THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
CHENNAI

STUDY MATERIAL

COMPETITION LAW

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PREFACE

God's mercy it is a privilege for me to prepare this course material. Dear learning friends, this material is largely a compilation of work comprised of various organisations including the Competition Commission of India and other individuals. In addition to that I have also contributed some of my research work in this material. The good way to begin with competition law is to read the principles of economics, especially micro economic principles, Report of the High Level Committee on Competition Policy & Law (SVS Raghavan Committee Report), The Competition Act, 2002 as amended by 2007 and 2009 amendments and The Competition (Amendment) Bill, 2012.

We would like to thank Respected Director – UG Courses, The School of excellence in Law for considering me for this assignment and I am also grateful to my teacher and present Head of Department, Department of Business Law. As a matter of acknowledgements I sincerely thank The Competition Commission of India for their advocacy materials which is really helpful to understand the concepts and for their advocacy role played by them in disseminating healthy competitive practices and consumer interest.

We are also grateful to learning friends of BA., BL., (Hons.), BL., (Hons.), B.COM., BL., (Hons), LLB., (Hons.), BA., LLB., (Hons.), B.COM., LLB., (Hons.), BBA., LLB., (Hons.), BCA., LLB., (Hons.),. I am here also because of their encouragement and support. We wish this course material would be helpful to understand the fundamentals of this course. Best efforts are taken to free from errors. In spite of that if any error is found I take sole responsibility and kindly condone me for the same and finally we wish let all your labour be honoured by God.

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UNIT – I
INTRODUCTION

The Competition is "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share"[1]. There are two schools of thought regarding trade one thought is to have totally free and unfettered competition in the belief that it will drive out all unfair practices. The other thought is to assert that the process of free competition should be supported by regulations which preclude any attempt at subversion of free trade and competition. It may bc pertinent here to note that in most parts of the world, free competition is supported by relevant rules and regulations to ensure free trade and absence of unfair practices.

The origin of the classical restrictions against the monopoly can be known from the enactment of Statute of Monopolies, 1623[2]. The modern origin of competition law can be traced fromenactmentofAnti-Combines Act, 1889 Canada and later the USA with the Sherman Act, 1890 is authored by Senator John Sherman who started a journey of regulation of competition and created a level playing field among the enterprises and protecting the best interest of the consumers in the market. The very object of enacting economic legislations is to government intervention in social and economic life and to maintain economic order in the state. Competition regulation in India is traced from the constitution of India under Articles 38& 39of directive principles of the state policy.

1. ORIGIN OF COMPETITION LAW

1.1.UNITED STATES OF AMERICA

The law promotes or seeks to regulate conduct of the enterprises in US is known as antitrust law. Antitrust laws are implemented through public private and enforcement. This regulatory law nomenclature differs from country to country, for example in UK previously it is known as Trade practices law now competition law, Anti-monopoly law in China, Fair trade in Japan, European Union called as both antitrust and competition regulation. Now in most of the countries it is well known as completion law.

The reason for termed as antitrust[3] is in united states is way back in the 1800s, there were several giant businesses known as "trusts." they controlled whole sections of the economy, like railroads, oil, steel, and sugar. Two of the most famous trusts were U.S. Steel and Standard Oil; they were monopolies that controlled the supply of their product—as well as the price. With one company controlling an entire industry, there was no competition, and smaller businesses and people had no choices about from whom to buy. Prices went through the roof, and quality didn't have to be a priority. This caused hardship and threatened the new American prosperity. While the rich, trust-owning businessmen got richer and richer, the public got angry and demanded the government take action. President Theodore Roosevelt "busted" (or broke up) many trusts by enforcing what came to be known as "antitrust" laws. The goal of these laws was to protect consumers by promoting competition in the marketplace.

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[1] World Bank, 1999

[2] Ed. Pecche's Case, Rot.Parl., 50 Edw. 3, No. 33 (1376); Davenant v. Hurdis, Moore *576, *580 (K.B., 1599); Edward Darcy v. Thomas Allen 11 Co.Rep. *84, Moore *671 (K.B., 1599), Noy *173, 25 Hen. VIII, c. 2, § 1 (1533).

[3]https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf (accessed on 20.09.2017)

ROBBER BARON AND THEIR TRUSTS

During end of the 19th century several entrepreneurs started gaining advantage in the free market company. Those entrepreneurs are James J. Hill, Henry Ford, Andrew Carnegie, Cornelius Vanderbilt and John D. Rockefeller, Robert Fulton, Edward K. Collins, *Charles M. Schwab*, J.P. Morgan and Leland Stanford and their trust's are Oil trust, Sugar trust, Railroad trust, salt trust, a steel trust, whisky trust.

In a business application, the trust was an arrangement under which stockholders in a company would assign their shares to trustees, who have the voting power to guide the decision-making of that company. This technical use of the term is of less historical interest than its other use, to describe an arrangement[4] under which major producers in an economic arena would agree to control production and prices to their mutual benefit. Instances included John D. Rockefeller's oil trust, the barbed wire trust, the cash register, trust and the sugar trust, among others.

In the United States, trusts came under increasing public criticism in the late 19th century and would become the subject of antitrust legislation. The state of New Jersey in 1889 enacted new corporation legislation, authorizing the use of the holding company to circumvent the discredited trust. The eighteen eighties were years of important change in American business and industry. In eighteen seventy-nine, a new form of business organization was developed -- the trust. In a trust, stock owners of many competing companies give control of their stock to a committee, or group, of trustees. The trustees[5] operate all the companies as one and pay profits to the stockholders. The profits would be high, because there would be no competition to drive down prices. One of the first trusts was formed by John D. Rockefeller in the oil industry. The stockholders of seventy-seven oil companies gave control of their stock to nine trustees of Rockefeller's Standard Oil Company. The nine men controlled ninety per cent of the nation's oil production.

PUBLIC DEMAND FOR GOVERNMENT INTERVENTION

The public began to demand government controls of the trusts[6]. Farmers claimed that prices were too high, and they blamed the trusts. Workers said their unions could not negotiate with the new industrial giants. Small businessmen charged that trusts were too powerful. They said the trusts could destroy them. Public demands for action led the governments of fifteen states to pass anti-trust laws. But the state laws could do nothing. Most of the trusts were nationwide corporations which did business in many states. Public protest was so great that both parties in the eighteen eighty-eight elections promised to pass a federal law against trusts.

NEED FOR ENACTMENT OF SHERMAN ACT

1. Exploitation of the public could result in a violent uprising that could destroy the whole system.
2. captains of industry were arrogant enough to believe themselves superior to the elected government

For the reasons aforesaid it was urgent need to enact an act to regulate the activities of the enterprises which goes beyond the good economic conditions of the state, therefore the government passed Sherman Act, 1890.

[4]http://www.u-s-history.com/pages/h954.html (accessed on 15th July 2017)
[5]https://learningenglish.voanews.com/a/a-23-2005-11-09-voa2-83127042/125125.html (accessed on 20th July 2017)
[6]http://abouttheodoreroosevelt.com/trust-buster-theodore-roosevelt/283/ (accessed on 20th July 2017)

The Sherman Antitrust Act (1890)

Section 1. Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Monopolizing trade a felony; penalty
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 $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 3. Trusts in Territories or District of Columbia illegal;
combination a Felony Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

Section 4. Jurisdiction of courts; duty of United States attorneys;
procedure The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Section 5. Bringing in additional parties
Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Section 6. Forfeiture of property in transit
Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Section 6a. Conduct involving trade or commerce with foreign nations
Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect -
(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Section 7. "Person" or "persons" defined
The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Northern Pacific Railway Co. v. United States[7]

Black, J
"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[8]

Brown Shoe Co. v. United States[9]

Warren, C.J

". . . [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."

United States v. Aluminum Co. of America[10]

Learned Hand, J.

"[I]t is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit. The Act has wider purposes. Indeed, even though we disregarded all but

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[7] 356 U.S. 1 (1958)
[8] Origin and Objectives of Antitrust law, Randal C. Picker (http://picker.uchicago.edu/antitrust/Set1.pdf)(accessed on 15th July 2017)
[9] 370 U.S. 294, 344 (1962)
[10] 148 F.2d 416, 427 (2d Cir. 1945)

economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them. In any event the mere fact that a producer, having command of the domestic market, has not been able to make more than a 'fair' profit, is no evidence that a 'fair' profit could not have been made at lower prices.

True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, and stimulated every possible demand. No doubt, that would be one way of dealing with the matter, although it would imply constant scrutiny and constant supervision, such as courts are unable to provide. Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."

National Society of Professional Engineers v. United States[11]

Stevens, J.

"Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead . . . it focuses directly on the challenged restraint's impact on competitive conditions.

"The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."

Berkey Photo, Inc. v. Eastman Kodak Co.[12]

Kaufman, C.J.

"Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is 'inherently evil. . . .' [W]hile proclaiming vigorously that monopoly power is the evil at

[11] 435 U.S. 679, 688, 695, (1978)
[12] 603 F.2d 263, 273 (2d Cir. 1979) (1980).

which § 2 is aimed, courts have declined to take what would have appeared to be the next logical step—declaring monopolies unlawful per se unless specifically authorized by law. . . .

"The conundrum was indicated in characteristically striking prose by Judge Hand, who was not able to resolve it. Having stated that Congress 'did not condone' 'good trusts' and condemn 'bad' ones; it forbad all," he declared with equal force, 'The successful competitor, having been urged to compete, must not be turned upon when he wins.' Hand, therefore, told us that it would be inherently unfair to condemn success when the Sherman Act itself
mandates competition. Such a wooden rule, it was feared, might also deprive the leading firm in an industry of the incentive to exert its best efforts. Further success would yield not rewards but legal castigation. The antitrust laws would thus compel the very sloth they were intended to prevent. We must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition."

Verizon Communications v. Law Offices of Curtis v. Trinko[13]

Scalia, J.

"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.". . . "Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'. . . . The cost of false positives counsels against an undue expansion of § 2 liability."

Olympia Equipment Leasing Co. v. Western Union Telegraph Co.,[14]

Posner, J.

"[Over time] it became recognized that the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. . . . Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."

THEODORE ROOSEVELT THE TRUST BUSTER

As soon as Roosevelt sworn in 1901, his first attack was on the corporation who works against the country's economy, he ordered his attorney to file suit against Morgan for restricting trade by limiting traffic between Chicago and the Northwest. In 1904, the U.S. Supreme Court voted five to four in favor of the government, ordering the NSC to be dismantled. This victory served to re-define the highest court's view of trusts, stopped an impending national railroad consolidation in its tracks, curtailed public interest in holding companies, and made Teddy more popular than ever among the average citizens.
Then after the success of dissolving NSC's trust, Theodore was instrumental in encouraging the study of another conglomerate monopoly, which eventually led to its demise. John D. Rockefeller's company – Standard Oil – was the largest monopoly of its time. Following the federal Commissioner of Corporations

[13] 540 U.S. 398, 407, 414 (2004)
[14] 797 F.2d 370, 375 (7th Cir. 1986).

study of Standard (from 1904-06) it was determined that the company had engaged in purposely deceitful tactics to raise prices for consumers and competing interests, in order to maintain its hold on the market. After years of court battles, in 1911 the Standard trust was finally dissolved and broken into 33 separate companies. And also enlarged the commissions jurisdictions in following ways,

1. In 1903, the Elkins Anti-Rebate Act forbade the carriers from giving large and powerful shipper's rebates from the published freight tariffs. This law allowed the railroads, in effect, to administer their rates. The ICC enforced this statute.
2. In 1906, the Hepburn Act granted the ICC the power to set maximum rates. No longer could the railroads simply enforce rates without challenge. Now shippers could challenge rates before the Interstate Commerce Commission and hope that, after careful investigation, they might be lowered.

Federal Trade Commission's Act, 1914

Federal Trade Commission

Composition: It consists composed of five Commissioners,

Appointment:

(a) Chairman: The President shall choose a chairman from the Commission's membership

(b) Commissioners: who shall be appointed by the President, by and with the advice and consent of the senate. Condition: Not more than three of the Commissioners shall be members of the same political party.

Term of service: seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Even after upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified.

Removal: by the president on the grounds of inefficiency, neglect of duty, or malfeasance in office

Functions of the Commission

The Federal Trade Commission (FTC) functions primarily as a law enforcement agency. It enforces federal consumer protection laws that prevent fraud, deception and unfair business practices. The Commission also enforces federal antitrust laws that prohibit anticompetitive mergers and other business practices that could lead to higher prices, fewer choices, or less innovation. Whether combating telemarketing fraud, Internet scams or price-fixing schemes, the FTC's mission is to protect consumers and promote competition. The FTC takes action to stop and prevent unfair business practices that are likely to reduce competition and lead to higher prices

a) Reduced quality
b) Levels of service
c) less innovation.
d) price fixing
e) group boycotts
f) Exclusionary exclusive dealing contracts
g) trade association rules

Important Aspects of Section 5 of FTC Act:
Section 5 of FTC clearly speaks about the jurisdiction of FTC over Unfair methods of competition and its prevention by Commission. Generally agreements are grouped into two types:

(A) agreements between competitors, also referred to as horizontal conduct
(B) monopolization, also referred to as single firm conduct

1. The FTC generally pursues anticompetitive conduct as violations of Section 5 of the Federal Trade Commission Act, which bans "unfair methods of competition" and "unfair or deceptive acts or practices."

   1.1. Horizontal
   It is illegal for businesses to act together in ways that can limit competition, lead to higher prices, or hinder other businesses from entering the market. The FTC challenges unreasonable horizontal restraints[15] of trade. Such agreements may be considered unreasonable when competitors interact to such a degree that they are no longer acting independently, or when collaborating gives competitors the ability to wield market power together. Certain acts are considered so harmful to competition that they are almost always illegal. These include arrangements to fix prices, divide markets, or rig bids.

   1.2. Vertical
   It is unlawful for a company to monopolize or attempt to monopolize trade, meaning a firm with market power cannot act to maintain or acquire a dominant position by excluding competitors or preventing new entry. It is important to note that it is not illegal for a company to have a monopoly, to charge "high prices," or to try to achieve a monopoly position by aggressive methods. A company violates the law only if it tries to maintain or acquire a monopoly through unreasonable methods.

2. Unfair: methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

3. Jurisdictions: The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loaninstitutions described in section 57a(f)(3)of this title, Federal credit unions described in section 57a(f)(4)of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in oraffecting commerce and unfair or deceptive acts or practices in or affecting commerce.

4. "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--
   a. cause or are likely to cause reasonably foreseeable injury within the United States; or
   b. involve material conduct occurring within the United States.

5. Finality of order
   a. An order of the Commission to cease and desist shall become final--

[15]https://www.ftc.gov/enforcement/anticompetitive-practices (accessed on 30th July 2017)

i. Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

ii. Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by--

1. the Commission;
2. an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii)an application for such a stay was previously submitted to the

b. Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

c. the Supreme Court, if an applicable petition for certiorari is pending.

