

## CONSUMER PROTECTION AND COMPETITION POLICY

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One cannot but note the spate of legislation that is coming into force or has come into force all over the world to protect the consumer. Recent years have seen a rapid increase in the volume of legislation. It is essentially designed to afford protection to consumers against fraud and dishonesty in commercial dealings and also against oppressive bargains and dangerous products. This can be called public interest consumerism. Increasingly, there is considerable interest and concern in “consumerism” relevant to the formulation of consumer policies.

Commercial litigation tends to be concerned primarily with dispute between business concerns or between service rendering concerns. There is a growing school of thought which holds that consumer protection law is at best only distantly related to commercial law and that it is legitimate and imperative as a separate exercise to focus on transactions between suppliers and the ultimate consumer. Consumer protection law has thus its own *raison de etre*.

Competition policy/law and consumer protection law have objectives at once overlapping and distinct. Consumer law protects the interests of consumers, individually and severally. Competition law, on the other hand, protects not only consumers but also protects competition in the market. While both have concern for consumers, competition law/policy has the larger objective of ensuring freedom of trade carried on by other participants (implying other than consumers) in the market. Put in another way, consumer law seeks to ensure fair play while competition law seeks fair and free play in the market.

### CONSUMER

Who is a consumer? One who purchases or hire-purchases goods for private use or consumption is a consumer. Equally, a consumer of services will also fall under the definition. Consumer can be regarded as a member of that broad of class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection and other trade practices for which consumer protection laws exist. A consumer needs to be distinguished from a manufacturer who produces goods and wholesaler and retailer who sells goods<sup>1</sup>. Over the years, the definition of a consumer has been broadened to include anyone who consumes goods or services at the end of the chain of production, thus catching the otherwise excluded plaintiff in *Donoghue vs. Stevenson*<sup>2</sup>. In that case, a person and his friend went to a café where the friend bought ginger beer in a bottle made of dark opaque glass. After the former consumed some of the ginger beer, the friend poured out the remainder of the bottle revealing a decomposed snail. The former suffered shock and gastroenteritis as a result of the impure ginger beer. The person who consumed the beer being not the purchaser could not sue the café proprietor in contract. Lord Atkin in his judgment observed as follows:-

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<sup>1</sup> Black's Law Dictionary - Sixth edition, West Publishing Company, St. Paul USA 1990.

<sup>2</sup> *Donoghue Vs Stevenson*, 1932, AC 562, HL

“A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take reasonable care.”

The above decision is an illustration of how the genre of consumers has become wide even when they are not direct purchasers.

A consumer is generally regarded as a king in the market. But in reality, he is merely a pawn in the hands of suppliers of goods and services. The doctrine of “caveat emptor” meaning “let the buyer beware” has given way to “caveat venditor” meaning “let the seller beware”. Mahatma Gandhi<sup>3</sup> the father of the Indian Nation described the consumer flamboyantly as follows:-

“A customer is the most important visitor in our premises. He is not dependent on us, we are dependent on him..... He is not an interruption in our work, he is the purpose of it. He is not an outsider to our business, he is part of it. We are not doing him a favour by serving him, he is doing us a favour by giving us an opportunity to do so.”

### **WHY PROTECT THE CONSUMER?**

For many centuries, the society has thought it appropriate to protect the consumer against fraudulent and dangerous trade practices. This reflects a more and even a religious ethic and is an appropriate function of the criminal law. Senator Murphy<sup>4</sup>, the Australian Attorney General introducing the Trade Practices Bill of the Commonwealth of Australia in the Senate justified the same in the following words:-

“In consumer transactions unfair trade practices are widespread. The existing law is still founded on the principle known as caveat emptor meaning ‘let the buyer beware’. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.”

A dimension in consumer protection relevant to the question as to why a consumer should be protected is the problem of claiming compensation against the large producer where the goods or services are defective. Litigation is disproportionately costly and troublesome to the small consumer. Consumer policy, therefore, particularly in the developed countries has encouraged producers to adopt codes of practice whereunder legitimate complaints are promptly dealt with on the one hand and has also encouraged small claims and arbitration procedures to solve actual disputes expeditiously, cheaply and relatively informally on the other<sup>5</sup>.

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<sup>3</sup> Mahatma Gandhi - Quoted in ‘Consumerism, A Growth Concept’ , Mohini Sethi and Premavathy Seetharaman, Phoenix Publishing House, New Delhi, 1994, p.3.

<sup>4</sup> Quoted in John Goldring - ‘Consumer Protection and the Trade Practices Act, 1974-5’, 6 Federal L Rev, p.288.

