Intellectual Property Rights, And Competition Law
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Lecture - 08
Introduction to Competition Law

Dear students this week we are going to see the basics of Competition Law and its application, what is actually the competition law and also its components of competition law.

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Then we will see the Indian scenario and then the different aspects of competition law starting from anti competitive agreements, abuse of dominance position and regulation of combinations. We know that the competition law is a new branch of law, which is added to the entire realm of law mainly because of international trade.

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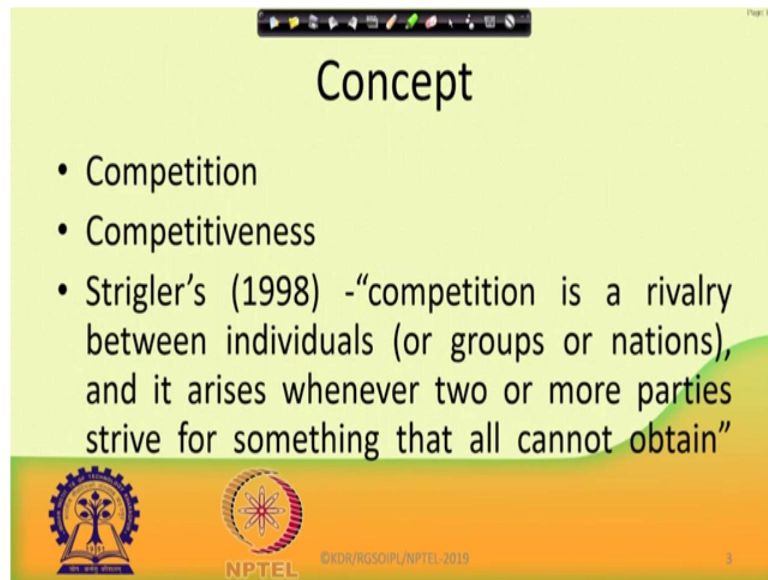

What is this concept of competition actually? There is a confusion between competition and competitiveness. Competition is defined by many scholars. Competitiveness is something different from competition. Strigler defines the competition as "it is a rivalry between individuals or groups or nations and it arises whenever two or more parties strive for something that all cannot obtain". It means that for limited resource if some competitors strive for capturing the market it is a competition.

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The competitiveness is something different. What is the object of competition? You can see that the objective of competition is very clear in the market to make profit. Each and every company in the market is working with an objective of making profits. Economist basically says that there are three components to be looked into for the objective of competition. The first one is the underlying variable of competition i.e. price, quality and quantity and secondly, the end level of achievement what competitiveness you want to achieve, then third the entire competitive process, which is facilitated by legislation and the competitive or competition policies.

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- Cartels recognized and prohibited in Eastern Roman Empire (Byzantium)
- Constitution of Zeno of 483AD punished price fixing in clothes , fishes, sea urchins etc with perpetual exile , usually to Britain, then a colony

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Again you can see that the history says that the competition law or competition in the market is not new at all. So, the first form of anti competitive practices you can find in the form of *cartels* in time immemorial period. And also in 483AD, the constitution of Zeno punished price fixing in clothes and the fishes, sea urchins etcetera with perpetual exile and usually to Britain at that point of time a colony.

It means that the competition law and this practice is not the invention of 20th or 21st century. So, regulating the competition in the market is a time immemorial law which has prevailed in many countries at certain point of time.

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See the authentic portion of the competition law is given by the famous economist *Adam Smith* in 1776 in his book *the Wealth of Nations*. He says "people of the same trade seldom meet together even for this merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices".

So, competition in the market is not prohibited. So, the competitors are not prohibited. So, the competition in the market is promoted, the process of competition is promoted, not the competitors So, Adam Smith very clearly says there must be competition in the market.