6. Modification or setting aside of order by Supreme Court
If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

7. Modification or setting aside of order by Court of Appeals
If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

8. Rehearing upon order or remand: If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

9. Penalty for violation of order; injunctions and other appropriate equitable relief
Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such

failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

10. Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure (1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

11. Final cease and desist order other than consent order: If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice-- after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

12. De novo trail: If the cease and desist order establishing that the actor practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section

13. Compromise or settlement: The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court. (n) Standard of proof; public policy consideration The Commission shall have no authority under this section or section 57aof this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

14. CONSUMER PROTECTION – 'stopping fraud'

    a) Stopping fraud in every community
    b) Protecting consumers on new technology platforms
    c) Safeguarding consumers' privacy and data security

15. Investigation: The FTC may gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce,

    Exceptions: banks, savings and loan institutions

Clayton Act, 1914

The Clayton Act, 1914 regulates tying, price discrimination, civil enforcement of the antitrust laws, statute of limitations, mergers and acquisitions, premerger. Some of the important aspects of the Act are as follows,

1. Prohibits companies from merging with or acquiring other companies when the effect may be substantially to lessen competition, or to tend to create a monopoly.

2. Tying arrangements: compelling consumers to buy other product while buying the product is illegal.

3. Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty- seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.

4. No discrimination: Price and Customers: No discrimination substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

5. Payment or acceptance of commission, brokerage, or other compensation with certain exceptions

6. Burden of proof: burden of proving innocence is on the person on whom charges are leveled.

7. Sale and other agreement not to use goods of competitor are illegal.

8. No compromises between parties are allowed without the approval of the court.

Robinson Patman Act, 1936

1. Protect small retail shops against competition from chain stores by fixing a minimum price for retail products.

2. The act only applies to sales of tangible goods that are completed within a reasonably close timeframe and where the goods sold are similar in quality. The act does not apply to the provision of services such as cell phone service, cable TV and real estate leases. The goods must be of "like grade and quality."

3. There must be likely injury to competition (that is, a private plaintiff must also show actual harm to his or her business). Normally, the sales must be "in" interstate commerce (that is, the sale must be across a state line).

4. The following acts are declared illegal,
    a) below-cost sales by a firm that charges higher prices in different localities, and that has a plan of recoupment;
    b) price differences in the sale of identical goods that cannot be justified on the basis of cost savings or meeting a competitor's prices; or
    c) promotional allowances or services that are not practically available to all customers on proportionately equal terms.

5. provides an affirmative defense to discrimination intended to meet competition;
6. prohibits certain brokerage fees and commissions;
7. prohibit sellers from discrimination in providing allowances or services to competing customers for promoting the resale of the seller's products; and
8. prohibits buyers from inducing a seller to violate the RPA.
9. Burden of proof: on the plaintiff to prove that there is a competitive injury (primary line injury and secondary line injury).

Hart – Scott - Rodindo Antitrust Improvements Act, 1976

Company intending to acquire or merge with another company should make an application about its intention to the Federal trade Commission.
Two principal test are important to ensure that whether transaction will come under the HAS Act. They are (1) the size of parties test; (2) the size of transaction test.

Threshold: Competitor corporations are covered by Section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000.

US ANTITRUST LEGILATIONS

S. NO.	STATUTE	OBJECT
1	Sherman Act, 1890	(i) prohibits every contract, combination or conspiracy between two or more companies which exerts an unreasonable restraint on trade or commerce (ii) prohibits the monopolization, any attempted monopolization, or any agreement or conspiracy to monopolize any market for a particular product or service. Sanctions (1) contract or combination in restraint of trade or conspiracy (a). corporation $10,000,000 (b). any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (2) monopolise or attempt in like nature or, conspire or, combine among states of foreign states shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (3) Combination or conspire shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (4) Forfeiture of property.
2	Clayton Act, 1914	(i) Regulates tying arrangements, exclusive dealing arrangements, mergers and acquisitions and interlocking boards of directors and also preserves consumers (ii) civil damages can be claimed from private parties
3	Federal Trade Commission Act, 1914	(i) Investigation of unfair trade practices by commission (ii) prohibits "unfair methods of competition" and "deceptive practices." Conduct which does not violate the other federal antitrust laws may nevertheless be unlawful under the FTC Act
4	Robinson Patman Act, 1936	Prohibits price discrimination;
5	Celler-Kefauver Act, 1950 (Anti-merger Act)	To close a loophole regarding asset acquisitions and acquisitions involving firms that were not direct competitors. It gave the government the ability to prevent vertical mergers and conglomerate mergerswhich could limit competition.
6	Hart – Scott - Rodindo Antitrust Improvements Act, 1976	(i) requires companies to file premerger notifications with the Federal Trade Commission and the Antitrust Division of the Justice Department for certain

		acquisitions. (ii) establishes waiting periods that must elapse before such acquisitions may be consummated and authorizes the enforcement agencies to stay those periods until the companies provide certain additional information about the likelihood that the proposed transaction would substantially lessen competition in violation of Section 7 of the Clayton Act

1.2.UNITED KINGDOM

Competition Act, 1998

Objects

1. To make provision about competition and the abuse of a dominant position in the market;
2. To confer powers in relation to investigations conducted in connection with Article 85 or 86 of the treaty establishing the European Community;
3. To amend the Fair Trading Act 1973 in relation to information which may be required in connection with investigations under that Act?
4. To make provision with respect to the meaning of "supply of services" in the Fair Trading Act 1973; and for connected purposes.

Salient Features

1. Anti competitive agreements: Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

(a) may affect trade within the United Kingdom, and
(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

2. Excluded Agreements: prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedule 1 (mergers and concentrations); Schedule 2 (competition scrutiny under other enactments);Schedule 3 (planning obligations and other general exclusions); or Schedule 4 (professional rules) and Secretary of the State may amend the schedule to exclude.

3. Establishment of Competition & Markets Authority (CMA). [CMA was established by merging of the Office of Fair Trading (OFT) and the Competition Commission (CC)]

4. Exemptions: The Director may grant an exemption from the Chapter I prohibitions with respect to a particular agreement with certain conditions. Various kind of exceptions are individual exemptions, Block exemptions, parallel exemptions

5. Dominant position: any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

ii. limiting production, markets or technical development to the prejudice of consumers;

iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

iv. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

6. Investigations and enforcement: The Director may conduct an investigation if there are reasonable grounds for suspecting—
   a. that the Chapter I prohibition (anti competitive agreements) has been infringed; or
   b. that the Chapter II prohibition (abuse of dominant position) has been infringed.

Enterprises Act, 2002

1. To establish the Office of Fair Trading and Competition Appeal Tribunal and the Competition Service;
2. To make provision about mergers and market structures and conduct;
3. To amend the constitution and functions of the Competition Commission;
4. To create an offence for those entering into certain anti-competitive agreements;
5. To provide for the disqualification of directors of companies engaging in certain anti-competitive practices; to make other provision about competition law;
6. To amend the law relating to the protection of the collective interests of consumers;
7. To make further provision about the disclosure of information obtained under competition and consumer legislation;
8. To amend the Insolvency Act 1986 and make other provision about insolvency; and for connected purposes.

Salient Features

1. Establishment of the OFT: The OFT is established by section 1 of the Enterprise Act 2002. Section 1 of the Fair Trading Act 1973 had established the office of Director General of Fair Trading, and many of the most important functions in competition law were carried out in the name of the individual appointed by the Secretary of State to this position. The Enterprise Act therefore created the OFT, and abolished the office of Director General of Fair Trading; his functions were transferred to the OFT. The Board of the OFT consists Chairmen and not less than four members and term of office not exceeding five years.

2. Competition Appellate Tribunal: Applications for the review of decisions made by the Secretary of State and the CMA in respect of merger and market investigations under the Enterprise Act 2002 (s.12 & Schedule 2)and Appeals on the merits in respect of decisions made under the Competition Act 1998 by the Competition and Markets Authority ("CMA") and the regulators in the

telecommunications, electricity, gas, water, railways, air traffic services, payment systems, healthcare services and financial services sectors. CAT functions are as follows,

a) To hear appeals on the merits in respect of decisions made under the Competition Act 1998 by the Office of Fair Trading (OFT) and the regulators in the telecommunications, electricity, gas, water, railways and air traffic services sectors.

b) To hear actions for damages and other monetary claims under the Competition Act 1998.

c) To review decisions made by the Secretary of State, OFT and the Competition Commission in respect of merger and market references or possible references under the Enterprise Act 2002.

d) To hear appeals against certain decisions made by Ofcom and the Secretary of State relating to the exercise by Ofcom of its functions under Part 2 (networks, services and the radio spectrum) and sections 290 to 294 and Schedule 11 (networking arrangements for Channel 3) of the Communications Act 2003.

e) To hear appeals in respect of decisions made by the OFT under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (as amended).

3. Merger: (1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that –

a) a relevant merger situation has been created; and
b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

(2) The OFT may decide not to make a reference under this section if it believes that—

a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission; or

b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.

4. Market investigations: The UK markets regime which allows the Competition and Markets Authority (CMA) to conduct investigations into the workings of markets. Under s 131 of the 2002 Act a market investigation reference may be made by the OFT where it has reasonable grounds for suspecting that any feature or combination of features, of a UK market prevents, restricts or distorts competition.

5. Serious Fraud Office: Section 188 of the Enterprise Act 2002 introduced a criminal cartel offence for individuals responsible for 'hard- core' cartels. Serious penalties – of up to five years in prison – can be imposed upon those found guilty of this offence. Prosecutions may be brought by or with the consent of the OFT218, or by the Serious Fraud Office, working in close liaison with the OFT.

6. Enforcement of Consumer Legislations: OFT has right to invoke and enforce certain consumer legislation for the best interest of the consumers.

Enterprise and Regulatory Reform Act, 2013

One important object of enacting Enterprise and Regulatory Reform Act 2013 is to establish and make provision about the Competition and Markets Authority and to abolish the Competition Commission and the Office of Fair Trading; to amend the Competition Act 1998 and the Enterprise Act 2002. Part 3 and 4 (ss.29 to 58) deals about Establishment of Competition and Market Authority and Competition reforms respectively.

EUROPEAN COMMISSION COMPETITION REGULATIONS

The aim of competition law is therefore to regulate the relationships between undertakings selling goods or providing services of the same kind at the same time to an identifiable group of customers within the same geographical market. The creation of the European Economic Community in 1957 started a process of economic integration in which competition law has played a principal role. Within this process, for more than 60 years the Commission and the Community Courts have built a complex and wide-ranging framework of competition law principles, with which Member States are required to comply. EU competition law is a unique legislative framework: it has been structured on the basis of the different historical and legal experiences that have shaped national competition laws of the various member states and has been superimposed on them. EU competition law includes four main policy areas arising from the Treaty rules:

a) The control of any type of cartels or control of collusion and other anticompetitive practices that have an effect on the EU (Article 101 TFEU);

b) The prohibition of monopolies or any abuse of dominant market positions (governed by Article 102)

c) The control of direct and indirect aid given by EU Member States to companies (state aid, covered under Article 107); and

d) The control of proposed mergers, acquisitions, and joint ventures involving Companies having a defined amount of turnover in the EU/EEA (governed by Article 102 and by Council Regulation 139/2004 EC, the Merger Regulation)

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. The Article itself provides a non-exhaustive list of examples of agreements which fall within this provision. These include:

(i) price fixing;
(ii) limiting or controlling production, markets, technical development, or investment;
(iii) sharing markets or sources of supply;
(iv) applying dissimilar conditions to equivalent transactions with other trading parties; and
(v) making the conclusion of contracts subject to acceptance by the other parties of supplementary and unconnected obligations.

Article 101(2) TFEU provides that any agreement or decision in breach of Article101(1) TFEU shall be automatically void.

Under Article 101(3) TFEU, Article 101(1) TFEU may be declared inapplicable when the agreements concerned fulfill a number of specified requirements. This is designed to allow those agreements which are prima-facie anticompetitive, but which on balance benefit consumer welfare when the restrictions of competition and the efficiencies created by the agreement are weighed against each other. Article 102 TFEU prohibits an undertaking which holds a dominant position in the internal market, or in a substantial part of it, from abusing that position insofar as it may affect trade between the Member States. This Article also provides a non-exhaustive list of examples of behaviour that would constitute abuse. These include:

(i) imposing unfair prices or other unfair trading conditions;
(ii) limiting production, markets or technical development to the prejudice of consumers;
(iii) applying dissimilar conditions to equivalent transactions; and
(iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary and unconnected obligations.

Article 101 TFEU, Article 102 TFEU and merger control are often referred to as the 'three pillars 'of EU competition law. However, EU merger control is not governed by EU primary law but by a regulation that forms part of EU secondary law. Merger control was introduced at EU level only in 1992, i.e. about three decades after Articles 101 and 102 TFEU entered into force.

1.3.INDIAN COMPETITION REGIME

1.3. a. MRTP ACT

In order to achieve the objectives of directive principles of state policy in Article 38 of the Constitution of India the Central government took several efforts namely,

1. Planning commission was set up on March 1950 (through various five year plans objects were achieved).
2. Industries (Development and Regulation) Act, 1951 (controlling the pattern of investment, indirectly through industrial licensing and targeting that affected the private sector, and directly through the creation of a large public sector)
3. Prof. Mahalanobis committee, 1960 (for equality of distribution of wealth and resources)
4. Monopolies Inquiry Commission, 1964 (MIC) (to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture)
5. Enactment of MRTP Act, 1969 and its various amendments
6. The Expert Group (1999) on the Interaction between Trade and Competition Policy appointed by the Ministry of Commerce.

Among above mentioned efforts one important statutory effort is that the enactment of monopolies and restrictive trade practices Act, 1969 with the object of achieving the directive principles of state policy which read as follows.

A.38 State to secure a social order for the promotion of welfare of the people

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations

A.39. Certain principles of policy to be followed by the State

The State shall, in particular, direct its policy towards securing—

.....

(b) that the ownership and control of the materialresources of the community are so distributed as besttosubserve the common good;

(c) that the operation of the economic system doesnot result in the concentration of wealth and meansof production to the common detriment;.....

Object of MRTP ACT, 1969

1. Prevention of concentration of economic power to the common detriment;
2. Control of monopolies;
3. Prohibition of monopolistic trade practices;
4. Prohibition of restrictive trade practices
5. Prohibition of unfair trade practices

Salient Features of the MRTP Act

1. ESTABLISHMENT AND CONSTITUTION OF THE MRTP COMMISSION

The Central government shall establish MRTP Commission which shall consist of a Chairman and not less than two and not more than eight other members, to be appointed by the Central Government. Every member shall hold office for such period, not exceeding five years but shall be eligible for reappointment. Provided that no member shall hold office as such for a total period exceeding ten years, or after he has attained the age of sixty-five years, whichever is earlier.

2."agreement" includes any arrangement or understanding, whether or not it is intended that such agreement shall be enforceable (apart from any provision of this Act) by legal proceedings;

Non Application: Act not to apply in certain cases, Unless the Central Government, by notification otherwise directs, this Act shall not apply to -

(a) any undertaking owned or controlled by a Government company,

(b) any undertaking owned or controlled by the Government,

(c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central, Provincial or State Act,

(d) any trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees,

(e) any undertaking engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force,

(f) any undertaking owned by a co-operative society formed and registered under any Central, Provincial or State Act relating to co-operative societies,

(g) any financial institution.