<sup>5</sup> Brain W. Harvey and Deborah L. Parry - ‘The Law of Consumer Protection and Fair Trading’ – Butterworths,

## **AGAINST WHAT IS THE CONSUMER PROTECTED?**

A consumer can generally be regarded as a prudent shopper. But in developing countries, the consumer is not necessarily prudent because of illiteracy and ignorance and the pernicious unleashing of advertisements and representations by the suppliers. The consumer is considered as imprudent if he or she buy goods and services which he/she does not need or cannot afford or if he/she buys too much in quantity or pays too much as a result of smart salesmanship. This can lead to increasing consumption, the price of which can be exorbitant as contrived consumer demands because of advertising and salesmanship lead to a switch of productive resources into areas not necessarily designed for economic development. The role of consumer protection laws must therefore be primarily designed to protect the consumer against misrepresentations and even non-representations and to protect prudent shoppers on the basis of making available to them all relevant information about quality, quantity, standard, performance, guarantee, warranty and price.

Scanning the literature on consumer policy will bring to surface a body of legislation, which can be generically consumer protection laws essentially designed to protect the private consumer from:-

- a) unsafe products
- b) qualitatively deficient goods and services
- c) quantitatively deficient goods and services
- d) fraudulent, misleading or undesirable trading practices
- e) insufficient information
- f) unfair, restrictive or monopolistic trade practices
- g) misrepresentation, non-representation and under-representation
- h) economic exploitation through lack of competition or excessive prices.

## **LITTLE PROGRESS IN CONSUMER PROTECTION**

Consumer interest and protection have not progressed adequately in most developing countries for a variety of reasons. The reasons, by and large, are:

- (i) Poverty - A good proportion of the population (consumers, who consume some product or the other), is poor and impecunious and is unable to exercise its rights as consumers. Such consumers are at the mercy of suppliers of goods and services.
- (ii) Mal-nutrition - Hungry consumers do not differentiate between adulterated and unadulterated food. They accept without protest whatever they are supplied with.
- (iii) Indifference of the well-to-do - The section of the society which is well endowed gets its needs satisfied with the power of money. It seldom gives thought to its social responsibilities and turns a Nelson's eye to unfair trade practices and malpractices in the market.

- (iv) Inadequate organisation of consumers - Consumer organisations have very limited participation of the general public and are generally concerned only with local problems. They hardly rise to tackle problems at the national level. This can be attributed to lack of organised consumer activism.
- (v) Poor implementation of laws - Consumer protection laws are seldom implemented effectively. While on the one hand, consumers themselves particularly in the rural areas are not aware of their rights because of illiteracy and ignorance, on the other hand, the suppliers of goods and services try to avoid indictment by the consumer courts by taking advantage of loopholes in the laws.

The last of the aforesaid reasons was aptly epitomized by Shri Jawaharlal Nehru<sup>6</sup>, late Prime Minister of India who observed:-

“Laws and Constitutions do not by themselves make a country great. It is the enthusiasm, energy and constant effort of the people that make it a great nation.”

### **UNFAIR TRADE PRACTICE (UTP)**

Consumer protection legislation generally deal with Unfair Trade Practices (UTPs). The High Powered Committee<sup>7</sup> set up under the Chairmanship of Mr. Justice Rajindar Sachar to review and suggest changes required to be made to the Indian Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) in the light of experience gained in the administration and operation of the Act observed that protection of consumers would be needed against false or misleading advertisements or other similar unfair trade practices resorted to by the trade and industry to mislead or dupe them. To quote the Committee: “Advertisement and sales promotion have become well established modes of modern business techniques. That advertisement and representation to the consumers should not become deceptive has always been one of the points of conflicts between business and consumer”. The Committee therefore recommended that a separate chapter should be added to the MRTP Act defining various unfair trade practices so that the consumer, the manufacturer, the supplier, the trader and other persons in the market could conveniently identify the prohibited practices. The 1984 amendments to the MRTP Act introduced UTPs as a separate Chapter therein.

Essentially unfair trade practices fall under the following categories:-

1. Misleading advertisement and false representation.
2. Bargain sale, bait and switch selling.
3. Offering of gifts or prizes with the intention of not providing them and conducting promotional contests.
4. Product safety standards.
5. Hoarding or destruction of goods.

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<sup>6</sup> Jawaharlal Nehru - quoted in ‘Consumerism, A Growing Concept’, *ibid*, Mahatma Gandhi, p.19 (footnote 3).

<sup>7</sup> Sachar Committee - ‘Report of the High-Powered Expert Committee on Companies and MRTP Acts’, Ministry of Law, Justice and Company Affairs, Government of India, New Delhi, August, 1978.