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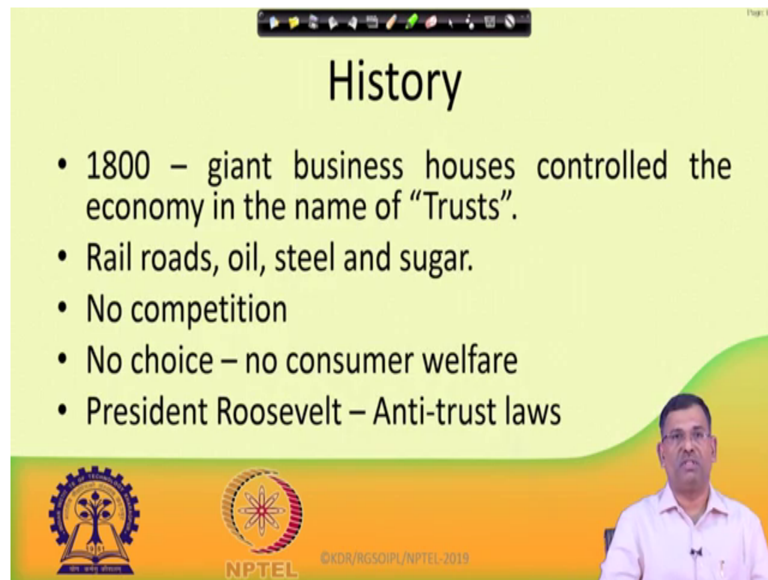

When we look into the history you can see that, during the 1800 there were huge business firms especially in the United States which are famous in the name of trust since they controlled the whole economy at that point of time and they controlled the important businesses like railroads, oil, steel and sugar.

Actually these companies had monopolies over these businesses and no competition in the market and nowhere to go, no choice and the consumers had to avail their services without any competition. At this point of time all these are the competitive practices of these trust collecting amazing, massively amazing wealth which is against the public interest or the public welfare which worried the governments at that point of time in the United States.

The president of the United States at that point of time the president *Roosevelt* actually wanted to curb the monopolistic practices of these trust which were against the consumer welfare. They planned for an antitrust law in the United States. The laws synonymously uses antitrust laws as well as the competition law.

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History

- Sharman Act, 1890 – Anti-trust Law
- Tariff Act, 1894 – FTC – Agency to Watch competition
- Clayton Act, 1914 – stopping mergers
- Federal Trade Commission Act, 1914
- Formation of Trust by American Companies
- Promoting free enterprise in America
- Illegal – Restrain Trade or try to make monopoly
- S.2 - Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding **$100,000,000** if a corporation, or, if any other person, **$1,000,000**, or by imprisonment not exceeding **10 years**, or by both said punishments, in the discretion of the court.
- *Standard Oil Co. v. United States*, 1911.

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And at this point of time you can very clearly say that the first authentic formal competition law came into existence in the United States in the name of *Sharman Act of 1890*. So, basically this is to regulate the activities of the trust which came into play. You can see Section 2 of this particular act very clearly says that, every person who has monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a felony and conviction thereof shall be punished by fine as well as imprisonment not exceeding 10 years.

Remember this particular legislation made the "restraint of trade" as a felony. There is a huge fine and there is a jail term for indulging in such kind of activities. And later on these trust again in order to avoid the *Sharman Act* found mergers, mergers between different trust in order to avoid the provisions of the Sharman Act. Then these group in order to curb the loopholes passed the act which is known as the *Clayton Act of 1914* which made curbs for the stopping of mergers. In order to implement, enforce the competition law very strictly in the United States or the Sharman Act, the antitrust law very strictly the *Tariff Act of 1894* was passed and agency i.e. the federal trade commission was formed to enforce the antitrust law in the United States. So, you can see the formation of trust by the American companies for amazing massive wealths were

curbed by this particular law. And we can say that this is an authentic, the new generation competition law which was passed first time in the United States. And this particular law promotes free enterprises in America and it held all ‘restraint of trade’ or attempt to make monopoly illegal under this particular act.