3. APPOINTMENT OF DIRECTOR GENERAL, ETC., AND STAFF OF THE COMMISSION

(1) The Central Government may, by notification, appoint a Director General of Investigation and Registration, and as many Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration, as it may think fit, for making investigation for the purposes of this Act and for maintaining a Register of agreements subject to registration under this Act and for performing such other functions as are, or may be, provided by, or under, this Act.

4. INQUIRY INTO MONOPOLISTIC OR RESTRICTIVE TRADE PRACTICES BY COMMISSION

The MRTP Commission may enquire in following situations,

(a) any restrictive trade practice –
- (i) upon receiving a complaint of facts which constitute such practice [from any trade association or from any consumer or a registered consumers' association, whether such consumer is a member of that consumers' association or not], or
- (ii) upon a reference made to it by the Central Government or a State Government, or
- (iii) upon an application made to it by the [Director General], or
- (iv) upon its own knowledge or information;

(b) any monopolistic trade practice, upon a reference made to it by the Central Government [or upon an application made to it by the Director General] or upon its own knowledge or information.

5. MONOPOLISTIC TRADE PRACTICES

Chapter IV of the Act deals with monopolistic trade practices by an undertaking. Although the authority to take action vests with the Central Government, Section 10, empowers MRTP Commission to inquire into any monopolistic trade practice upon a reference made to it by : (i) the Central Government; (ii) the Director General; (iii) upon its own knowledge or information. Besides, where the MRTP Commission while making an inquiry into a restrictive trade practice comes to learn of any monopolistic trade practice, it may inquire into such monopolistic trade practice and recommend suitable action to the Central Government (Section 37).

6. RESTRICTIVE TRADE PRACTICES

Chapter V of the Act deals with matters pertaining to restrictive trade practices. The MRTP Commission has been vested with full powers to regulate such practices through investigation and final orders thereafter. The Act also has made provision for a scheme of registration of certain agreements pertaining to restrictive trade practices. As per Section 10 inquiry into such practices can be made at the instance of (i) the Central

Government; (ii) State Government; (iii) Director General; (iv) Trade association; (v) a registered consumers' association; or (vi) the Consumer

7. UNFAIR TRADE PRACTICE

MRTP Commission has full powers to inquire into and pass appropriate orders with respect to unfair trade practices. As in the case of restrictive trade practices, inquiry into an unfair trade practice can be made at the instance of (i) the Central Government; (ii) State Government; (iii) Director General; (iv) Trade association; (v) a registered consumers' association; or (v) the consumer. The Statutory definition for "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely: -

The practice of making any statement, whether orally or in writing or by visible representation which, -
(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorships, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof :

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(viii) makes to the public a representation in a form that purports to be -

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result. if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(ix) materially misleading the public concerning the price at which a product or like products or goods or services, have been, or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;
(x) gives false or misleading facts disparaging the goods, services or trade of another person.

8. DIVISION OF AN UNDERTAKING

According to Section 27(1), the Commission may inquire into as to whether it is expedient in the public interest to make an order a) for the division of any trade of the undertaking by the sale of any part of the

undertaking or assets thereof, or b) for the division of the undertaking or inter-connected undertakings into such number of undertakings as the circumstances of the case may just.

1.3. b. REASON FOR CONSTITUTION OF S.V.S. RAGHAVAN COMMITTEE AND THEIR FINDINGS AND SUGGESTIONS

Domestic competition law will be a precursor to the international competition law, which is sought to be placed on the agenda of the WTO. Competition law must emerge out of a national competition policy, which must be evolved to serve the basic goals of economic reforms by building a competitive market economy.

The MRTP Act was limited in its sweep and hence fails to fulfil the need of a competition law in an age of growing liberalisation and globalisation. All quantitative restrictions (QRs) have been completely phased out and with low level tariffs already negotiated during WTO rounds, India will be facing severe competition from abroad. Practically, the entire range of consumer goods will bear the brunt of open imports, combined with a lowering of tariff walls in the coming years. Lots of other sectors too will have to be shaped up to face competition. From toy-makers, plastic processors and urea manufacturers to giants of industry like automobile makers, steel producers and textile mills, all will have to face competition from the world over.

Introduction of a domestic competition law will prevent international cartels from indulging in anti-competitive practices in our country. After enactment of domestic competition law, a Memorandum of Understanding can be reached with countries like U.S. where cartels are prevented from operating by effective domestic competition laws. In other words, if they cannot indulge in such practices in U.S. they will be prevented from doing so in our country.

Committee findings

1. Public Sector

Based on a belief that there was a need for an active State in the process of development, it was envisaged that the State, through the public sector, would be responsible for the development of infrastructure and would have control over key sectors of the economy such as defence and defence equipment, iron and steel, energy, power, transportation and telecommunication. Public sector enterprises were not only protected from competition through reservation, there were also policies that mandated that both Central Government departments and public sector enterprises apply price and purchase preference in favour of the public sector.

2. Licensing and Other Restrictions

The Industrial (Development and Regulation) Act, 1951 (IDR Act) empowered the State to channel private investment through the extensive use of industrial licensing. This gave the State comprehensive control over the direction and pattern of investment. With some exceptions, entry into all industries as well as the expansion of capacity, were effectively regulated. In addition there was control over the product mix and the technology. The pattern of investment envisaged in the various five-year plans was implemented in this manner. Additional criteria for the issuing of industrial licenses were geographical location and the import content of the initial investment. The pattern of investment that was fostered emphasized the development of heavy industry and the capital goods sector. There was a noticeable re-allocation of resources away from the production of consumer goods towards the production of machine tools and capital goods.

3. Barriers on MRTP Industries

There were additional barriers to entry placed on the larger firms with the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and the Foreign Exchange Regulation Act, 1973 (FERA). The so called MRTP firms were prohibited from entering and expanding in any sector except those listed in Appendix 1 of

the IDR Act, for which they had to obtain MRTP clearances in addition to the usual industrial licenses. For certain other, "priority" industries, only a capacity license was required.

4. Small Scale Industry

An exception to the licensing requirement is the small-scale sector which was promoted with a view to fostering Labour intensive production in the consumer goods sector and to spread the impact of industrialisation to rural areas. Though the definition of small scale has been periodically revised upward, up to the early 1980's, these revisions merely kept pace with the rate of inflation. By the late sixties, during the Fourth Five Year Plan (1969-74), policies for protecting the small scale sector against competition from the large scale sector were also put into place.

5. Foreign Investment and Technology Agreements

As a result of the Foreign Exchange Regulation Act, 1973 (FERA), the equity of foreign companies in Indian companies was limited to 40 per cent. A large number of such companies had to divest their holdings and bring them down to 40 per cent. With a minority holding, the incentives for greater assistance (e.g. for capital and technology) from the foreign parent were lower. Till 1991, agreements to import technology had to be approved by the Government. The Government had discretion about the maximum royalty that could be paid. Imports of technology were not approved, if the import content of the processes was considered to be too high. Prior approval was essential from the Ministry of Industry for the engagement of foreign technicians, and their terms of payment and tenure were restricted.

6. Exit Barriers

In addition to the various entry barriers described above, labour and bankruptcy laws created effective exit barriers. With a view to protecting labour and employment, closures and the retrenchment of labour are controlled by the Industrial Disputes Act, 1947. Under the Sick Industrial Companies Act, 1986, the Board of Industrial and Financial Reconstruction (BIFR) was set up in 1987. Its job is to review the viability of sick units and to recommend rehabilitation or closure.

7. "Indigenous availability" criteria and loss in foreign competition

The "indigenous availability" criteria for the issue of import licences effectively ruled out foreign competition. Domestic competition was limited by the Capital Goods licences and the industrial licensing restrictions on entry and capacity expansion. Since all firms were entitled to their "fair" share of import licences, and since the licences were legally non-transferable, there was no way by which more efficient firms could bid away the scarce imported inputs from less efficient firms. The absence of competition implied that there were limited incentives for cost reduction. The indigenous availability criterion also ensured automatic protection to any domestic producer of an import-substitute "regardless of cost, efficiency and comparative advantage"

8. State and natural monopoly

In a number of important infrastructure industries such as transport, communications and power, state monopolies persist. In certain cases limited privatisation has taken place but a suitable regulatory framework is still evolving. In areas that were traditionally considered natural monopolies, one solution was to have State run monopolies on the assumption that these set the right prices and maximised welfare. The other option was to have regulated private participants, where the regulators' job was to set prices that mimicked a competitive market and thus maximised welfare. In certain cases, changes in technology have made competition possible in areas that were hitherto considered natural monopolies. There is considerable scope for introducing regulated competition into most of these areas.

9. Essential features of Shri Raghavan Committee report

Although significant steps have been taken to increase competition in various sectors of the economy, a number of important things need to be done that are essential for a competition policy. There is the need for a Competition Law Tribunal (Competition Commission of India) that will act as a watch-dog for the introduction and maintenance of competition policy. It will promote the introduction of the required changes in the policy environment and once this is done, it will perform a pro-active advocacy function for competition. Competition Law should deal with anti-competitive practices, particularly cartelisation, price-fixing and other abuses of market power and should regulate mergers. It is important to ensure that such legislation does not itself become anti-competitive and this is a real danger. For this, it is necessary to ensure that the law is precise and discretion is kept at a minimum.

1. Under the extant MRTP Act, there is a requirement for registration of agreements relating to restrictive trade practices. It is not clear from experience as to what purpose the registration serves, apart from adding to unnecessary paper work. The new Competition Law should scrap the registration requirements altogether.
2. The essence and spirit of competition should be preserved while positing the Competition Policy and seeking to harmonise the conflicts between Competition Policy and Governmental Policy.
3. The Industries (Development and Regulation) Act, 1951 may no longer be necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and National heritage protection considerations etc.
4. There should be no reservation for the small-scale sector of products which are on Open

   General Licence (OGL) for imports. There should be a progressive reduction and ultimate elimination of reservation of products for the small scale industrial and handloom sectors. Cheaper credit in the form of bank credit rate linked to the inflation rate should be extended to these sectors to enable them to become and be competitive. The threshold limit for the small scale industrial and small scale service sectors needs to be increased.
5. The economic reforms of liberalisation, deregulation and privatisation need to be further

   progressed and should be so designed that they strengthen the Competition Policy and viceversa.
6. All trade policies should be open, non-discriminatory and rule-bound. They should fall within the contours of the competition principles. All physical and fiscal controls on the movement of goods throughout the country should be abolished.
7. Government should divest its shares and assets in State monopolies and public enterprises and privatise them in all sectors other than those subserving defence and security needs and sovereign functions. All State monopolies and public enterprises will be under the surveillance of Competition Policy to prevent monopolistic, restrictive and unfair trade practices on their part.
8. The Industrial Disputes Act, 1947 and the connected statutes need to be amended to provide for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.
9. Structures like BIFR need to be eliminated.
10. Concerns relating to trade dimensions vis-à-vis WTO Agreements and principles need to be squarely addressed.
11. Competition Law and Competition Law Authority: For implementing the Competition Policy/Law, it is necessary to establish a Competition Law Authority (Competition Commission of India) with adequate powers for advocacy of competition policy, adjudication, and effective enforcement of the

Law and for implementation of its decisions. The following principles are desirable in designing and implementation of Competition Law.

a. The Competition Law should provide a system of checks and balances by ensuring due process of law with provisions for appeal and review.

b. The Competition Law Authority should be a multi-member body comprised of eminent and erudite persons of integrity from the fields of Judiciary, Economics, Law, International

c. Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. Having an appropriate provision for their removal only with the concurrence of the Apex Court may ensure their independent functioning.

d. The Competition Law Authority should be independent and insulated from political and budgetary controls of the Government.

e. Competition Law should separate the investigative, prosecutorial and adjudicative functions.

f. Competition Law should have punitive provisions for punishing the offenders besides other remedial methods (reformatory).

g. The proceedings of the Competition Law Authority should be transparent, non discriminatory and rule-bound.

h. The Competition Law Authority should have a positive advocacy role in shaping policies affecting Competition.

12. The State Monopolies, Government procurement and foreign companies should be subject to the Competition Law. The Law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made.

13. Bodies administering the various professions should use their autonomy and privileges for regulating the standard and quality of the profession and not to limit competition.

14. If quality and safety standards for goods and services are designed to prevent market access, such practices will constitute abuse of dominance/exclusionary practices.

15. Certain anti-competitive practices should be presumed to be illegal. Blatant price, quantity, bid and territory sharing agreements and cartels should be presumed to be illegal.

16. Abuse of dominance rather than dominance needs to be frowned upon for which relevant market will be an important factor.

17. Predatory pricing will be treated as an abuse, only if it is indulged in by a dominant undertaking.

18. Exclusionary practices which create a barrier to new entrants or force existing competitors out of the market will attract the Competition Law.

19. Mergers beyond a threshold limit in terms of assets will require pre-notification. If no reasoned order, prohibiting the merger is received within 90 days it should be deemed to have been approved. In adjudicating a merger, potential efficiency losses from the merger should be weighed against potential gains.

1.3. c. INDIAN COMPETITION REGIME AND THE COMPETITION ACT, 2002

Based on SVS Raghavan Committee report the Central Government enacted Competition Act by rep repealing the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and also dissolved the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act. The Competition Act, 2002, which establishes the Competition Commission of India (the Commission / CCI), provides a regulatory regime that prohibits abuse of market power, whether acquired through concert, dominance, or combination, and thereby protects freedom of enterprises at market place.

This enables the enterprises to compete among themselves on merits on a level playing field for a larger share of the market. As a consequence, each enterprise tries to do better than others by improving its efficiencies: technological, productive, dynamic (innovation) and so on. Some enterprises thrive, others lose and may even have to exit, but the economy always gains, for it is only the most efficient ones that survive. The surviving enterprises generate the highest return on resources. The result of this approach has been astounding. From a largely controlled, state-owned and inward-looking economy, India has become a more liberal, more private sector led and more globalized economy. Importantly, the success of reforms reinforced faith in the market: a faith that demand for and supply of goods and services determine the two major economic outcomes, namely, quantities to be produced in the economy and prices at which these are to be exchanged, in a manner that is best for the economy.

OBJECT OF COMPETITION ACT:

"Economic development of the country"

1. Establishment of a Commission to prevent practices having adverse effect on Competition.
2. To promote and sustain competition in markets
3. To protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets and for matters connected therewith or incidental thereto.
4. To prohibit anti-competitive agreements like cartels, which restrict freedom of trade and cause consumer harm by way of limiting production and distribution of goods and services and fixing prices higher than normal
5. To prohibits abusive behaviour of a dominant firm, who through its position of dominance may restrict markets and set unfair and discriminatory conditions:
6. To regulate mergers and acquisitions of large corporations in order to safeguard competitivemarkets
7. Competition advocacy by spreading competition literacy.