Making false or misleading representation of facts disparaging the goods, services or trade of another person is also a prohibited trade practice under most competition/consumer laws.

### **CONSUMER PROTECTION LEGISLATION**

The industrial revolution and the burgeoning development and growth in international trade and commerce have led to the vast expansion of business and trade, as a result of which a variety of consumer goods have appeared in the market to cater to the needs of the consumers like insurance, transport, electricity, housing, entertainment, finance and banking. A well organised sector of manufacturers and traders with better knowledge of markets has come into existence, thereby affecting the relationship between the traders and the consumers making the principle of consumer sovereignty almost inapplicable. The advertisements of goods and services in television, newspapers and magazines influence the demand for the same by the consumers though there may be manufacturing defects or shortcomings in the quality, quantity and the purity of the goods or there may be deficiency in the services rendered. In addition, the production of the same item by many firms has led the consumers, who have little time to make a selection, to reflect the pros and cons before they can purchase the best. For the welfare of the public, the glut of unadulterated and sub-standard articles in the market has to be checked. There are laws in many countries to protect the consumer against adulterated and sub-standard articles like Prevention of Food Adulteration legislation, Standards of Weights and Measures legislation, Sale of Goods legislation and so on. Yet, it is necessary to protect the consumers from exploitation in the market and to save them from adulterated and sub-standard goods and services and to safeguard the interests of consumers. Consumer Protection legislation is for the protection of interests of consumers and its sole concern is the welfare of the consuming public.

### **INDIAN CONSUMER PROTECTION LEGISLATION**

India has one of the well legislated statutes in the world for consumer protection. The Statute is christened 'The Consumer Protection Act, 1986' (CPA). It provides for the protection of interests of consumers and has provisions for the establishment of consumer councils and other authorities for the settlement of consumer disputes and matters connected therewith. The consumer councils essentially seek to promote and protect the rights of consumers such as:-

- a) the right to be protected against marketing of goods hazardous to life and property;
- b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumers against UTP;
- c) the right to be assured access to variety of goods at competitive prices;
- d) the right to be heard and to be assured that consumers' interests will receive due consideration at appropriate fora;
- e) the right to seek redressal against UTP or unscrupulous exploitation of consumers; and
- f) the right to consumer education.

Quasi-judicial machinery has been set up at the District, State and Central levels empowered to give relief to the consumers and to award compensation for the loss or injury suffered by them. For non-compliance of the order given by the quasi-judicial body, CPA provides for penalties. Thus, the CPA has two approaches, the first to provide consumer education and the other to provide for a simplified, inexpensive and speedy remedy for redressal of grievances of consumers.

Among the reliefs available, which the quasi-judicial bodies are empowered to direct the guilty party are:-

- a) to remove a defect in the goods in question;
- b) to replace the goods with new goods of similar description, free from any defect;
- c) to return to the complainant the price or charges paid by him/her; and
- d) to pay such amount as may be awarded as compensation for the loss or injury suffered by the consumer due to the negligence of the guilty party.

While consumer protection laws are a step in the right direction to protect legitimate aggrieved consumers, it is important to appreciate the fact that any law is only as good as it is administered. Experience informs us that while policy makers and even the Judicial Tribunals pontificate on the merits of consumer interest and laud consumer protection laws, there is a vast multitude of consumers who continue to be the victims of the market, having nothing in defense except a voice in the wilderness. It is not sufficient to just have statutes on consumer protection, but there should be a consumer-oriented spirit among the Judiciary, the Legislature and the Executive. Political will embodying concern for the consumer, bureaucracy's empathy for the consumer and the Judiciary's approach expressing primacy for consumer interest, can together synergise consumer protectionism.

### **COMPETITION POLICY AND CONSUMER INTEREST**

As noted earlier, competition policy is broader than consumer policy. The latter takes care of the interest of consumers but the former not only takes care of consumer interest but also attempts to ensure a market driven by competition. An interesting dimension could be discussed at this stage, given the premise that competition policy is designed by governments on 'public interest' and that consumer policy is designed on 'consumer interest'. The dimension relates to possible conflicts between public interest and consumer interest.

Most executive policies of the government are tethered to what is known as 'public interest'. All policies are not necessarily competition-compatible. Public interest requires some delineation, as it means many things to many people. In the name of public interest, many governmental policies are formulated which are either anti-competitive in nature or which manifest themselves in anti-competitive behaviour. In the name of the so called 'common man', the expression 'public interest' is invoked by the government. The said expression sometimes covers consumer interest and sometimes overrides it. What is 'public interest'? Public interest and consumer interest are not synonymous and need to be distinguished.

