the price that is determined by the market forces shall not be considered by the seller. This in turn leads to the demand curve being negatively sloped.
- There is a single seller and many buyers in the market.
- There are restrictions in the entry of any new firm and the reasons include legal barriers, natural barriers, and economic barriers.
- Since we are talking about the monopolistic competition, the distinctive feature of this is that there is no close substitute of the product offered by the monopolist firm.
- Another distinct feature is Price discrimination. A monopolist seller can charge different amounts for different units of products that are sold by him because of which he enjoys super normal profits, as shown in the figure, below.

Figure 4: Price Determination in a Monopoly Market



Source: *Monopoly,* https://www.economicsonline.co.uk/Business_economics/Monopoly.html.

In the ***2004 Microsoft Case,*** the CCI decided against Microsoft, holding that it had abused its dominant by its act of withholding critical interoperability information from its competitors, in PC operating systems. This means that the service providers of Microsoft's rival operating systems were unable to compete effectively with it in the market. The court, in the instant matter, considered the features of a monopoly market, especially barrier to entry, that would affect the other competitors from entering the market. The court also considered the effect such an abuse of dominance would have on the demand and supply (consumer and producer behaviour) in the market and how such a behaviour of Microsoft would lead to a market failure. *(Commission Decision of 24 May 2004, relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation).*

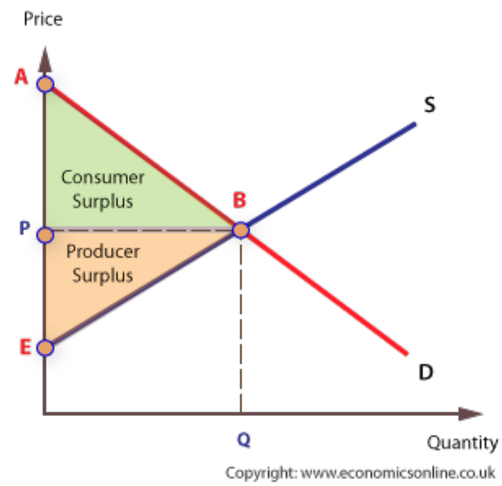
Similarly, the CCI had imposed a heavy penalty on around 14 car manufacturers for entering into an anti-competitive agreement of refusal to deal and exclusive distribution and supply relating to the spare parts supply, thereby holding that each of the manufacturers were dominant in the supply of spare parts in their respective brands. Similarly in another case, the CCI held that if an agreement cannot be strictly classified as a horizontal or vertical agreement but has the nature or potential to effect competition in the market, it shall be treated as an anti-competitive agreement and would be prohibited. *(Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors., 2010 Comp. LR 0061 (Supreme Court))*. We, therefore, see that 'the access to market' plays very important factor in determining whether the equilibrium would be disrupted or not, thus we consider the factors of different markets.

Market Efficiency- Consumer and Producer Surplus:

It is important to understand that both cartelization and abusing the dominance leads to a distortion in the equilibrium price. The equilibrium in the market is directly related to both the Consumer and Producer surplus *(Dr. Johannes Paha, 2014)* and when the exiting consumers in the market are required to pay a higher price or produce the good at a higher price (in case of producers) and some others have to leave the market it further leads to a reduction in the consumer as well as the producer surplus. The diagram below shows the Producer and the consumer surplus at the equilibrium price. Now, if the price is increased or decreased due to the firms forming a cartel or any dominant firm abusing its position, it will directly affect the equilibrium point thereby affecting the producer and consumer surplus ultimately affecting the economic surplus as a whole.

Economic Surplus (Total Surplus/ Market Welfare) = Producer Surplus + Consumer Surplus

Figure 5: Consumer and Producer Surplus

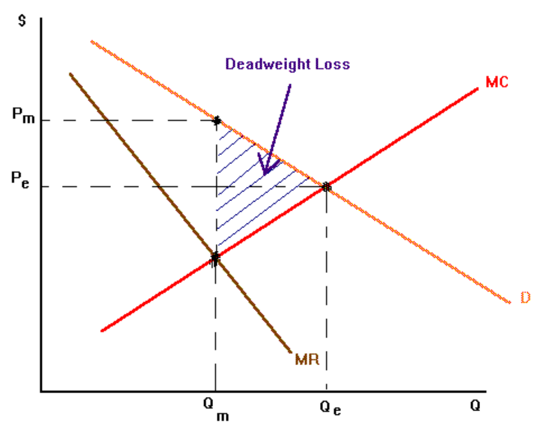


Source: Consumer and Producer Surplus, https://www.economicsonline.co.uk/Competitive_markets/Consumer_and_producer_surplus.html.