UNIT –II

ANTI COMPETITIVE AGREEMENTS

The objective of a section 3 is to promote efficiency and prohibits an enterprise or person or their associations from entering into an agreement which causes or likely to cause an appreciable adverse effect on competition within India. The term adverse effect on competition refers not to particular list of agreement s but to a particular economic consequence which may be produced by different sort of agreements in varying circumstances.

S.2 (b) of Competition Act, 2002 defines agreement as ,

***"agreement"** includes any arrangement or understanding or action in concert,—*
(i) whether or not, such arrangement, understanding or action is formal or in writing, or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings
The definition given here is wider in nature because of the reason of its inclusiveness. Chapter 3 of the Act speaks about the prohibition of certain agreements
Anti-competitive agreements

s.3. Anti competitive agreements

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which--

(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation - For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely

affecting or manipulating the process for bidding (4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including.

(a) tie-in arrangement;
(b) exclusive supply agreement;
(c) exclusive distribution agreement;
(d)refusal to deal;
(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation - For the purposes of this sub-section,-
(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict-(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

(a) theCopyrightAct, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods(Registration and Protection) Act, 1999 (48 of 1999); (e)the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Mogul Steamship Co v. McGregor[16]

McGregor, Gow& Co. represented a group of ship merchants engaged in the Chinese tea trade. Mogul Steamship (Mogul) (plaintiff) was also a ship merchant engaged in the tea trade. All the McGregor ships formed an agreement with each other to drastically undercut the price of tea for the purpose of driving away all other competitors, including Mogul. Additionally, the McGregor group offered a five percent rebate to all local shippers and agents who agreed to exclusively deal with them. Mogul brought suit against McGregor for unfair competition. The lower court held for McGregor, and Mogul appealed.Held that the monopolies were unlawful because of their restrictions upon individual freedom of contract and their injury to the public at common law.

s.3 classifies agreements in two types

1. Horizontal agreements
2. Vertical agreements

2.1. Horizontal agreements s.3 (3)

"Horizontal Agreement"[17] means an agreement between enterprises, each of which operates at the same level in the production or distribution chain. Defined under Section 3(3) of the Act, horizontal agreements include agreement which:

a) **Directly or indirectly determine purchase or sale prices:** Fixing of prices by competitors is a horizontal agreement wherein competitors conspire to raise, decrease, fix or stabilize prices in a specific market. The prices in a competitive market should be determined freely on the basis of demand and supply and not as a result of an agreement between the competitors. An understanding between the competitors under which the competitors agree to take actions to raise, decrease, fix or stabilize prices would be anticompetitive. Such agreements are oftcn done in secret but can be unearthed, through circumstantial evidence. Fix or stabilize prices would be anticompetitive. Such agreements are often done in secret but can be unearthed through circumstantial evidence.

Example 1:

Businessman 1: Every shop in the mall is slashing their prices.

Businessman 2: Now we have to lower our prices too.

Businessman 1: Look, we'll all end up making less if we go on like this. Why don't we talk to other owners and stop the price war? Let's fix the prices together. Then we can keep our margin.

Businessman 2: That sounds like a smart plan. Let's talk to other owner

Businessman 3: Smart Plan? If you're smart, you'll know this is against the Competition Law.

Businessman 1: Come on! No one cares about small businesses like us.

Businessman 3: That's not right! It's got nothing to do with the business size. Price fixing is wrong. I am not going to do anything illegal.

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[16] 1892 AC 25

[17] INTRODUCTION TO COMPETITION LAW, CCI, Part I, Basic Introduction.

Inference: Price-fixing is serious anti-competitive conduct under the Competition Law. No business, big or small, should agree with theircompetitors to fix prices. Don't cheat. Compete.

2.1.1 CARTEL AS A RESTRICTIVE TRADE PRACTICE UNDER MRTP ACT

The MRTP Act empowered the Central Government[18] to set up an authority, called the MRTPC, which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on suomoto basis.

The DGIR used to report directly to the Ministry of Corporate Affairs and not the MRTPC Commission. However, as per the Competition Act, the DG (IR) would report directly to the Commission. Complaints regarding restrictive trade practices from affected parties have to be referred to the DG (IR) for conducting preliminary investigation as per section 11 and 36C of the MRTP Act. The DG (IR), after completion of the preliminary investigation and as a result of its findings, submits an application to the MRTPC for an enquiry. Restrictive trade practices are generally those practices that have an effect on prevention, distortion and restriction of competition. For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice

One example of a RTP is a cartel. As held in ***Union of India & Others v. Hindustan Development Corporation***[19]"a cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". Under the MRTP Act, a cartel is categorised as an RTP, which has been defined as "a trade practice which has or may have the effect of preventing, distorting or restricting competition" (Section 2(o) of the MRTP Act). Various categories of agreements enumerated under section 33(1) of the MRTP Act, including agreements, which restrict persons from whom certain goods can be purchased, have been recognised as per se restrictive.

Cartels, fall under clause (d) of the section, which states that "any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers shall be deemed for the purpose of this Act, to be an agreement relating to restrictive trade practices and shall be subjected to registration as under Section 35 of the MRTP Act". However, such agreements are not per se void or illegal. The MRTPC would still require undertaking an enquiry under Section 37 of the MRTP Act, as to whether the agreements are prejudicial to public interest or not. Until the time that the MRTPC declares the agreement as prejudicial to public interest, the parties may continue to conduct trade and business as usual.

Under the MRTP Act, the only power vested with the MRTPC with respect to restrictive trade practices such as cartels, is to issue a 'cease and desist order' or to permit the parties to a collusive agreement to modify the agreement so that it is no longer prejudicial to public interest. As mentioned above, parties until they are directed by the MRTPC could continue with the restrictive trade practice. At the most when a party is called

[18] [illegible] (accessed on 15th October 2017)

[19] 1994 (3) [illegible]

and a restrictive trade practice is established, it may be directed to discontinue with the practice and only if it continues with the practice after the direction, would it be punishable for contravening an order made under Section 31 and 37 as provided in Section 50 of the MRTP Act. The MRTP Act grants the MRTPC the power to search and seize vital information necessary for proving a cartel. However, the act did not grant leniency provision, which the Competition Act now empowers the CCI with.

Under the MRTP Act, even when the facts, as discovered during the inquiry, establish the existence of a restrictive trade practice, the onus is on the accused to show that the restriction is not against public interest or that the restriction is not unreasonable. Looking at the cases of cartels, no matter how malicious the offences may be in the eyes of the public, no matter how serious the detriment caused may be, the MRTPC was without any effective weapon to grant justice to the aggrieved parties. The consequences are that the respondents, in case a complaint is lodged with respect to such breach of law or the MRTPC inquires suomoto, can still enjoy the fruits of their illegal acts, which may amount to a very large economic rent. Yet no penalty can be levied because the MRTPC has not been empowered to impose penalties or spell out an order of imprisonment to the offenders; what it can do is just pass a cease and desist order. However, there have been cases in the past where the MRTPC as per section 12B have awarded compensation, but it failed to do so in cartel cases.

Kiroloskar Oil Engines Ltd. v. MRTPC[20]

MRTPC ordered the appellant to pay compensation for indulging in Restrictive Trade Practice. But as the necessary ingredients for establishing indulgence of restrictive trade practice have not been found, the order could not be sustained.

Pennwalt (I) Ltd. & Another v. MRTPC[21]

The respondent filed an application u/s 12B of the MRTP Act for compensation of Rs 110.48 lakhs for supplying defective machinery which led to unfair trade practice. The MRTPC filed a show cause notice on receipt of the application. The petitioner challenged the notice. The petition was rejected.

R.C. Sood& Co. (P) Ltd. v. MRTPC[22]

Petitioners by way of writ petition challenged the notice issued against the application of second respondent under section 12B of MRTP Act, claiming compensation for loses caused as a result of unfair trade practice. The petition was rejected and it was held that it is not necessary that MRTPC should inquire first or investigate into the allegations before issuing notice u/s 12B of the MRTP Act.

DG (IR) v. Modi Alkali and Chemicals Ltd[23]

An anonymous complaint was received alleging that some of the leading undertakings in Northern India have formed a cartel for hiking the prices of their products. The prices of chlorine gas and hydrochloric acid had an increase of 277 percent and 200 percent within six and four months respectively in the year 1992. The same were contended to be a result of an agreement amongst the parties to create artificial scarcity, in order to raise prices of their products. Since the prices of raw materials namely sodium chloride and electricity had more or less remained the same, it was stated to be a fictitious crisis created to take advantage of the market and increase the prices of their products. Investigation: The MRTPC directed the DG (IR) to

[20] JT2002 (10) SC53
[21] AIR1999Delhi23
[22] 1996 (38) DRJ118
[23] 2002, CTJ 459 (MRTP)

carry out the preliminary investigation. The DG submitted its preliminary investigation report (PIR) which said that no case of cartel has been found and recommended that no action should be taken. However, the MRTPC after considering the PIR was of the view that the case needed enquiry and directed the issuance of a Notice of Enquiry.

The respondents raised an objection on the ground that the notice of enquiry lacked a concise statement of material fact on which the notice was based, not meriting to cognisance based upon an anonymous complaint. The DG (IR) contended that the present notice of enquiry had been issued under Section 10 (a) (iv) of the MRTP Act, which empowers the MRTPC to inquire into restrictive trade practice upon its own knowledge or on a complaint or information. Information can be derived from an invalid/irregular complaint or from any anonymous letter as held by the Calcutta High Court in the case of ***ITC Limited v. MRTP Commission &Ors.***[24]. Thus, it was held that the objection with regard to the anonymous complaint was not valid. Order: The Commission then looked into the allegation of formation of a cartel. "Cartel" was not defined in the MRTP Act; however, the Commission referred to a preceding judicial pronouncements – "cartel is an association of producers who by an agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity".

Three essential factors were identified to establish the existence of a cartel, namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy and (iii) intent to gain monopoly or restrict/eliminate competition. Thus, keeping in mind the definition of cartels and the necessary elements, the Commission was of the view that, except for the use of the expression 'cartel', there was no material evidence to suggest parity of prices or meeting of minds. The Commission observed that the notice of enquiry and the subsequent investigation lacked relevant and necessary information with regard to the parties forming a cartel leading to distortion and restriction of competition in the market. With the essential factors not proved, the Commission agreed with the respondents that prima facie there was no case of a cartel.

In Alkali & Chemical Corporation of India Ltd.And Bayer India Ltd.,

The companies were engaged in the manufacture and sale of rubber chemicals and amongst themselves possessed a dominant share of the total market for these products. There were charges against them making identical increases in prices on five to six occasions on or around the same date. However, there was no direct evidence available behind the increase in prices. Investigation and Order: The MRTPC observed while making its judgment, that "in the absence of any direct evidence of cartel behaviour and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in the proof of any plus factor to
bolster the circumstances of price parallelism, we find it unsafe to conclude that the respondents indulged in any cartel for raising the prices".

Sirmur Truck Operator's case[25] and Truck Operators Union v. Mr. N.C. Gupta & Mr. Sardar[26]

The nature of allegation was the same, i.e. the respondents had acted in concert while fixing the freight rates for rendering transport services and that they did not allow non-member truck operators to load and unload goods, unless they joined the union. Investigation: In both the cases, the MRTPC instituted an enquiry on the grounds that practices indulged in by respondents fell under section 33(1)(d) and Section 2(o) of the MRTP Act. For substantiating the allegations made against the respondents, in the Sirmur Truck Operators case, the DG (IR) submitted a lot of documents, such as the freight rates circulated by the respondent union and the

[24](1996) 46 Comp. Case. 619
[25] (1995) 3 CTJ 332 (MRTPC)
[26] (1995) 3 CTJ 70 (MRTPC)

letters exchanged between the respondents. Taking the freight rates as evidence, it was seen that there was no information on the freight list, that with the increase or reduction of the rates of diesel oil by the Government of India, there would be increase or decrease in freight rates fixed by the respondents.

Thus, there was no doubt that fixing the rates for the truck operators and asking the members to charge freight only on the rates fixed by the union was an instance of restrictive trade practice falling under clause (d) of Section 33(1), which states: "Every agreement falling within one or more of the following categories shall be deemed, for the purpose of this Act, to be an agreement relating to restrictive trade practice and shall be subjected to registration, namely... (d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers".

In the Truck Operator's union case, the respondents did not co-operate with the investigation and the DG (IR) conducted an on-spot investigation to assess the correctness of the allegations. During the on-spot investigation, they met a member of the union, who did orally acknowledge that unless the complainant truck owners become members of the union, they were not permitted to operate. Order: The MRTPC in the both the cases, concluded on the basis of the evidence, that preventing and restricting competitors from doing business was undoubtedly a restrictive trade practice falling under Section 2(o) of the MRTP Act. Accordingly, the Commission issued an order of 'cease and desist' against the respondents and directed them to stop the trade practice.

American Natural Soda Ash Corporation (ANSAC) v. Alkali Manufacturers Association of India (AMAI) and others, ANSAC

A joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI, whose members included the major Indian soda ash producers, complained to the MRTPC to take action against ANSAC for cartelised exports to India. 69 Investigation: The MRTPC instituted an enquiry and passed an ad interim injunction on ANSAC, restraining it from cartelised exports to India. In June 1997, the Commission rejected ANSAC's petition for vacating the injunction. Quoting from the ANSAC membership agreement, it held that ANSAC was prima facie a cartel which was carrying out part of its trade practices in India, giving the Commission jurisdiction under Section 14 of the MRTP Act, even though the cartel itself was formed outside India. ANSAC made an appeal to the Supreme Court of India, on the following grounds:

1. Under the MRTP Act, the MRTPC had no power to stop import
2. The MRTP Act did not confer extra-territorial jurisdiction to the MRTPC
3. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved and that too only after the goods had been imported into India.

In this case, the shipment had not actually taken place. Order: The Supreme Court did not go into the allegation of cartelisation, but instead held that the wording of the MRTP Act did not give the MRTPC any extra territorial jurisdiction. The MRTPC therefore could not take action against foreign cartels or the pricing of exports to India, nor could it restrict imports. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too only after the goods had been imported into India. The Supreme Court overturned the order of the MRTPC.

In DG (IR) v. Sumitomo Corporation, Tokyo, Japan and others[27]

The MRTP was called upon to decide on the charges of restrictive trade practices of manipulating prices of products within the meaning of Section 2(o)(ii)78 of the MRTP Act. On the receipt of information by the commission regarding collusive tendering in the steel industry and quoting of identical prices, the commission appointed a consultant who reported that the Japanese companies along with their Indian agents have colluded and were quoting identical prices for input material required by the steel plant. Investigation: In the preliminary investigation, it was revealed that the prices quoted by the Japanese companies and their Indian agents were identical for 8 items pursuant to a global tender floated by SAIL. However, there were some sort of negotiations between the relevant authorities and the Japanese companies, after which the latter revised their rates, which also were identical to the prices quoted by their apex body, i.e. the Rollers Exporters Association. The same was the case with regard to another global tender in the year 1984 invited by the Rourkella Steel Plant (RSP) to supply qualified rolls.