### **PUBLIC INTEREST**

Public interest is an elusive abstraction meaning general social welfare or regard for social good. In

other words, it predicates the interest of the general public in matters where regard for the social good is of the first moment<sup>8</sup>. In the words of Justice Felix Frankfurter of the United States Supreme Court, “the idea of public interest is a vague, impalpable but all controlling consideration” (quoted in Ramaiya, page 1660, footnote 8). It is thus distinguishable from the self interest or individual, sectional, class or group interest.

The term ‘public interest’ has been widely used in different contexts. Such use takes a positivistic or a normative viewpoint. Those who adopt the positivistic viewpoint recognise that the concept of ‘public interest’ is defined by different actors at some point of time and that the concept itself has been changing over time. But, they do not posit any consensual or convergent meaning or definition of the concept. On the other hand, those who adopt the normative viewpoint while agreeing that the concept of ‘public interest’ has changed overtime in particular catena of contexts, tether their approach to a specific position on what the concept of ‘public interest’ should mean<sup>9</sup>. And their approach has some measure of commonality.

Public interest is understood as ‘public good’, ‘public welfare’, ‘general interest’ and ‘interest of the community over individual good’ etc. The concept of ‘public interest’ being complex and not capable of a simple definition, those who use the expression assign their own values to it and in the process legitimize their own interests and action. The underlying emphasis in all such usages of the expression is the genre of commonality of interest which the citizens are presumed to share.

Banfield<sup>10</sup> describes the difference between sectional interest and public interest as follows: -

“A decision is said to serve special interests, if it furthers the ends of some part of the public at the expense of the ends of the larger public. It is said to be in the public interest, if it serves the ends of the whole public rather than those of some sector of the public”.

The concept of public interest is closely related to the universal consensus necessary for the operation of a democratic society. Raymond Marks<sup>11</sup> and others describe not a consensus of interests but a balancing of interests, when they say that the public interest is “policy resulting from the sum total of all interests in the community – possibly all of them actually private interests - which are balanced for the common good”.

After studying the telecommunications infrastructure, Horwitz<sup>12</sup> noted that ‘public interest’ would be served by the promotion of commerce and expansion of the market place through government initiatives in Telecommunication infrastructure but that this commerce-based concept would also fulfil social equity goals including the provision of service for all, including consumers who would

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<sup>8</sup> Ramaiya, A - ‘Guide to the Companies Act’ - Wadhwa and Company, Agra, India, 1992.

<sup>9</sup> Reena George - ‘Public Interest in Infrastructure Sector Regulation’, Discussion Paper at Workshop on 25 September, 2000 – [static.teriin.org/discussion/public](http://static.teriin.org/discussion/public).

<sup>10</sup> Banfield Edward, C and Martin Meyerson - ‘Politics, Planning and the Public Interest’ - The Free Press, New York, 1955, p.322.

<sup>11</sup> Marks Raymond, E. et al - ‘The Lawyer, the Public and Professional Responsibility’ – American Bar Association, Chicago 1972, p.51.

<sup>12</sup> Horwitz, R B – ‘The Irony of Regulatory Reform: The Deregulation of American Telecommunications’, Oxford University Press, New York, 1989.

not be able to afford the price. He viewed public interest as a balance of interest and described it as a “black box whose meaning or representation is the terrain of struggle”. He advised that public interest consideration requires an analysis of interacting economic, political, legal and technological forces. In other words, he forced a redefinition of public interest from “a concern with stability and a kind of social equity to a concern with market controls and economic efficiency (see also Reena George, footnote 9).

## **CONSUMER INTEREST AND PUBLIC INTEREST**

Often consumer interest and public interest are considered synonymous. But they are not and need to be distinguished. In the name of public interest, many governmental policies are formulated which are either anti-competitive in nature or which manifest themselves in anti-competitive behaviour. If the consumer is at the fulcrum, consumer interest and consumer welfare should have primacy in all governmental policy formulations. But then the question is whether in any circumstance, consumer interest may have to be relegated to a secondary position below public interest.

Consumer is a member of a broad class of people who purchase, use, maintain and dispose of products and services. Consumer interest is affected by pricing policies, financing practices, quality of goods and services and various trade practices. Consumers have to be distinguished from manufacturers who produce goods and wholesalers or retailers who sell goods.

Public interest on the other hand is something, in which the public or the community at large has some pecuniary interest or some interest by which their legal rights or liabilities are affected. The expression “public” thus pertains to and concerns a multitude of people. The expression “right” means a well-founded claim, an interest, concern, advantage or benefit. Public interest does not mean anything so narrow as mere curiosity or as the interests of a particular locality or of a small section of citizens or of a group of consumers.