From the inception of this particular act, huge jurisprudence has emerged in the United States on the antitrust law or the competition law and which we will study in detail in the next week class.

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Europe

- 1890s – Political turmoil
- After the end of world war many countries enacted competition law
- Treaty of Rome - EEC – 1957

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If we look into Europe, Europe also wanted to come out with the legislation during the 1980s because of the monopolistic activities of huge business firms. They come out with a draft law, but the political turmoil in the Europe prevented them from passing any law at that point of time. But actually the momentum was made immediately after the world war was over, the II World War. Then the formation of the European economic community (EEC) in the 1957 formed by the treaty of Rome in 1957 included specific provisions to deal with anti competitive practices and abuse of dominant position in the Europe.

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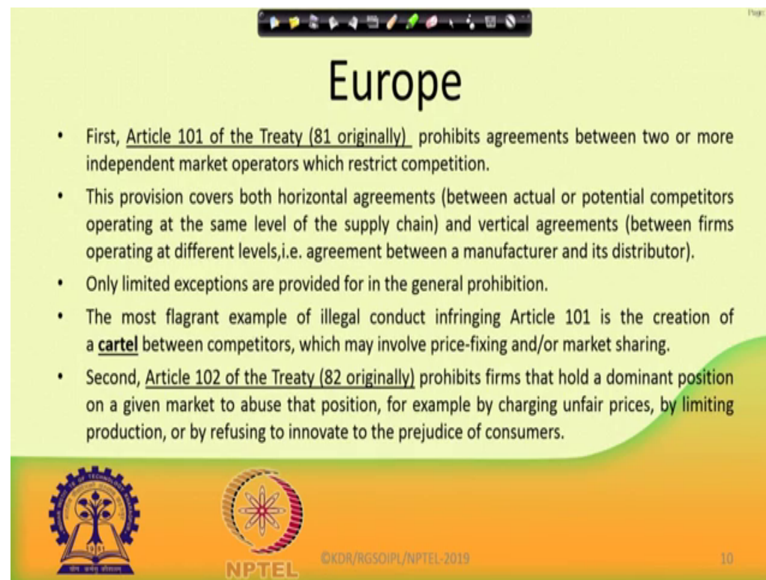

So, originally it was in Article 81 and 82 of the Rome Treaty. Presently the law is in Article 101 and 102 of the Treaty which clearly curbs the anti competitive practices or the abuse of dominance or the agreements between two or more independent market operators which restraint competition.

So, in Europe as well the competition in the market is promoted, the competitive process is promoted and also the Article 101 clearly covers both horizontal agreements (horizontal agreements actually means a potential competitors operating at the same level of supply chain) as well as the vertical agreements (that between the firms operating at the different levels i.e. agreements between manufacturers and distributors is vertical agreements). And both the horizontal and vertical agreements are included under article 101 of the treaty forming the European Union.

Again you can see that under the European law, *cartels* are considered to be most illegal conduct infringing these provisions and we will see what is *cartel* in the coming classes in detail. And the Article 102 of the treaty very clearly prohibits firms that hold a dominant position and using their dominant position in the market and exploiting the market for example, by using the dominant position they charge unfair prices.

And by limiting production and then bundling products and tying agreements and trying to refuse to innovate which is absolutely prejudicial to the consumers. So, we can see that in similar provisions the concept is one and the same in the United States and the European Union. What about the agreements? what are the type of agreements prohibited which curb the competition in the market?

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In the modern economic era which is known as liberalization or liberal economies or opened up economies presently more than 110 countries have the competition law, which shows that every country promotes competition in the market.

This is considered to be revolutionary in nature because most of the countries never heard of competition law in their market for example, India until 2002 India never talked about the competition, promoting competition in the market rather they were concentrating on curbing monopolistic activities and restrictive practices with the legislation in 1969 which we will see later. We can see that the competition law which is in its advanced state of law is presently administered by many countries now.