On the basis of a complaint initiated by the RSP, the DG was of the view that the respondents were indulging in restrictive trade practice within the meaning of section 2(o)(ii) of the Act. Accordingly a Notice of Enquiry was initiated. In response to the investigation, the defendants submitted their defence on the following grounds:

1. absence of any factual allegations regarding the manipulation of prices imposing unjustified cost on consumers, the issuance of notice of enquiry was misconceived;
2. participation of 35 companies from 13 countries, identical prices as quoted by the Japanese companies would in no way lead to manipulation of prices imposing unjustified costs;
3. restriction of competition was to be seen with reference to context of SAIL, which had 90 percent of the market share in product and supplies; ultimate decision for placement of orders to suppliers rested with SAIL, as well as RSP, hence, the uniformity in prices would have no significance;

    a. orders under the global tenders that were floated were for 18 rolls out of 228 pieces; and
    b. The Indian agents, also a party to the investigation, pleaded that they had no role to play in either fixation of prices of the products or in negotiations with the purchaser.

The MRTPC focused on the depositions made by the defendants, where it was confirmed that their apex body (Rollers Exporters Association) conducted the negotiations. The variations in sales commission to their respective agents and conditions of delivery had also existed but there were no differences in the price the purchaser had to pay. Thus, these facts clearly established a case of price fixing cartel by the defendants. However, the defendants contended that it had in no way been established that quotations of identical prices by them had been instrumental in preventing or impairing competition in any manner.

In any case, the order for supply as placed by them was so small that it had virtually negligible effect on competition in the market and the same would bring the case in the ambit of provisions of Section 38 (1) (d) of the Act – (1) For the purposes of any proceedings before the Commission under section 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the following circumstances, that is to say – "(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other

[27] 2004 CTJ 26 (MRTP)

such persons, controls a preponderant part of the market for such goods". With reference to the definition of cartel, as mentioned above in **DG (IR) v. Modi Alkali** and Chemicals Ltd, quoting of identical prices pursuant to a global tender, negotiation of prices by the parties other than those who had submitted the tenders, having a close nexus in the trade dealings were a few factors strongly pointing to an action or activity undertaken by the respondents for manipulating the prices, which had adversely affected competition in the market.

In addition to that, it was argued that the arrangements between the respondents and its allied parties in quoting identical prices had narrowed down the option of the purchasers to buy the goods, despite there being other 35 companies. With regard to the allegation that SAIL had 90 per cent market power there was a need to make a distinction between voluntary decisions by players about not entering the market and those being pushed by the State Government. Thus, the allegations raised by the respondents, were not sustainable. Keeping in mind the facts of the case, it was held that the respondents had indulged in cartelisation. However, the respondents argued that they were liable to be exempted in lieu of the gateways, to which the Commission also agreed. The Commission agreed that in terms of both the quantity and value of the rolls, it would have insignificant impact on the cost of rolled products. Order: In lieu of the gateway available to the defendants, i.e. Section 38 (1)(d), the notice of enquiry was discharged. The allegation of cartelisation was only discharged on the ground of the availability of the gateway to the respondents.

The Competition Act covers cartels under Section 3, i.e. anti competitive agreements. According to the section, it is presumed that such agreements cause appreciable harm to competition. Thus the burden of proof in any cartel case is on the defendant to prove that the presumption is not causing appreciable adverse effect on competition. A specific goal of the Competition Act is the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors.

The CCI is required to control agreements among competing enterprises on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes which are likely to harm competition need to be addressed. The Competition Act lists certain factors that are to be taken into consideration for determining whether an agreement or a practice has an appreciable adverse effect on competition, namely, creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumers; improvements in production or distribution of goods or provisions of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

CCI is empowered under Section 19 of the Act, to inquire into any alleged contravention of the provision either on suomoto basis or on receipt of information by any person, consumer or association or on a reference made to it by the Central or State Government. The Competition Act empowers the CCI with leniency provisions and also allows the Director General to undertake search and seizure by invoking sections 240 and 240 A of the Companies Act, 1956. In addition, the Competition Act extends its jurisdiction to cover any agreement referred to in section 3, which have been entered into outside India; and any party to such agreement, who is outside India. The CCI shall "have power to inquire into such agreement [...] if such agreement [...] has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India." This is known as the "effects doctrine" (Section 32). The CCI has the power to grant interim relief (Section 33), impose penalty (Section 27(b)) and to grant any other appropriate relief. The CCI also has the power to levy penalty for contravention of its orders, making of false statements or omission to furnish material information, etc.

s.2 (c) "cartel" includes 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;

Cartels are agreements between enterprises (including association of enterprises) not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice. A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets.

An important dimension in the definition of a cartel is that it requires an agreement between competing enterprises, not to compete, or to restrict competition. Agreements between enterprises engaged in identical or similar trade of goods or provision of services (commonly known as horizontal agreements), including cartels, of four types specified in the Act are presumed to have appreciable adverse effect on co s.2(i)mpetition and, therefore, are anti-competitive and void.

There are typically four types of cartel conduct:

1. price fixing;
2. market sharing;
3. output restricting; and
4. bid rigging

Common Characteristic of cartels

Usually cartels function in secrecy. The members of a cartel, by and large, seek to camouflage their activities to avoid detection by the Commission. Perpetuation of cartels is ensured through retaliation threats. If any member cheats, the cartel members retaliate through temporary price cuts to take business away or can isolate the cheating member. Another method, known as compensation scheme, is resorted to in order to discourage cheating. Under this scheme, if the member of a cartel was found to have sold more than its allocated share, it would have to compensate the other members. If there is effective competition in the market, cartels would find it difficult to be formed and sustained. Some of the conditions that are conducive to cartelization are :

a) high concentration - few competitors
b) high entry and exit barriers
c) homogeneity of the products (similar products)
d) similar production costs
e) excess capacity
f) high dependence of the consumers on the product
g) history of collusion.

PARTIES TO A CARTEL

Person s.2(l)

(l) "person" includes—

(i) an individual;
(ii) a Hindu undivided family; (iii) a company;

(iv) a firm;
(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; or
(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
(vii) any body corporate incorporated by or under the laws of a country outside India;
(viii) a co-operative society registered under any law relating to cooperative societies;
(ix) a local authority;
(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

Enterprises s.2(h)

"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.-For the purposes of this clause,—

(a) "activity" includes profession or occupation;
(b) "article" includes a new article and "service"includes a new service;
(c) "unit" or "division", in relation to an enterprise, includes
(d). a plant or factory established for the production, storage, supply. distribution, acquisition or control of any article or goods;
(f) any branch or office established for the provision of any service;

s.2(o) **Price**

"price", in relation to the salef any goods or to the performance ofanyservices, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;

s.2(i) **goods**

"goods" means goods as defined in the Sale of Goods Act, 1930 (3 of1930) and includes—
(A) products manufactured, processed or mined; (B)debentures, stocks and shares after allotment;
(B) in relation to goods supplied, distributed or controlled in India, goods imported into India;

s.2(u) **service**

"service" means service of anydescription which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material

treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;

Investigation

The Commission, on being convinced that there exists a prima facie case of 'cartel', shall direct the Director General to cause an investigation and furnish a report. The Director General, for the purpose of carrying out investigation, is vested with powers of civil court besides powers to conduct 'search and seizure'

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Enforcement

The Commission is empowered to inquire into any cartel, and to impose on each member of the cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of average of the turnover of the cartel in the preceding three financial years, whichever is higher. In case an enterprise is a 'company' its directors/officials who are guilty are liable to be proceeded against and punished. In addition, the Commission has the power to pass inter alia any or all of the following orders (section 27): (i) direct the parties to a cartel agreement to discontinue and not to re-enter such agreement; (ii) award compensation on an application to any person for any loss or damage caused as a result of cartel; (iii) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and (iv) pass any other order as it may deem fit.

In re Lombard Club[28]

Fact: Each month the CEOs of the largest Austrian banks got together as the top-level body ('Lombard Club'). One level down were the product-based specialist committees, most of which met in Vienna. These included the 'Lending Rates Committees' and the 'Deposit Rates Committees', which, as their names suggest, dealt with lending and deposit interest rates. Both the Lombard Club and the Vienna-based committees had a guiding function for the numerous 'regional committees', which held regular meetings in every province of Austria. Within the Lombard network, a constant flow of information took place in particular between the various committees as well as between them and the Lombard Club at the top. In controversial cases, the Lombard Club's guidance was awaited. Discussions in one committee were often suspended pending agreement in another. In addition, even outside this institutionalised network, numerous contacts took place between representatives of the banks concerned — sometimes at the highest level — on interest rates and charges/fees.

Held: 'various discussions and agreements', 'further telephone conversations', 'telephone contacts between the banks', to 'the managing directors [phoning] each other and [discussing] a co-ordinated approach as soon as possible' or to 'final negotiation' could be considered as cartel agreement. And Commission imposed fines totalling € 124,26 million on eight Austrian banks for their participation in a wide-ranging price cartel. In a highly institutionalised price-fixing scheme, the CEOs of the banks met every month, except August, as the "Lombard Club", a cartel which covered the entire Austrian territory "down to the smallest village", as one bank put it with a view to fixing deposit, lending and other rates to the detriment of businesses and consumers in Austria. The cartel started well before the accession of Austria to the European Economic Area in 1994. But in this case, the Commission can only levy fines for the period starting with EU membership (1995) until June 1998, when it carried out surprise inspections at the banks' premises putting an end to the cartel behaviour.

[28] Case COMP/36.571/D-1: Austrian banks

Builders Association of India v. Cement Manufacturers' Association and Ors.[29]

Ashok Chawla, Chairperson, H.C. Gupta, Member (G), R. Prasad, Member (R), GeetaGouri, Member (GG), AnuragGoel, Member (AG), M.L. Tayal, Member (T) and Shiv Narayan Dhingra, Member (D)

Fact of the case:An information was filed under S. 19(1)(a)[3] of the Act by the Builder's Association of India (the "Informant") against Cement Manufacturers Association ("CMA") and 11 cement manufacturing companies[4], for alleged violation of S. 3 (anti-competitive agreement) and S. 4 (abuse of dominant position) of the Act. On June 20, 2012, the CCI found the parties in contravention of S. 3(3)(a) and S. 3(3)(b)[5] read with S. 3(1)[6] and imposed monetary penalty along with directions to cease and desist from indulging in any anticompetitive activity. It further prohibited CMA to engage and associate itself from collecting and circulating information about wholesale and retail prices and details on production and dispatches of cement companies to its members.

Anti-Competitive Agreement:With respect to S.3, the Respondents questioned the legality of the manner in which the DG conducted the investigations and the economic soundness of the evidence relied upon. It was contended by the cement manufacturing companies that:

a) There was no direct evidence to showcase existence of a cartel between the Respondents and mere circumstantial evidence falls far from sufficient.
b) Price parallelism per se cannot justify cartelization, unless adverse affect on the competition is established.
c) Mere price correlation, dispatch parallelism and generalized under utilization of capacity to cost benchmark is inadequate to analyze concerted action for cartelization.

Further CMA contended that, collection of information about prices and production was under the instructions from Department of Industrial Policy and Promotion which was not confidential information, but available in the public domain and also widely published.

Abuse of Dominance: On this point the CCI observed that cement market was characterized by several players where no single firm or group was in a position to operate independent of competitive forces or affect its competitors or consumers in its favor. Further, since the Act did not provide for concept of collective dominance, the Respondents could not collectively be considered to hold a dominant position. Hence, no investigation into abuse was required.

Questions for determination: CCI framed 2 questions for determination; whether alleged conduct of the Respondents was an (i) anti-competitive agreement under S. 3 and (ii) amounted to abuse of dominance under S.4 of the Act.

Informant had alleged that Respondents were engaged in cartelization by limiting and restricting production and supply of cement and collusive price fixing through price parallelism.[10] It was argued that they purposefully did not make maximum utilization of installed production capacity, resulting in artificial scarcity, restricted supply, higher cement prices and abnormal profits. It was submitted that respondents had divided Indian market into 5 zones, based on their operations and increased price without any direct nexus with the varied input costs and production value incurred at different regions. These activities have triggered an adverse affect on the competition in the real estate sector and affected consumer interests at large. Regarding the abuse of dominance, it was submitted that the cement manufacturing companies had a

[29]Case No. 29/2010; 2012 CompLR 629 (CCI)

dominant position by collectively holding 57.23% market share in India, which they abused to arbitrarily increase cement prices.

CCI Order: Relying on statistical information on price, production, supply in cement industry, minutes and reports of CMA, facility utilization reports, party testimonies, the CCI held that the Respondents operated in a cartel to cause appreciable adverse effect in competition in cement industry for May 2009 to March 2011. CCI observed that:

a. S. 2(b) which defines "agreement" (any arrangement or understanding or action in concert, whether or not the same is in formal or in writing or intended to be enforceable by legal proceedings), is wide and will include tacit agreement. In cartelization, parties are cautious to avoid explicit and direct evidence such as minutes, paper trails, call records, inevitably mandating an inference to be based on circumstantial evidence taken as a whole and economic indices. CCI relied on Dyestuff's case,[11] where European Court of Justice observed that, whether there was a concerted action can only be correctly determined if the evidence considered as a whole and not in isolation, bearing in mind the peculiar feature of the market in question. It further noted that given the clandestine nature of cartels, circumstantial evidence is of no less value than direct evidence to prove cartelization.

b. CMA, through its meetings, and reports provided a platform for sharing of price, production, supply related information for sharing between the cement manufacturing companies. CCI relied on the T-mobile case[12] where European Court of Justice had held that, in an oligopolistic market[13] (like cement industry) the exchange of such information that increases the predictability of market operations between competitors leads to restricted scope for competition.

c. Where there is strong price correlation between involved parties, a positive inference is drawn towards price parallelism indicating concerted action. Cement industry being seasonal, homogenic market is subject to volatile prices, higher variable costs and is susceptible to parallel price pattern. However, CCI noted that even though price parallelism is not conclusive evidence, the same in conjunct with other "plus factors", such as easy access to competition information, product and dispatch parallelism, and capacity under utilization will suffice to prove cartel.

d. Cement manufacturing companies had deliberately reduced their production and produced much less than the installed capacity to create an artificial scarcity and raise the prices of cements in order to earn abnormal profits.

Based on this, CCI upheld that the Respondents were in breach of S. 3(3)(a) and S. 3(3)(b) read with S. 3(1) of the Act. This, in effect, means the Respondents have to deposit the specific penalty imposed on each of them. The figure can be computed as a percentage of the turnover or net profits, whichever is higher. CCI computed it on the basis of net profits over a defined period for each cement manufacturer. Additionally, CCI also imposed a penalty of 10% (Rs.6700 Cr.) of total receipts over a two year period. The penalty is payable within 60 days of receipt of the order.