## **EFFICIENCY AND EQUITY FACETS**

There are many facets to the concept of public interest rendering, as noted earlier, consensual definition difficult. However, many of the facets can be grouped under two principal headings namely efficiency and equity<sup>13</sup>. The former concerns the technical and allocative efficiencies, which are basically economic in nature. Such efficiencies relate to cost minimisation, profit maximisation, optimal use of resources etc. The latter, namely equity, on the other hand, is a multi-dimensional social objective and very simplistically speaking, it can be linked to free and fair competition in the market in the interest of consumers. But these two facets, efficiency and equity, are not necessarily mutually exclusive social goals. A crude theory can be that the efficiency facet can be fastened to public interest and consumer interest in that order and equity facet fastened to consumer interest and public interest in that order. The efficiency facet theory suggests that there is sub-serving of public interest in efficient use of resources and in obtaining economic or technical efficiencies and therefore sub-serving of consumer interest (because of cost reduction, quality improvement etc brought about

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<sup>13</sup> The discussion herein draws on ‘Competition Laws and Policies’, Study Material prepared by S.Chakravarthy for the Institute of Chartered Accountants of India, New Delhi, Nov. 2004.



by the efficiencies). The equity facet theory suggests that there is sub-serving of consumer interest in the equitable supply of goods and services (because of fair and free competition) and sub-serving of public interest (because of securing for the society multi-dimensional social objectives).

An important ethical delineation of public interest comes from the philosopher John Rawls<sup>14</sup>. According to him, while protecting sectional interest, it is imperative that the social and economic equities for the larger public are protected by competition policies and governmental legislative/executive policies. In other words, the mixture of sectional and general interests will have to be so balanced that a consensus emerges as to what constitutes public interest within the frame of reference of a particular society and culture.

There is a well justified apprehension that in the name of “public interest”, governmental policies may be fashioned and introduced which may not be in the ultimate interest of the consumers particularly in the long run.

In a paper<sup>15</sup> presented to the Expert Group, Swaminathan S. Aiyar, (a Member of the Group and a distinguished economist), made a pointed reference to the plethora of law and rules in India that explicitly protect favoured players, reduce competition and give discretion in decision making to politicians and bureaucrats in the name of public interest. He observed that “public interest is frequently and unabashedly invoked to protect one specific interest group (unionised labour, small scale industries, handloom weavers) with no explanation of how or why the interest of this group transcends all others”. He provided the illustration of restrictive policies which impede competition like reservation of industries for the public sector (Coal, Railways, Postal services, Insurance, Petroleum etc.), canalisation of exports and imports through the public sector (petroleum and some agricultural products), the jute packaging order (compelling fertilizer and cement producers to use jute rather than plastic sacks resulting in leakage of material), reservation of items for the small scale sector and reservation of items for the handloom sector in support of his contention that many Governmental policies are anti-competitive in character. He has also referred to the Industrial Disputes Act, which makes it impossible to retrench labour or close units without Government permission, even if the units are unviable and to the Urban Land Ceiling Act, which inhibits competition in using urban land. In the name of public interest, runs his further argument, protecting job leads to sacrifice of efficiency, raises potential costs and risks and discourages new investment. The possibility of abuse of the expression “public interest” by the government warrants the caveat that the competition law should have provisions to test the governmental measures on the touchstone of competition.

The foregoing discussion demonstrates that governmental legislative/executive policies including competition policy may generally cover the larger public interest in a country, while consumer policy may cover a smaller group of consumers in the country.

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<sup>14</sup> Rawls, John - ‘A Theory of Justice’ - Harvard University Press, Cambridge, 1971.

<sup>15</sup> See paper presented by Swaminathan. S. Aiyar to the Expert Group, Indian Institute of Foreign Trade, New Delhi, 1998 (the Expert Group was appointed by the Ministry of Commerce, Govt of India to study the interface between Competition and Trade policies).

## **INJURY TO DOMESTIC INDUSTRY**

An effective competition policy and competition law could bring in their wake easy and cheap imports thus making the consumers happy. But such a policy may have devastating consequences on the domestic industry. While, the need for a competition policy including competition law is generally welcomed by the developed and the developing countries, there are apprehensions whether the introduction of the competition policy and the competition law may visit the developing countries with consequences of an adverse nature like injury to the domestic industry, producers and suppliers. Having said this, it is desirable to keep in view that while competition policy is a desirable objective, it has to be laced with certain safeguards for a limited period to protect the domestic industry, till it is enabled to stand up to and face competition, particularly from overseas (imports). In other words, if competition policy were to be given an unbridled run, it may benefit the consumers and serve consumer interest, but it is quite possible that some of the MNCs may oust or extinguish the domestic industries because of the former's financial and marketing clout. The apprehension is that many domestic industries, which have invested their capital and labour and other resources, may not be able to stand up to competition with giants and conglomerates, which, with their size and economies of scale, will have an advantage in the competitive market. Public interest may get hurt and even prejudiced, if competition policy is allowed an unruly run. While it is apposite that consumer policy benefits consumers, oftentimes it conflicts with public interest. The Colombian case in the Box below illustrates the tight rope balance between public interest and consumer interest normally encountered by competition agencies and governments.