Mostly the markets are controlled or guided or regulated by these particular competition laws and there is a close connection between these competition laws and innovations. We

saw in the beginning classes of intellectual property classes that, all innovators are supposed to get a limited period of monopoly for a period of time.

But if they started exploiting that particular monopoly which they got through a patent protection or any other intellectual property protection, then the competition law will step in. And the competition law will step in into their monopolistic activities even though it is protected by intellectual property rights.

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And again we can see that the whole activities of competition in the market are regulated through the competition act. For example if the market fails when these kind of activities are not curbed or not regulated, these anti competitive practices such as the collusion between firms, the collusion between firms and companies which form cartels and market dominance, the giant companies like Microsoft or Google we will see these cases later on. If they abuse their market dominance and market dominance for exploitation of the consumers then the competition law will step in.

So, simply we can see that when we look into the objective of competition law, it is efficiency in the market as well as fairness in the market. So, efficiency and fairness are the two pillar stones of competition law or objective of competition law. So, we know that the efficiency is a concept that can be measured objectively at the same time fairness

cannot be measured, but fairness can be different from country to country. So, the measurement of fairness will be different in developing countries. Developing country parameters will be different, developed countries parameters may be absolutely different.

And open economies like India the parameter may be different, but closed economies like China where everything is controlled by the state the parameter of efficiency may be very high, but the parameter of fairness may be very low. So, there is a closed connection between competition, fairness and efficiency in the market.

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So, when you look into the competition policy actually what competition policy does? The competition policy actually tries to make a balance between the competitors and the market and it can be said that government directly interferes into the behaviour of the firms and tries to control their behaviour which is against the market. And we can see that the structure of industries and their behaviour and their attitude towards the economy is controlled through the competition policy.

So, we can see that these regulations and trade policies of governments includes tariffs, quotas and anti dumping agreements, anti dumping measures taken under the anti dumping agreement of WTO, investment measures, investment policies or regional trade agreements and preferential tariff agreements and all labour market, and all these policies

actually affect the competition in the market. So, all these components are to be taken into consideration when we calculate the fairness and when we calculate the competitiveness of the market.

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And the very objective of the competition law is clearly to encourage the process of competition not the competitors. And to promote efficient use of resources while protecting the freedom of economic action of various market participants; that means, the competition in the market is not prohibited; competitors are not prohibited to compete in the market.

What actually is prohibited is their behaviour, it is actually regulated by this particular competition law. We know that the decentralization of economies is very important for the development of any country. Decision making cannot be concentrated and the economic concentration will lead to the abuse of economic power and complete destruction of small businesses.

So, the big businesses and the small businesses should go hand in hand and there must be a harmonious relationship between the big business firms and small business firms. So, there is a conflict between economic efficiencies and policies. They always fight each

other. So, if there are more regulations and policies it will severely affect the economic efficiency of working of the companies

So, the policies may distort the market and competitive process. The competitive policies in the market directly interferes into the competitive process itself. So, there must be competition policies as well as competition law in order to directly interfere in the competitive process to promote the competitive process.

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Welfare

- Welfare of the industry (consumer surplus + producer surplus)
- Effects of price increases (the increase in profit may not compensate the reductions of consumer surplus)
- Distributional issues are overlooked (it is possible to operate redistribution schemes suche that both producers and consumers are better off)
- Welfare from a dynamic point of view: future welfare matters as well.
- Fixed costs are already recovered leads to maximise welfare BUT firms would not invest and innovations not introduced→future welfare is reduced.

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So whether it is for the welfare of industry? Yes it is, there must be welfare of industry, the industries must grow otherwise no economy can grow, but when we talk about welfare here it is the welfare of consumers, the ultimate goal of a competition law is the welfare of the market not only the consumers, consumers is one variable or one component of the competition law or one player in the entire competition law.