COMPAT Order:Aggrieved by CCI's orders, the Respondents appealed before the Competition Appellate Tribunal ("COMPAT"), on the grounds of violation of principles of natural justice. One of the questions that rose was, whether CCI's Chairperson who did not participate in the hearing of arguments of the Respondents could become a party to the final order dated June 20, 2012. The Respondents also raised objections on the grounds of unfair hearing, bias and pre-determined mindset. COMPAT noted that thorough consideration was not given to the report of the Director General ("DG"), parties' submissions and interlocutory orders.[9] COMPAT observed that procedural defect in nature of non-observance of principles of natural justice cannot be cured in appeal, because if natural justice is violated in the first stage, the same cannot be given as true right in an appeal. No party can be compelled to satisfy an unjust trial. Accordingly, the COMPAT set aside the impugned orders and remitted the matter to the CCI for fresh adjudication of the

issues relating to the alleged violation of S. 3(3)(a) and S. 3(3)(b) read with S. 3(1) of the Act, in accordance with law.

Aalborg Portland A/S v. Commission of the European Communities[30]

European Union (EU) carried out investigations[31] into European cement producers and trade associations and adopted a statement of objections drawing a basic distinction between two types of objectionable practices namely prices at the international level and national level. The EU held that the cement undertakings infringed the provisions of Article 81 (1) of the EC Treaty by participating in an agreement designed to ensure non transhipment to home markets and to regulate cement transfers from one country to another by participating in an agreement on the exchange of price information. The European Court of Justice discussed the role of economic analysis in the detection of cement cartel case. The economic analysis can prove helpful in times when there is not sufficient documentary evidence to prove the existence of a cartel activity.

MP Malhotra v. Kingfisher-Jet Airways[32]

The Competition Commission of India has begun investigation in the alleged case of airline[33] cartelization in the form of code sharing agreement between the two airlines. Jet Airways and Kingfisher together control a market share of close to 60 percent. Apart from this combination there are only small market share holding airlines excluding Air India. So this combination may prove to be detrimental to the interest of the consumers and to the very spirit of the competition law. Also, the DG report has found that the code sharing agreement has breached sections 3 and 4 of the Competition Act, 2002. These sections deal with anti-competitive pacts regarding production, storage, distribution and supply and abuse of dominant position.

The CCI has reached a final determination in the case and found that there was no anti-competitive practice or a cartel to increase air fares in this case. But it can be said that such alliances may prove detrimental to competition in the relevant market as the main objective of an alliance is to strengthen or expand the aligning member's market presence and to redefine or consolidate their position in aggressively competitive global environment. Airline alliances benefit the consumer by offering seamless travel and services between a more extensive range of city pairs, reduction in traveling time, joint lounges and co-ordination of Frequent flier programs. But on other hand, alliance can significantly reduce competition on overlapping nonstop routes and overlapping connecting routes where the allied airlines were once main competitors.

The two airlines could form a monopoly, virtually killing all kinds of competition in the aviation sector.55 This code sharing agreement would result in formation of a cartel and may also result in an abuse of dominance.56 But as said before that rule of reason needs to be applied rather than just a theoretical doctrine or principles of cartelisation that prohibit industry practice such as code sharing per se.

Air India's Involvement in Fuel Surcharge Raising Cartel[34]

It was found that the airlines had conspired to raise fuel surcharge rates for air cargo to-and-from Korea between 1999 and 2007 in a concerted manner. The case included summoning 54 airline executives from all over the world for investigation and conducting a joint investigation with foreign competition authorities for the first time. The regulator found that the conspiracies took place on outbound shipments from Korea and inbound shipments to Korea from Hong Kong, Europe and Japan. The case showed that the airlines

[30] (C- 204/00 P); [2004]. ECR I-123
[31] http://www.circ.in/pdf/Case_Study_04.pdf (assessed on 6th September 2017)
[32] Case No.4 of 2009
[33] http://www.nlujodhpur.ac.in/downloads/clawcerque1.pdf (accessed on 15th October 2017)
[34] Case No. 30 of 2013

overcharged by $5.71 billion in the local market by imposing or increasing fuel surcharges during the eight-year period.

The uncovering of airline cartels on fuel surcharge actually began in 2006, when European and US authorities investigated few airlines including British Airways. The investigation came at a time when the airlines were facing high fuel costs and competition from low-cost carriers. The situation deteriorated further in 2007, as more airlines were inspected and charged for various anti-competitive practices. European Commission charged several airlines for fixing freight service prices. British Airways had to pay billions of dollars as fine as the UK and the US competition authorities denounced it for price fixing during the period 2006-07.

Korean Federal Trade Commission (KFTC) found that 21 airlines had conspired to raise the fuel surcharge rates for air cargo to and from Korea including Air India. Flag carrier Korean Air was fined the largest amount of KRW 48 billion, though the actual fine paid will be around KRW 22 billion as it was granted leniency for providing crucial information during the investigation. India's national carrier although escaped from being prosecuted by Korean Fair Trade Commission in the present case and a class action against 21 airlines followed the issuing of a combined $ 98.9 million as fine. From this case, we can see that Korean Air even after being a flag carrier and founded by South Korean Government in 1962 was penalised, and Air India despite escaping the penalty from KFTC was not brought to book or penalised by the Indian Antitrust Authorities even when there was a conclusive proof of Air India's involvement. Just because it is acting as government instrumentality (i.e. if Air India Ltd.'s corporate veil is pierced we can see the government officials are involved in the business decisions) so, it should be exempted from investigation of such conduct by CCI shows lackadaisical attitude of the Indian Antitrust Authorities.

As Air India by virtue of Aeronautical Information Circulars No. 08 of 2009 and the Air Corporation Act of 1953 gets preferential treatment in few matters, this creates disincentives for the national carrier to become a more efficient and financially leaner service provider. In order to level out the competitive field between private service providers and national carrier, preferential treatment legislation needs to be revised. Because poor business decisions of Air India are not punished by the market in the same way as poor decisions of other private air carriers. Bad business decisions of all private air carriers are punished by holders of the firm's debt whereas Air India is only accountable to the Indian government. This social safety net reduces Air India's incentive to compete in the same way as other private Indian carriers. Maintaining the viability of the national carrier is very important, however preferential treatment reduces the national carrier's incentive to compete and make sound business decisions. Furthermore, in order to incentivize Air India to become a leaner and more competitive service provider, the national carrier may be partially privatized. Also, to show India's commitment and law abiding attitude towards Declarations/Memorandum of Understanding (MoU) signed by India with BRICS and other countries for international cooperation in anti-trust issues.

Cartels for Charging High Ticket Pricing CCI received a fresh complaint in September 2013 from the Air Passengers Association of India (APAI), which has alleged that airlines were acting as cartels to push the ticket prices. Chennai-based APAI had approached CCI after a recent hike of as much as 25 per cent in air fares by most carriers. CCI Chairman Mr. Chawla said that CCI would need more information from APAI to proceed further, as the price movements were found to be a function of supply and demand during its earlier probes. CCI Chief also said that this matter has been looked into again and again, because the upward and downward movements in ticket prices have indeed been found to be in tandem.

At the same time, the prices had also been found to be moving in tandem with the forces of demand and supply, which is how a market should function and therefore no evidence could be seen of any cartelization. In the first week of September, all domestic carriers hiked their respective fares by about 25 per cent after a

steep rise in fuel prices. The hike was first announced by low-cost carrier Spice Jet and followed by other players like Jet, Air India, Indigo and Go Air followed suit. Although this matter has merely begun and not even close to its final determination, it is difficult to comment conclusively on the likelihood of cartel formed among the airlines to hike the ticket prices because it would need rational economic evidences to make sure that cartel exists and thereby satisfy rule of reason.

Coal India Limited (CIL) & Suppliers of Explosives[35]

Coal India Limited, as an Informant, had alleged that the explosive manufacturers had formed a cartel and consequently have violated Section 3 of the Act. The Commission vide its order dated 16.4.2012 found the act of boycott of e-reverse auction by the explosive suppliers to be in violation of Section 3(3)(b) and Section 3(3) (d) of the Act and imposed a penalty at the rate of 3% on the average of 3 years turnover on the 10 Opposite Parties named in the information filed. These Opposite Parties were also directed to 'cease & desist' from engaging in practices of manipulating process of bidding in any manner. Penalty of Rs.58,82,65,713 was imposed.

Varca Druggist & Chemist & Others and Chemists & Druggists Association (CDAG)

In an information filed by Varca Druggist & Chemist it was alleged that the Chemists & Druggists Association, Goa is indulging in unfair practices. The Commission vide order dated 11.6.12 found the conduct and practices being followed by the Chemists & Druggists Association to be anti competitive and in violation of Section 3(3) (a) and Section 3(3) (b). CDAG and its members were directed to 'cease & desist' from indulging in such practices, to file an undertaking that restrictions on appointment of stockists and wholesalers from non members of CDAG were done away with and that restricted clauses in their Circulars, MoU and Guidelines were removed. Penalty of Rs. 2.00,000/- was also imposed on CDAG.

M/s. Kansan News Pvt. Ltd. & M/s. Fast Way Transmission Pvt. Ltd. &Others

The Informant, who is running a current affairs TV channel "Day & Night News" alleged that Sh. Gurdeep Singh is directly controlling the business of all Opposite Parties. It was further alleged that Opposite Parties have acted as cartel by denying broadcasting the channel of the Informant in the State of Punjab and Union Territory of Chandigarh in violation of Section 3. The Commission vide its order dated 3.7.2012 found that four of the Opposite Parties were part of the same group and were in contravention of Section 4(2)(c) of the Act. The Commission imposed a penalty on the Opposite Party Group at the rate of 6% of their average turnover of the three proceeding years. Penalty of Rs.8,04,01,141 was imposed on Opposite Parties.

Sunshine Pictures Private Limited & Eros International Media Limited vs Central Circuit Cine Association, Indore &Ors.[36]

The Informant alleged that under the garb of a trade association the Opposite Party had become a vehicle for collusive conduct for persons and enterprises engaged in identical business of distribution and exhibition of films. The CCI noted that the associations were indulging in issuing circulars and letters of restricting the exhibition of films and taking punitive action against the Informants, in violation of provisions of Section 3(3)(b)of the Competition Act. Looking at the gravity of the allegations, the commission decided to impose a penalty on each of these associations at rate of 10% of the average of their three years total receipts.

[35] Case No.4 of 2010

[36] CCI Case No. 52 of 2010 and Case No. 56 of 2010

In Re. Aluminium Phosphide Tablets Manufacturers[37]

CCI received information from Food Corporation of India (FCI) relating to increase in cost of procurement due to anti-competitive agreement amongst manufacturers of aluminium phosphate tablets (which is needed for preservation of central pool food grains of FCI).The Commission found that the acts and conduct of three of the Opposite Parties (Excel Crop Care Ltd., Sandhya Organics Chemicals Pvt. Ltd. and United Phosphorus Ltd.) named in the information to be in violation of provisions of 3(3)(b) and 3(3)(d) of the Act. The Commission decided to impose a penalty @ 9% of average of 3 years turnover on these Opposite Parties. The penalty aggregated to Rs.317.91 crore was imposed on the parties.

Varca Druggist & Chemist & Others v. Chemist & Druggists Association, Goa[38]

This case[39] was initiated on a complaint filed by Varca Druggist & Chemist through its proprietor Mr. HemantPai Angle and two other proprietors of pharmaceutical drugs and medicines firms before the Director General (Investigation & Registrations), Monopolies & Restrictive Trade Practices Commission (DGIR, MRTPC) alleging that the Opposite Party, namely. Chemist & Druggist Association, Goa (CDAG) was indulging in restrictive trade practices. The case was transferred to the CCI on the repeal of MRTP Act. The CCI comes to the conclusion that the conduct and practices of CDAG were limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act.

FICCI – Multiplex Association of India Federation House v. United Producers Distributors &Ors.[40]

The informant FICCI-Multiplex Association of India had alleged that the respondents namely United Producers/Distributors Forum (UPDF), The Association of Motion Pictures and TV Programme Producers (AMPTPP) and the Film and Television Producers Gild of India Ltd. (FTPGI) were behaving like a cartel. The Informant alleged that UPDF is an association of film producers and distributors which includes both corporate houses and individuals independent film producers and distributors. The AMPTPP and FTPGI were the members of UPDF. It was further alleged that UPDF, AMPTPP and FTPGI produce and distribute almost 100% of the Hindi Films produced/supplied/distributed in India and thereby exercise almost complete control over the Indian Film Industry.

It had been further alleged that UPDF vide their notice dated 27.03.2009 had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the informant. It had been further informed that being aggrieved by the decision of UPDF various members have approached the informant and sought its assistance. The CCI after considering the contentions of the opposite parties on merit and after elaborate discussion ruled that Opposite Parties had contravened the provisions of Section 3(3)(a) and 3(3)(b) of the Competition Act. The CCI imposed a penalty of Rs. 1,00,000 on each of the 27 opposite parties.

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[37]Case No.2/2011

[38] MRTP C-127/2009/DGIR4/28

[39]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf (accessed on 15th October 2017)

[40] CCI Case No. 1 of 2009

In Re LPG Cylinder Manufacturers[41]

The cognizance in the present case was taken by the CCI suo-moto under section 19(1) of the Competition Act consequent upon the submission of investigation report of the DG in Case No. 10 of 2010, M/s Pankaj Gas Cylinders Ltd. v. Indian Oil Corporation Ltd. In that case it was reported by the DG that in tender No. LPG-0/M/PT-03/09-10 floated by Indian Oil Corporation Ltd. (IOCL) for the supply of 105 lakh, 14.2 Kg capacity LPG cylinders with SC valves, the manufacturers of LPG cylinders had manipulated the bids and quoted identical rates in groups through an understanding and collusive action. The CCI also observed that all the bidding companies who had infringed the provision of section 3(3) of the Competition Act were responsible in equal measure and no mitigating circumstances were available to any of them. Considering the totality of facts and circumstances of the present case and the seriousness of contravention the commission decides to impose a penalty on each of the contravening company at the rate of 7% of the average turnover of the company.

Film & Television Producers Guild of India v. Multiplex Association of India &Ors[42].

The Film and Television Producers Guild of India, Informant, filed a complaint against Multiplex Association of India (MAI) and various constituents of MAI alleging that MAI was forcing producers/distributors to negotiate revenue sharing only with MAI and not individual constituents. Further, MAI was imposing terms of exhibition which was prejudicial to the producer given the nature of film industry. The Informant alleged that these practices were anti-competitive (Section 3 of the Competition Act) and that MAI was abusing its dominant position (Section (2) (a) and 4 (2) (c) of the Competition Act). The CCI framed two issues – whether the Opposite Parties ('OPs') acted in violation of Section 3 and Section 4 of the Competition Act. After an examination of the detailed findings of the DG, the CCI rejected the same as there was insufficient evidence to establish that OPs had formed a cartel or acted in concert either for the purpose of revenue sharing or controlling the distribution and exhibition of films. Both issues were therefore decided in favor of the OPs.