### **BALANCE BETWEEN PUBLIC INTEREST AND CONSUMER INTEREST**

**BOX**

Right to free competition was incorporated in the Constitution of Colombia when the government issued a decree no. 2.153 in 1992. The decree was designed to stimulate competition in the market, improve the efficiency of the economy and foster the interest of consumers.

The beer industry in Colombia is highly concentrated being in the hands of a few powerful enterprises controlling most of the production in the country. One of the enterprises was Bavaria, a large producer of beer. Leona, a large manufacturer of soft drinks constructed a beer plant and gave competition to Bavaria. Leona's beer operations did not proceed at the expected levels of profitability and therefore it offered its beer business for sale. Bavaria made a bid for the same and succeeded. Bavaria and Leona coming together meant concentration and dominant power in the market potentially detrimental to consumers. Both Bavaria and Leona requested for approval of the integration. The proposal to integrate was approved subject to several conditions. These conditions were intended to allow other competitors to enter the market at a prospective time.

In according the above approval for integration, the paramount consideration was that one of the beer manufacturers (Leona) would not survive without integration. Death of Leona would mean retrenchments and loss of capital already invested. Integration avoided this. This is a typical case<sup>16</sup> of balancing public interest (by allowing integration) and consumer interest.

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<sup>16</sup> Oliveira, Gesner – 'Colombia' in 'Competition Regimes in the World – A Civil Society Report', CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, 2006.

Domestic enterprises might have invested substantial capital, established factories and machinery and employed a large number of workers and managers, but all these could be undermined because of cheap imports brought about by competition policy. Certainly, consumers are entitled to cheaper products, better quality and choice. But public interest in the form of survival of domestic industries cannot be dumped. They do require some protection for a while till they adjust to overseas competition in the market. The process of competition driving the markets should be set in motion in the interest of consumers but it should be done over a period of time and not suddenly. It is desirable to give sufficient time to educate and persuade the businesses and consumers of the need for competition in the market, particularly international competition. Strengthening the enforcement of competition laws, after going through such process of public education, would help to successfully establish a competition regime<sup>17</sup>.

Brusick<sup>18</sup> suggests that discussions on competition “should take into account the need for specific treatment for developing countries.....”. Analysing the consequences that competition policies would have for developing countries, Scherer<sup>19</sup> has noted that they have been slower than their already advanced counter-parts to enact laws seeking to maintain ‘vigorous competition’ in their domestic markets. Purchasing power being low in such countries, markets for goods and services are “characteristically thin”. He adds that “to achieve low cost domestic production despite weak demand, a high degree of seller concentration, perhaps bordering on monopoly, may be necessary in industries subject to appreciable economies of scale. Even in highly industrialized nations, the fear that scale economies might be sacrificed has often kept strong anti-merger and monopoly divestiture provisions out of competition policy laws. .... On the other hand, if domestic producers are allowed to enjoy the fruits of a highly concentrated market structure by pursuing monopolistic pricing policies, resource allocation may be distorted, income distribution will be skewed and perhaps most importantly, entrepreneurs may opt for a ‘quiet life’ from which tight cost controls and vigorous innovation are absent”. He suggests that domestic industries should be subjected to competitive pressure as is consistent with the realisation of scale economies. He concludes that the special needs of developing countries need to be accommodated.

Gail Omvedt<sup>20</sup> does not agree that businesses should be protected from multinational competition but helped to become significant players on a global scale as such protection constitutes “dangerous forms of repression”.

Notwithstanding the varied opinions on the subject of competition policy/law versus protection to domestic producers and suppliers (because of possible injury to their interests), it cannot be gainsaid that competition policy/law in developing countries is a desirable objective and instrument for subserving consumer interest and consumer welfare. Sans a competition law, the erring market players would get away with anti-competitive practices they might perpetrate with adverse consequences for the consumers. Competition law is like a cop to curb, if not, eliminate such practices. If 130 countries have chosen to enact a competition law, it demonstrates the utility and need for a competition regime for countries without one. But there is a need to bring about this

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<sup>17</sup> See ‘Supplementary Note’ of S. Chakravarthy in the ‘Report of ‘The High Level Committee on Competition Policy and Law’ – Dept. of Company Affairs, Govt. of India, New Delhi, 2000.