So, it includes the consumer and also at the same time the producer as well. Price increases, the difference in prices or monopolistic prices is definitely going to affect the consumers and it is directly going to affect the market. In the ideal situation in a market whenever the supply goes up the prices are not supposed to go up. The so called practices which leads to the increase in prices are not to be allowed it has to be curbed or it has to be controlled.

So, the “welfare” should be looked from a dynamic point of view; that means, the future welfare of the market should be the objective of any competition law.

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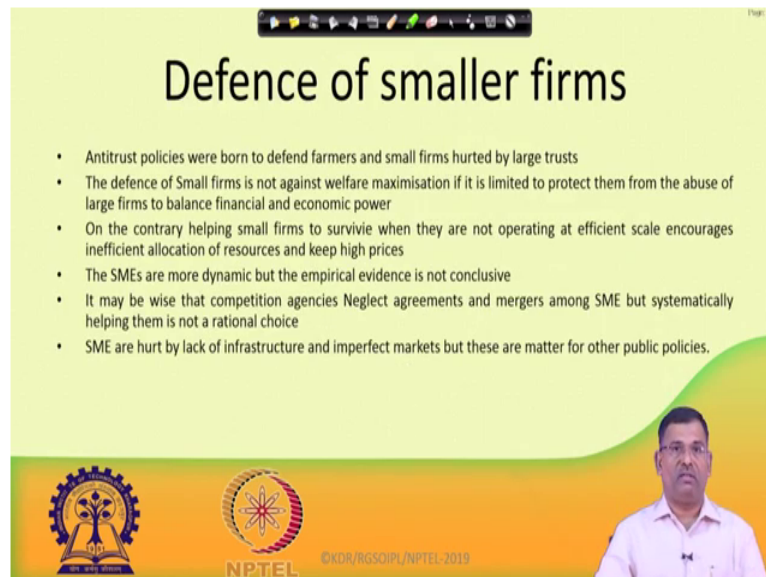

And we can see that the competition law or competition policies are required for the welfare of small firms. One group of scholars say that if you do not try to control the big business houses, then they are going to eat rather they are going to kill the small business firms.

So, there must be a harmony between the big houses and the small business firms then there will be an ideal competition in the market. So, the defence of small firms is one justification for the competition law. On the contrary you can see that helping small firms to survive even though they are not operating efficiently or at a sufficient scale or efficient scale encourages inefficient allocation of resources.

But every government protects small scale businesses because it provides a lot of employment especially in the rural areas. So, they have to protect even though there is inefficient allocation of resources in rural areas. Also it is wise to invest. It is wise to invest in these neglected areas and also in the small scale industries for the greater economic welfare of the society, greater economic welfare of the consumers.

So, that is why I said that the big business houses have sufficient allocation of resources infrastructure, but the small scale industries have a lack of sufficient infrastructure and also they have lot of limitations on marketing their products so, their involvement in the market will be very limited. So, the process of competition will increase their the presence in the market.

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And as I told you that the competition law always looks into promoting the market integration. So, the political objective are not necessarily consistent with the welfare maximization. So, it is very easy to go for welfare maximization by promoting big companies, but the societal setup requires integration of small scale industries as well. You can call it open markets or jargons like liberalization privatisation globalisation, all these are the contribution of the opening up of economies all over the world during the 1990s and the opening up of these markets opened up a new Pandora box of limiting the activities of multinational companies or big business firms. So, for example, these big companies which allocate resources very efficiently can sell their product much cheaper than the small scale industries.

So, the price discrimination between the markets are curbed by other legislations, other laws, international trade laws like anti dumping or safe guard measures or countervailing duties. So, the price discrimination is handled by using different measures at the same

time as the competition law. If you take a relevant market the competition law will take care of the competition process as such in the market.

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So, when we talk about economic freedom there may be contrast between economic freedom and efficiency. The economic freedom leads to economic efficiency and the allocation of resources will decide the efficiency.