Uniglobe Mod Travels Pvt. Ltd v. Travel Agents Federation of India &Ors.[43]

An interesting case relating to the expulsion of a travel agent for its failure to comply with the trade associations notice that members not deal / transact with Singapore Airlines The Informant, Uniglobe Mod Travel Pvt. Ltd., did not comply with several emails of Opposite Party (Travel Agents Federation of India) and was consequently suspended. The Informant had also filed a civil suit in the High Court of Delhi and had withdrawn the same (July 7, 2009) before filing the present complaint (July 21, 2009). The CCI had framed two issues – whether it had jurisdiction to entertain the complaint and whether OPs had contravened Section 3 of the Act.

In Re Glass Manufacturers of India[44]

The present matter relates to suo-moto cognizance taken by the erstwhile MRTPC on the basis of an article published in the magazine 'The Outlook Business' alleging cartel like practices of leading Indian manufacturers of float glass. Consequent upon the repeal of the MRTP Act, the case was received on transfer by the CCI) under section 66(6) of the Competition Act. The DG concluded that no case of violation of provisions of section 3 was made out in the matter for the period under investigation. The CCI agreed with this finding and stated that in the absence of any evidence of determination of price, limit on supply or

[41] CCI Suo-Moto Case no. 03/2011
[42] CCI Case No. 37 of 2011
[43] CCI Case No. 3 of 2009
[44] MRTP Case No. 161 of 2008

production of supplies in the market or sharing/ allocation of market arising out of any agreement or action in concert there was no reason to disagree with the findings of DG.

All India Tyre Dealers' Federation v. Tyre Manufacturers[45]

The information in this case was originally filed by the All India Tyre Dealers' Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded by the MRTPC. Consequent upon the repeal of the MRTP Act, the matter stood transferred to the CCI under section 66(6) of the Competition Act. In the said information dated December 28, 2007, AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities. The CCI took into consideration the act and conduct of the tyre companies/ ATMA, and found that on a superficial basis the industry displays some characteristics of a cartel there has been no substantive evidence of the existence of a cartel. The CCI held that the available evidence did not give enough proof that Tyre companies and associations acting together had limited and controlled the production and price of tyres in the market in India. The CCI found that there was not sufficient evidence to hold a violation by the tyre companies of section 3(3) (a) and 3(3)(b) read with section 3(1) of the Competition Act.

b) **Limit or control output, technical development, services etc:** Production control involves competitors agreeing to limit the quantity of goods or services available in the market. Competitors agreeing to specialise in certain products, ranges of products or in particular technologies could also be deemed to be anticompetitive.

Example 2:

Producer 1: None of us have really been doing well recently. We must think of something to boost the profit. I've been thinking to reduce the supply together. When there's less supply, we can raise the price. Things are only precious when they are rare.

Producer 2: Ok. You are right. Things are only precious when they are rare. You're the industry leader. We'll take our cue from you.

Producer 3: Have you considered the implication of such agreement? This is an illegal act and in contravention of the competition laws

Inference: Output restriction agreed between competitors is serious anticompetitive conduct under the Competition Law. Businesses should make Independent commercial decisions and never collude with each other to restrict Output.

DGS&D, Department of Commerce case[46]Ministry of Commerce & Industry. Govt. of India In this case DGS&D had filed a reference u/s 19 (1) (b)of the Competition Act against 11 Opposite Parties alleging bid rigging and market allocation in contravention of the provisions of Section 3 of the Act while bidding against a tender enquiry floated by them for calling rate contract of polyester blended duck ankle boot rubber sole for the period 1.12.2011 to 30.11.2012. The Commission after investigation found that all Opposite Parties by quoting identical/ near identical had indirectly determined prices in the rate contracts finalised by DGS&D and had contravened Sec. 3(1) read with 3(3)(a) and 3(3)(d). The Commission imposed a penalty on each of the contravening parties at the rate of 5% of the average turnover of last 3 years. Penalties of Rs.6,25,43,000/- were imposed on 11 Opposite Parties.

[45] MRTP Case RTPE No. 20 of 2008
[46] Case No. 1/2012

c) **Share or divide markets:** This could include competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base.

Example 3:

*Businessman 1:*I didn't know that operating bus services for business units was so lucrative.

*Businessman 2:*Smartly , We agreed among ourselves to send out quotations to different business units respectively . Now they don't really have a choice. And we will virtually monopolize the shuttle bus business. We can charge whatever we like!

Businessman 1: Even if your clients ask me for quotation, I am not going to reply .

Businessman 2: So, how are we going to share those estates this year?

Businessman 1: Same as usual, let's split the districts between us. I'll send you the list when it's done.

After a month:

Businessman 1: No wonder the bus fares are getting higher and higher. It's all because of our agreement to share the market!

Inference: Such agreement is in contravention of the law and is considered as a serious anti-competitive conduct under the Competition Law.

d) **Indulge in bid-rigging or collusive bidding:** Taking turns to win competitive tender contracts is an example of bid-rigging. This could include:

- parties agreeing to submit cover bids (high) that are intended not to be successful – where the unsuccessful bidders may get kick-backs;
- bid suppression where parties agree that only one of them will submit a bid for the contract.
- bid rotation where the parties to the agreement take turns to win contracts.

More than one of these bid-rigging practices can occur at the same time. For example, if one party to the agreement is designated to win a particular contract, the other parties could avoid winning either by not bidding ("bid suppression") or by submitting a high bid ("cover bidding").This is an arrangement between competitors whereby one of them agrees to refrain from bidding, in exchange of acting as a sub-contractor .

Example 4:

Company XYZ: Let's invite bids. We need to procure pipes.

Employee XYZ: All the bids are in! It is so strange... They all have similar prices and they're all very high too. We have compared all the tender submissions. Only ABC Enterprises quoted the lowest price.

Company XYZ: Alright then, we'll go for ABC Enterprises! Employee XYZ calls ABC Enterprises and informed that he had won the tender!

ABC Enterprises call other bidders: It is celebration time! We won the bid. Thanks guys for jacking up your prices; we'll be making a huge profit from this contract.

Other bidders: Don't be silly! We are partners – we all win from this!

ABC Enterprises: That's right; it'll be your turn to win next time! I will not submit my bid next time. We're in this together, and we'll all make profit from this!

Newspaper headlines: CCI Fined ABC Enterprises and other companies for Bid-Rigging. directors Disqualified.

Inference: Bid rigging is a violation of the Competition Law. Businesses might appear to win by not competing with each other, but they too can become victims.

2.2. Vertical Agreements s.3(4)

Vertical Agreements are agreements between firms at different levels of the manufacturing or distribution processes. For example, an agreement between the manufacturer and a distributor is a vertical agreement. Defined by Section 3(4) of the
Act, vertical agreements include:

2.2.1. TIE-IN ARRANGEMENT

s.3 (4) Explanation (a) inclusively defines tie in arrangement as

"tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

Tying occurs when customers buy a product they want (the tying product) but are required (forced) to buy a product (the tied product) from a different market that they may not want. Tying would be anti-competitive as it would restrict access to the tied product market by competitors. Bundling could be distinguished from tying, as bundling would normally involve products from the same market which consumers generally would buy together. For example, a car which is sold (bundled) together with tyres.

Example 5:

Hospital XYZ: Our new contract negotiation with ABC Enterprises is under way. But they request for an additional clause specifying that if we want to buy the medical device that only ABC Enterprises makes, we must buy other medical supplies including medical masks, gloves, syringes etc. as well.

Employee XYZ: But our current suppliers of these equipment offer lower prices and better quality. There's no reason for us to switch to ABC Enterprises.

Hospital XYZ: But if we do not agree, ABC Enterprises will not sell us their medical device and we can't provide proper care without this device. That leaves us no choice at all.

Employee XYZ: Calm down. This tying clause might contravene the Competition Law. ABC Enterprises cannot make such request.

Inference: Tie-in agreement are anti-competitive as per Section 3 (4) of the Competition Act and thereby punishable with penalty under Section 27.

TYPES OF TIE-IN OR TYING ARRANGEMENTS

Tying can be classified into two types. They are:-

1. Static Tying – Static tying can be thought of as an exclusive arrangement. In a static tied-sale, the buyer who wants to buy product 'A' must also purchase product 'B'. It is possible to buy product 'B' without product 'A' which explains why it is a tie. Thus, the items for sale are product 'B' alone or an 'A-B' package.

   example: the video game Halo is exclusive to the Xbox format. A buyer who wants to buy halo must also purchase the Xbox hardware. The tie could arise from the manufacturer's power in the market of the Xbox hardware.

2. Dynamic tying – in case of this type of tying, in order to purchase product 'A' the customer is also required to purchase product 'B'. In dynamic tying the quantity of product 'B' vary from customer to customer. Thus, the item for sale are a package of 'A-B', 'A-2B', 'A-3B' etc.

   example: A seller of a photocopy machine (product A) may require the purchaser of the machine to use a specific brand of paper i.e. (product B). The paper sales occur over time and vary across users, based on their demand for the copies. A customer would not need to determine how much paper to buy at the time the machine was bought. But under the tying contract, whatever paper was required would have to be bought from the machine seller.

FORMS OF TYING

Tying can take the following forms:

1. Contractual Tying – the tie may be the consequence of a specific contractual stipulation. For example in the case of **Eurofix-Bauco v. Hilti**[47] , hilti required users of its nail guns and nail cartridges to purchase nails exclusively from it. The commission held that this requirement of Hilti exploited customers and harmed competition and was an abuse of dominant position. A fine of 6 million was imposed for this and other infringements.

2. Refusal to supply – the effect of tie may be achieved where a dominant undertaking refuses to supply the tying product unless the customer purchased the tied product.

3. Withdrawal of a guarantee – a dominant supplier may achieve the effect of a tie by withdrawing or withholding the benefits of a guarantee unless the customer uses the supplier's components as opposed to those of a third party.

4. Technical tying – this occurs where the tied product is physically integrated in to the tying product, so that it is impossible to take one product without the other. This is what happened in the Microsoft case.

US ANTITRUST RULES IN DETERMINING TIE IN ARRANGEMENT

Section 1 of the Sherman Act, 1890 and Section 3 of the Clayton Act, 1914 deal with the concepts of Tying. The assessment of tying arrangements under U.S. Antitrust law has undergone significant changes over the time. There are three periods describing the change.

[47] T-30/89 [1990] ECR-II-163, [1992] 4 CMLR 16, CFI

1. Early period of the per se approach: early cases reflect a strong hostility towards tying arrangements that were regarded as having hardly any purpose beyond the suppression of competition.

2. The modified per se illegality approach: Jefferson Parish moved to an approach in which the criteria for tying are used as proxies for competitive harm and, arguably, efficiencies.

3. Rule of-reason approach: Microsoft III5 introduced a rule-of-reason approach towards tying; recognizing that, at least in certain circumstances, even the modified per se approach would lead to an overly restrictive policy towards tying arrangements. In the early cases the per se approach played an important role. In United States Steel v. Fortner, the court held that tying arrangements "generally serve no legitimate business purpose that cannot be achieved in some less restrictive way."

Northern Pacific Railway Co. v. United States[48]

The Court observed that, "They (tying arrangements) deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time, buyers are forced to forgo their free choice between competing products". For these reasons, tying arrangements fare harshly under the laws forbidding restraints of trade. he railroad was the owner of millions of acres of land in several North western States and territories. In its sales and lease agreements regarding this land, Northern Pacific had inserted "preferential routing" clauses.

These clauses obliged purchasers or lessees to use Northern Pacific for the transportation of goods produced or manufactured on the land, provided that Northern Pacific rates were equal to those of competing carriers. The Supreme Court took the view that Northern Pacific had significant market power. The court declared that the Per-Se rule applies "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a —not insubstantial' amount of interstate commerce is affected. In this case, the facts "established beyond any genuine question that the defendant possessed substantial economic power by virtue of its extensive land holdings"

International Salt Co., Inc. v. United States[49]

it was held by the court that "sufficient economic power" could be established in a number of ways, not all of which were related to the concept of "market power". Sellers forcing customers to accept unpatented products in order to be able to use a patent monopoly, and the patent rights were deemed to give the seller "sufficient economic market power"

Jefferson Parish Hosp. Dist. No.2 v. Hyde[50]

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL and REHNQUIST, JJ

A hospital governed by petitioners has a contract with a firm of anesthesiologists requiring all anesthesiological services for the hospital's patients to be performed by that firm. Because of this contract, respondent anesthesiologist's application for admission to the hospital's medical staff was denied. Respondent then commenced an action in Federal District Court, claiming that the exclusive contract violated 1 of the Sherman Act, and seeking declaratory and injunctive relief.

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[48] 356 US 1 (1958)
[49] [332 U.S. 392, 395-96 (1947)]
[50] 466 U.S. 2 (1984)

The District Court denied relief, finding that the anticompetitive consequences of the contract were minimal and outweighed by benefits in the form of improved patient care. The Court of Appeals reversed, finding the contract illegal "per se." The court held that the case involved a "tying arrangement" because the users of the hospital's operating rooms (the tying product) were compelled to purchase the hospital's chosen anesthesiological services (the tied product), that the hospital possessed sufficient market power in the tying market to coerce purchasers of the tied product, and that since the purchase of the tied product constituted a "not insubstantial amount of interstate commerce," the tying arrangement was therefore illegal "per se."

Held:

The exclusive contract in question does not violate 1 of the Sherman Act.

(a) Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case the analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, consideration must be given to whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement.

(b) No tying arrangement can exist here unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services. The fact that the exclusive contract requires purchase of two services that would otherwise be purchased separately does not make the contract illegal. Only if patients are forced to purchase the contracting firm's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of the firm.

(c) The record does not provide a basis for applying the per se rule against tying to the arrangement in question. While such factors as the Court of Appeals relied on in rendering its decision - the prevalence of health insurance as eliminating a patient's incentive to compare costs, and patients' lack of sufficient information to compare the quality of the medical care provided by competing hospitals - may generate "market power" in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying. Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. The fact that patients of the hospital lack price consciousness will not force them to take an anesthesiologist whose services they do not want. Similarly, if the patients cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement.

(d) In order to prevail in the absence of per se liability, respondent has the burden of showing that the challenged contract violated the Sherman Act because it unreasonably restrained competition, and no such showing has been made. The evidence is insufficient to provide a basis for finding that the contract, as it actually operates in the market, has unreasonably restrained competition. All the record establishes is that the choice of anesthesiologists at the hospital has been limited to one of the four doctors who are associated with the contracting firm. If respondent were admitted to the hospital's staff, the range of choice would be enlarged, but the most significant restraints on the patient's freedom to select a specific anesthesiologist would nevertheless remain. There is no evidence that the price, quality, or supply or demand for either the "tying product" or the "tied product" has been adversely affected by the exclusive contract, and no showing that the market as a whole has been affected at all by the contract, reversed and remanded.

International Business Machines Corp. v. U.S[51]

Tying is a practice whereby the seller of product A will sell A only on the condition that the buyer also purchase product B. A is referred to as the "tying product" and B as the "tied product." Most of the tying cases in the legal literature concern "requirements tie-ins," in which the buyer can get product A only if he agrees to purchase all of his requirements of B from the seller. For example, at one time a customer could lease an IBM tabulating machine only by also purchasing all of the necessary punch cards from IBM.