<sup>18</sup> Brusick, Philippe – ‘Competition, Development and the Set’– Paper at World Bank Symposium, Geneva, Nov. 1997.

<sup>19</sup> Scherer F.M. – ‘International Competition Policy and Economic Development’ - Industrial Economics and International Management Series, ZEW, Mannheim, Germany, May, 1996 (a discussion paper).

<sup>20</sup> Gail Omvedt – ‘Swadeshi Socialism’ – Article in ‘The Hindu’ Chennai, India, 4 Feb., 1998.

competition regime gradually than in one stroke. In other words, till the domestic producers and suppliers get educated and exposed to competition and thereby address themselves towards enhanced efficiency, economies of scale and subserving of the consumer interest (in the broadest sense of the term), the competition policy/law should be gradually strengthened and implemented. For this purpose, a transition period during which the implementation of competition policy/law is steadily but in a step by step manner strengthened, in its application to the market may be a desirable approach. It cannot be therefore gainsaid that economic development is, to a significant extent, predicated on the strengthening and promotion of competition. This is true of not only developed countries but also of developing countries. But, in the process of strengthening and promotion of competition, there should be enough space for its flexible application to take into account the specific characteristics and needs of individual countries. For the developing countries, in particular, flexibility in applying competition law and policy may be necessary in order not to impede efficiency, growth and development goals and coherence needs to be ensured between competition policy and other policies aimed at promoting development. It is desirable that competition policy inheres the stem of economic development dimension but at the same time have some flexibility to take care of the needs of individual countries.

#### **COST OF CONSUMER LAW**

While there can be no two opinions on the need for a good quality consumer protection law, it is also imperative that it should not result in excessive costs to the society and even extravagance. Often, consumer activists and consumer organisations cry wolf and suggest amendments to the existing law, of extreme dimensions. The suggestions are extravagant not only in conception but also in terms of money cost to the society. The consumer is everybody all the time. The consumer is the tax payer and there is little merit in creating an elaborate system to assist him/her in one capacity when he/she would have to pay for it in the other. The Molony Committee<sup>21</sup> on Consumer Protection had the following to say:-

“In so far as any increased cost fell on industry, recoument from the consumer would be no less inevitable. Further, in considering bold suggestions for reshaping consumer protection arrangements, it was necessary, in our opinion, not merely to balance the money cost, but also the degree of interference with production and distribution methods, against the benefits to the consumer claimed by the proponents of reform. These factors have weighed with us in favouring more stringent level provisions in aid of the consumer rather than an extensive protective machinery operating administratively at considerable cost.”

Despite the difficulty in providing the suggested balance above, attempts have been made to construct models of how the cost component can be matched with consumer protection. In India, the MRTP Commission and the Consumer Courts (tribunals dealing with the Monopolies & Restrictive Trade Practices Act, 1969 and the Consumer Protection Act, 1986) are sustained and supported by the Government exchequer. The money to service these Tribunals is raised by taxes or borrowings. The “compliance” cost to industry and suppliers in respect of legislative regulation of their products and services is also considerable but is of course passed on to the consumers by way of higher prices. What is therefore required is a cost-benefit analysis to balance the competing interests, costs

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<sup>21</sup> Molony Committee on Consumer Protection, U K - Cmnd, 1781, para 16.

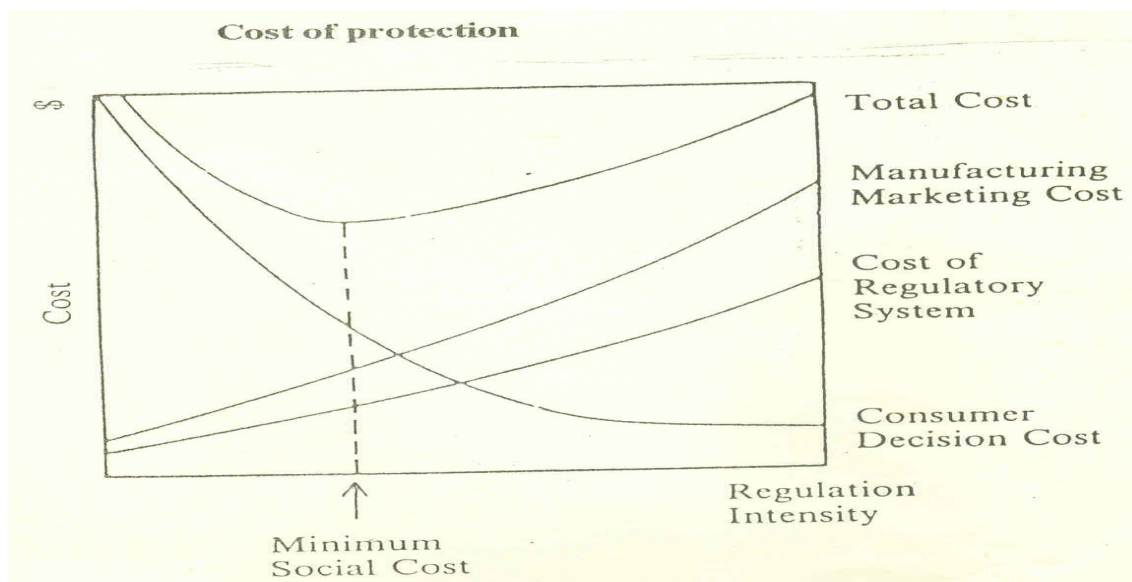
and benefits. A model constructed on a cost-benefit analysis should serve to measure the social cost to the community of the corrective action being contemplated.