Efficiency is any improvement in the behavior of the producer or the consumer that leads to interest of public at large. The markets themselves lead to an efficiency in the market by allocating the products in an efficient manner, this is the reason why the market forces themselves lead to a price equilibrium, but this occurs only in competitive markets. This is termed as a situation that is Pareto Efficient, which occurs when it becomes impossible to determine any change in the allocation of capital, goods, labour, or services which would likely improve the well-being of one individual in the market without hurting any other individual in the market. *(Pepall et al., 2008)*.

When the markets are perfectly competitive in nature and are not manipulated by the profit-making objective of the sellers, the market surplus increases. In an Oligopoly and a Monopoly market such will not be the case as the market would fail to allocate resources as efficiently as in the perfectly competitive market. This is the reason the Parliament came up with the Competition Law, to ensure that irrespective of the fact that there are a few firms in the market or if there is any firm enjoying a dominant position in the market, they do not disrupt the market forces, because the market forces themselves are efficient.

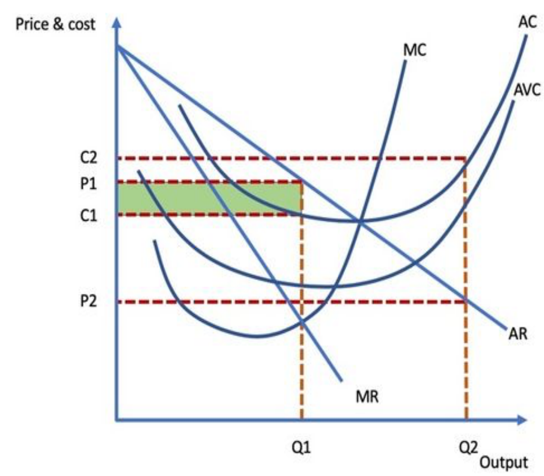
Figure 6: Dead weight Loss in the Society due to Monopoly in the Market



Source: Predatory Pricing, http://www.personal.psu.edu/~dxl31/econ2/Spring_2000/lecture25.html.

A monopolistic market prevents reaching an allocative efficiency thus the consumers would not be able to enjoy the products due to the exorbitant prices charged by the monopolist firm thereby preventing the market forces to create an equilibrium price which further leads to a reduction in the consumer surplus. *(Dr. Johannes Paha, 2014)*. Additionally, the high price imposed by the firm in a monopoly market acts as a tax imposed on the products which leads to a creation of a dead weight loss in the society.

Figure 7: Effect of Predatory Pricing in the Market



Source: Economics 2, Inefficiency of Monopoly, https://www.tutor2u.net/economics/reference/exam-answer-predatory-pricing.

If we talk about Predatory pricing as specified under Section 4(2) Explanation of the Competition Act, it will also have a negative impact on the economy because even if it does not affect the consumer surplus, it will affect the producer surplus, leading to creation of excessive demand which ultimately reduces the supply. For instance, this graph shows the effect of predatory pricing in the equilibrium price in the market. P2 in the above graph is the

Predatory price, now the dominant firm might suffer huge losses due to such pricing, but this forces the other firms to exit from the market, this leads to monopoly of the dominant firm and a distortion of the Equilibrium price in the market, which further leads to affecting the Consumer surplus. *(Bharti Airtel Limited v. Reliance Industries Limited & Anr., Case no. 3 of 2017).*

CONCLUSION

Thus, it is important to maintain competitiveness in the market and this is how Competition Law plays a pivotal role in helping with the same so that the market forces can operate freely. This is how the price theory can be applicable in the provisions of Competition Laws and how it has an impact on the market and the competition. The CCI and the EC act as watchdogs of the market and ensure that the provisions of the Competition law are complied with to ensure the maintenance of equilibrium in the market.

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