So, if there is a disparity between these allocation of resources or economic efficiency, the firms go for different kind of practices: it can be vertical restraints or it can be horizontal restraints. For example, the resale price maintenances are actually prohibited under the competition laws. Territorial restraints maybe efficient to use and simulate the efforts of retailers and the wholesalers. So, again we can see that any curb on the territorial activities or the price activities are against the economic freedom.

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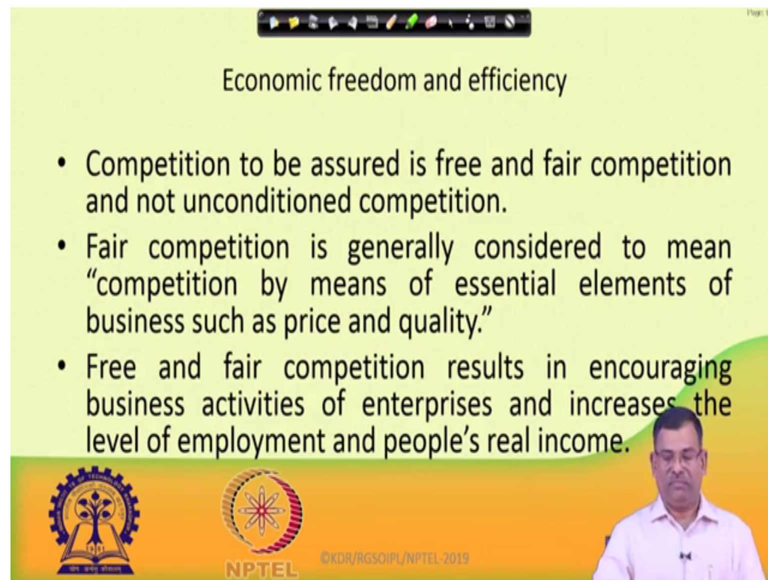

We can see that there is a close relationship between the economic freedom and efficiency. So, free and fair competition should be assured which we talked about earlier as well. The free and fair competition will depend upon the market size and also the market quality and the economic efficiency of markets.

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Competition law says that its ultimate objective of competition law is consumer welfare, protect the interest of consumers and its a means of reducing the cost and welfare to the

society at large and then it accelerate the growth and development of the society and preserves the economic and political activities in a market. So, finally and ultimately it promotes efficiency and promotes the welfare in the market.

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We already talked about the fairness and equity. When it comes to fairness and equity it is the small shopkeepers versus the large supermarkets or the large business firms versus the small scale industries, and the cost differences and allocation of resources.

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The industrial policies are making a very crucial role in the allocation of resources as well as the competitive process in the market. So, every country has come out with liberal economic policies and industrial policies and some countries have exemptions to the business activities.

For example, the United States law gives exemptions to the cartels and if the cartels are curbed the purpose is only to engage in export trade and no to restrain trade in the US and not to retrain the trade of expert competitors. So, there are limited activity. It means that the big firms have more freedom within the framework of the *Sharman Act* to promote their businesses abroad or beyond the territories.

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And the state policies, the competition policy can be used to achieve the protectionist goals of domestic firms as well. Some countries go for strict implementation of the competition policy, which may lead to promoting the domestic industries. For example, in order to promote the domestic industries, international trade law within the WTO framework allows the anti dumping law which promotes the domestic industries by imposing additional duties on exports, which are not good for the competition in the market but the international trade law allows it.

So, this competition law and trade law must go side by side and the industrial policies and trade policies should not be an obstacle to the competition policy for example, the subsidies, state aid, countervailing duty. So, trade law should not be an obstacle to the competition policy and the competition law in the countries.

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So, the public interest and economic freedom is one of the important topic of discussion. So, without public interest no competition law is required. So, providing equal opportunities for small businesses, medium businesses and the big businesses is the ideal scenario which we can make in the market.

So, I hope that the concepts of competition are clear, the ultimate objective is achievement of welfare of the market and welfare of the consumers.

Thank you.