Layton and Holmes<sup>22</sup> proceeded as follows:-

“Where legislation is concerned, more is not necessarily better. For, the total cost of corrective action is made up of at least three elements. First, there is the transactional cost that the customer incurs in terms of searching time, inconvenience and risk; a cost which is presumably reduced as the intensity of the regulation increases. But with the extension of legislation, a second cost becomes significant, that of enforcing and implementing the newly enacted orders. In turn, this spawns a third expense – that associated with the additional costs incurred by the business community in complying with all the relevant legal provisions. It would seem that in assessing any programme of consumer protection we must consider a total of all three of these action components and seek to establish that particular balance between exploitation and over protection that yields the minimum social cost to the community.”

(Note: ‘Searching time’, in the extract means the cost of ascertaining the quality of good or services and relevant information).

The following graph gives a visual presentation of the proposition of Layton and Holmes.



<sup>22</sup> Layton and Holmes - 'Consumerism – A Passing Malaise or A Continuing Expression of Social Concern?' 46, *Austr Quarterly* 6, at 23-4. See also E.P. Belababa - 'Unfair Trade Practices Legislation; Symbolism and Substance in Consumer Protection' – 15 *Osgoode Hall LJ* 327.

Merrilees and Cotman<sup>23</sup> proceeded on the basis that “the law of consumer protection is in substance the use of legal machinery to allocate consumer losses between the purchaser or user of goods and services and the vendor, manufacturer or others concerned with the production and distribution of goods and services.” They dealt with the economic impact of the various loss distribution models and concluded that the consumer is better served by a regulatory system that encourages rigorous quality control at the production stage rather than one which relies for its sanction on the consumer having the energy and funds to activate a breach of warranty claims in respect of defects which a less rigorous production system allows to occur<sup>24</sup>.

While a balanced consumer protection policy is the need of the hour, it is imperative that the society and the consumers are not burdened with costs required to sustain and support an elaborate rigorous level regulation. The industry, business and service renderers, who also form a part of the society, and who may also be consumers of some product, service or the other, have an equal responsibility to shoulder the burden of consumer interest and public interest. While consumer protection laws have a place and a role in the statutory regulations in a society, there should be voluntary codes of practice to be observed by the suppliers of goods and services. The regulatory agencies have to serve the society in both improving standards and streamlining complaint procedures. All these, in sum, while diminishing and optimizing the extent of regulation, will help consumer interest and public interest to inform the quality of life of the citizens. Every society has to undertake the cost-benefit exercise and formulate that consumer policy that subserves its interest.

#### **HYBRID LAWS AND AGENCIES**

Some advanced countries have models of separate competition law and consumer law. There are some advanced countries having one law to cover both (Australia is an example). For developing countries, who are entering the competition regime for the first time, it may be desirable to have one hybrid law to cover both competition and consumer welfare. It may be a tad too costly for them to have two separate laws to start with. Later, depending on experience gained, they could have two laws, one for competition and the other for consumer welfare. For those developing countries, which have had the benefit of having a competition regime for some time, they could have the luxury of two separate laws. There is no hard and fast rule for the model to be adopted. Each country needs to craft the model depending on the ground realities, like availability of experts and personnel, finances to meet the expenses, level of competition culture in the country and the ethics prevalent in the business community.

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<sup>23</sup> Merrilees and Cotman - ‘An Economic Analysis of Consumer Protection Law’ – Austr Quarterly March 1976. P.79.

<sup>24</sup> Jolowicz - ‘The Protection of the Consumer and Purchaser of Goods under English Law’ – 32 MLR1, 1969, P. 7