Other Cases on tie-in arrangements[52]

CASE	TYING ARRANGEMENT
Mercoid Corp. v. Mid-Continent Co.,[53]	heating system and stoker switch
Morton Salt Co. v. Suppiger Co[54].,	salt machine and salt
International Salt Co. v. United States[55],	salt machine and salt
Leitch Mfg. Co. v. Barber Co[56].,	process patent and material used in the patented process
International Business Machines Corp. v. United States[57],	tabulators and tabulating punch cards
Carbice Corp. v. American Patents Development Corp[58].	ice cream transportation package and coolant
FTC v. Sinclair Refining Co[59]	gasoline and underground tanks and pumps
United Shoe Machinery Co. v. United States[60]	shoe machinery and supplies, maintenance, and peripheral machinery
United States v. Jerrold Electronics Corp[61].	components of television antennas

EUROPEAN LAW ON TYING

Article 81(1) of the EC Treaty includes as agreements that which are incompatible with the common market and the agreements that make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Article 82 includes tying as an abuse of dominant position, thus Article 81 is attracted when tying is part of an agreement concluded by a non-dominant supplier and a buyer. However, Regulation 2790/1999 on Vertical restraints provides for a safe harbour system whereby vertical agreements involving tying will be presumed compatible with article 81 if the market share of the supplier is below 30% in the relevant market.

[51] 298 U.S 131 (1936)
[52] http://caselaw.findlaw.com/us-supreme-court/466/2.html (accessed on 15th October 2017)
[53] 320 U.S. 661 (1944)
[54] 314 U.S. 488 (1942)
[55] 332 U.S. 392 (1947)
[56] 302 U.S. 458(1938)
[57] 298 U.S. 131 (1936)
[58] 283 U.S. 27 (1931)
[59] 261 U.S. 463 (1923)
[60] 258 U.S. 451 (1922)
[61] 187 F. Supp. 545, 558-560 (ED Pa. 1960)

The formal framework of the tying analysis is almost a carbon copy of the U.S. per se approach, following a four-stage assessment:

1. To establish market power (dominance) of the seller in relation to the tying product;
2. To identify tying which means to demonstrate that (a) customers are forced (b) to purchase two separate products (the tying and the tied product);
3. To assess the effects of tying on competition;
4. To consider whether any exceptional justification for tying exists.

Napier Brown v. British Sugar[62]

Case arose from a complaint by Napier Brown, a sugar merchant in the United Kingdom, which alleged that British Sugar, the largest producer and seller of sugar in the UK, was abusing its dominant position in an attempt to drive Napier Brown out of the UK sugar retail market. In the subsequent proceedings, the Commission objected, among other things, to British Sugar's practice of offering sugar only at delivered prices so that the supply of sugar was, in effect, tied to the services of delivering the sugar. Having concluded that British Sugar was dominant in the market for "white granulated sugar for both retail and industrial sale in Great Britain," the Commission took the view that "reserving for itself the separate activity of delivering the sugar which could, under normal circumstances be undertaken by an individual contractor acting alone" amounted to an abuse. According to the Commission, the tying deprived customers of the choice between purchasing sugar on an ex factory and delivered price basis "eliminating all competition in relation to the delivery of the products."

Tetra Pak II[63]

This case also concerned the tying of consumables to the sale of the primary product. Tetra Pak, the major supplier of carton packaging machines and materials required purchasers of its machines to agree also to purchase their carton requirements from Tetra Pak. The Commission, upheld by the Court, condemned the tying as abuse of a dominant position.

INDIAN CASES

Consumer online foundation v Tata sky Ltd &Ors[64]

It was said by the Director General (DG) that "DTH service providers are forcing the consumers to get into a tie-in arrangement with them. They require the purchaser of their DTH Services to also buy/take on rent the STBs procured by them. They are not giving DTH services to those who are not willing to buy/ take on rent their STBs. This is a clear violation of section 3(4) of the Act under which a tie-in arrangement would prime facie be considered violative of section 3 if it has an appreciable adverse effect on competition in India. Further, as these four DTH service providers control more than 80% of the market, any anticompetitive practice would definitely have an appreciable adverse effect on the market.

Hence, this is a clear case of a tie-in arrangement which is having not only an appreciable but a „significant adverse effect on competition in the market. The supplementary report was considered by the Commission, in its meeting held on 05.01.2010. After having gone through the supplementary report, the Commission, vide its order dated 08.01.2010, sought additional supplementary report with regard to the issue of DTH service providers forcing the consumers to enter into a tie-in arrangement.

[62] 88/519/EEC, 1988 O.J. (L 284) 41
[63] 92/163/EEC, 1992 O.J. (L 072) 1
[64] Case no. 2 of 2009

This issue of tie-in sales of the consumer premises equipment (Set Top Box, Smart Card and Dish Antenna) was examined by the DG in detail including the reasons for the continuance of this practice. The said report focused on two major interfaces related to tie-in arrangement. These are: 1. Interface between the DTH service provider and STB manufacturer 2. Interface between the customer and DTH service provider On examination of the agreement between the DTH service provider and the customer, it was noted by the DG that no such clause which directly restricts or forces the customer to enter into tie-in arrangement is there. However, on account of the lack of customer awareness and lack of availability of Set Top Boxes and other equipments in open market, the customer does end up buying all the related equipments from the DTH service providers only.

The sale of Set Top Box, Smart Card and Dish Antenna is tied-in as all the three equipments are provided in one package and are not readily available for sale in open market-independent of each other. These three components are technically essential as each performs a specific function for availing the DTH service transmission. Owing to the lack of practical interoperability and lack of consumer awareness, the customer has no alternative but to purchase these three equipments from the DTH service provider whose service he is availing. This ultimately results in tie-in arrangements of the Consumer Premises Equipment from the DTH service provider. Except Dish TV, no other DTH service provider, under investigation, has specifically and clearly mentioned in its agreement with the customer that a customer can avail or procure compatible Set Top Box from any other source.

This offer of Dish TV is also of no benefit to customer as neither the compatible Set Top Box is commercially and readily available in the open market, nor the consumer is really aware of this possibility Summing up the findings, the DG concluded as under: —The entire forgoing discussion and the recent developments indicate that the tie-in' sale of the Customer Premises Equipment is happening on account of non-availability of Conditional Access Module (CAM), Set Top Box etc. in the open market, lack of consumer awareness as well as lack of enforcement of licensing conditions by any regulatory authority. The recent development of the news of the likelihood of availability of Conditional Access Module (CAM) in open market will be a positive step towards achieving interoperability. This can be further enhanced and fully interoperability, which is technically possible, can be achieved by the availability of non proprietary Set Top Boxes in the open market and enforcement of the clause 7.1 of the DTH licensing agreement relating to achieving interoperability among the DTH Service providers.

ShriSonam Sharma v Apple Inc. and Ors[65]

The allegations[66] in this case pertained to distribution agreements entered into between Apple India Pvt. Ltd., Indian subsidiary of Apple Inc. U.S.A. ("Apple") and Vodafone Essar Limited ("Vodafone") and Bharat Airtel Limited ("Airtel"), by virtue of which Apple iPhones (3G/3GS) could only be purchased on the GSM network of Airtel or Vodafone and only through their respective distributors. iPhones purchased from other sources or 'unlocked' i.e. reconfigured to run on other GSM networks were susceptible to lose their warranty cover since they were not accepted for repair at the respective service centres. It was further alleged that both Airtel and Vodafone had also 'tweaked' their mobile internet services in order to make them incompatible to be used with iPhones and subsequently notified iPhone specific internet services at relatively higher price than what they charged for use on other smartphones.

Further, Apple was also accused of allowing only applications approved by it and available on its online application store 'App Store' to be used on iPhones and if in case iPhones were 'unlocked' to make other third party applications workable with the same it rendered the warranty of such iPhones worthless, moreover any upgrade of the operating system of such iPhones caused for 'relocking' of such iPhones and

[65] Case No: 24/2011

[66] http://www.cc.gnnii.ac.uk/docs/GAR2016/191298.pdf (accessed on 15th October 2017)

deletion of all such unapproved, third party applications from the iPhones. The allegations were compounded to have offended provisions both u/s. 4 i.e. provisions condemning abuse of dominance and u/s. 3 i.e. provisions condemning anti- competitive agreements likely to have AAEC in the market. The alleged tie-in as identified by the C.C.I. was a 'distribution/ sales arrangement between Apple and Airtel/ Vodafone is a case of "contractual tying" wherein the handset manufacturer and service provider have joined hands to offer a packaged product to the customer.' 142 Upon an order of the C.C.I. u/s 26(1), the Director General ("DG") undertook an investigation into these allegations.

Amidst various objections raised against the jurisdiction of the C.C.I. in the instant case, which included inter alia the fact that subject- matter of the dispute was better suited to be tried before the Telecom Regulatory Authority of India ("TRAI") rather than the 142 Sonam Sharma (n 7) 24, para 70. 66 C.C.I.; that the informant did not have a locus standi in the instant case; that the Competition Act, 2002 did not have retrospective application and the concerned aberrations if at all happened, happened prior to the notification of sections 3 and 4 of the Act. Moreover, 'collective dominance' (assessing jointly the standing of Vodafone and Airtel in the market) was not recognised under the Act and thus the prerequisite of dominance with regard to Vodafone and Airtel was not made out.

As per the DG, the arrangement between Apple, Airtel and Vodafone of selling 'locked' iPhones was a Tie-in arrangement u/s. 3(4)(a). However given the miniscule market share of Apple in the 'smartphone' market in India (1%- 3% in terms of volume) at the time of the aberrations i.e. between 2008- 2010, such tie-in could not have caused any AAEC in the said market in India. With regard to violations u/s. 4, the DG identified two relevant markets namely, '(i) relevant market for smartphones in India and (ii) relevant market for GSM cellular services in India'143 and further deduced that Apple or Airtel and Vodafone (individually) were not dominant in these markets respectively.

RamakantKini v Dr. L.H. Hiranandani Hospital[67]

In this case, an exclusivity agreement whereby Dr. L.H. Hiranandani Hospital ("Hiranandani") did not allow for any stem cell bank apart from Cryobanks International India ("Cryobank") to offer stem cells banking services (collection of umbilical cord at the time of birth and preserving it at sub- zero temperature for 21 years) on its premise was the cause for the dispute to arise. The informant in this case had already approached M/s Life Cells India Pvt. Ltd. ("Life Cell") for its services and then had engaged Hiranandani for maternity related services and delivery of her child. However, as was averred, she was not notified of the special arrangement that existed between Hiranandani and Cryobank at this point, it was only subsequently when she requested Hiranandani to allow Life Cell to collect the umbilical cord at the time of the delivery of her child that she was refused the same and Cryobank as an alternative was suggested to her. This caused for the Informant to engage another hospital for its maternal services.

Based upon the above mentioned, allegations u/s. 3(4). s. 4(2)(a)(i) and 4(2)(c) were registered with the C.C.I., who instructed an investigation of the DG u/s. 26(1). As per DG's investigation, the agreement between Hiranandani and Cryobank was anti- competitive as u/s. 3(4) and the same was likely to have AAEC in the market. Further, Hiranandani was considered to be dominant in the market of 'provisions of maternity services by super speciality hospital in the geographic market of 0-12 km from the Hiranandani Hospital covering S, L, N, K/E, T & P/S wards of Municipal Corporation of Greater Mumbai as per Section 2(r) of the Act'144 which it had abused by imposing unfair conditions on expecting mothers coming to it for maternity services. It must be clarified here that subsequently the Commission had assessed a violation only of s. 3(1) of the Act in the case as an agreement causing AAEC but not falling expressly within s. 3(3) or 3(4) i.e. the claim for tie-in did not materialise.

[67]Case No. 39 of 2012

2.2.2. EXCLUSIVE DEALING AGREEMENTS

Regulation under contract act, 1872

The concept of 'restraint of trade' is very famously infamous in the common law as well as in the contract law. 'Restraint of trade' receives a bad treatment in law and is considered to be strictly void under section 27 of the Indian Contract Act, 1872. One of the ways in which such restraint can be exercised is by way of entering into any sort of sole dealing agreements whereby the wholesaler or the manufacturer of some goods requires a distributor to distribute his goods only exclusively for certain period of time in return of some remuneration thereby closing a particular channel of distribution for other players in the market. Thus, he gains a better chance of promoting his goods in comparison to other players and that is not a fair game or a fair means of competition.

Regulation under Competition Act, 2002

Exclusive Dealing agreements are agreements to sell a product on the condition that the buyer takes all (or effectively all) of its requirement of that product from the seller. Such agreements have possible anticompetitive effects, but may also have possible redeeming efficiencies. The major anti-competitive concerns are that such agreements might foreclose enough of the market to rival competition to impair competition. In an oligopolistic market which means the first type of imperfectly competitive market, is a market with only a few sellers each offering a product similar or identical to that of others Economists measure a market's domination by a small number of firms with the statistics called the 'concentration ratio, which is the percentage of total output in the market supplied by the largest firms in the market.

In such a market, exclusive dealing agreements might aid oligopolistic coordination by effectively allocating the market, making it difficult to increase market share by decreasing the prices. Some positive effects of such agreements are, since, they might reduce uncertainty about future sales at the contractually set price it can lower risk-bearing costs or inventory costs, or give firms the contractual commitments they need to invest in expanding their capacity in a way that achieves economies of scale. Exclusive dealership might also encourage relation specific investments between the seller and buyer that increase their efficiency only with each other.

2.2.2. a. EXCLUSIVE SUPPLY AGREEMENT

s.3 (4) Explanation (b)

"exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

It is an exclusive distribution agreement, the supplier agrees to sell his products only to one distributor for resale in a particular territory . At the same time, the distributor is usually limited in his active selling into other exclusively allocated territories.

Example 6:

Enterprise X is a producer of laptops who distributes throughout India through its distributors. However, it gives only one distributorship for East, West, North and South India and it does not allow distributors to sell in each other's territory . Such an arrangement by enterprise X will prevent competition among distributors.
Inference: Exclusive distribution agreement are considered to impinge on competition.

Standard Oil Co. v. United States[68]

Under contracts entered into by an oil company with independent dealers in petroleum products and automobile accessories, the dealer agreed to purchase exclusively from the company all of his requirements of one or more of the products marketed by the company. In 1947, the contracts affected a gross business of $58,000,000, comprising 6.7% of the total in a seven-state area in which the company sold its products.

Held: contracts were violative of s.3 of the Clayton Act and the company was properly enjoined from enforcing or entering into them.

Standard Fashion Co. v. Magrane-Houston Co.[69]

Magrane Houston, a Boston Department Store, decided to carry the McCall line of "garment patterns" which violated an exclusive dealing covenant with Standard Fashion and precipitated a lawsuit. Magrane Houston claimed the "Standard Fashion only" covenant was illegal under section 3 of the Clayton Act .

It seems transparent from the language of section 3 that Congress' did not intend to make exclusive dealing a per se violation. Hence the courts must sort out the following issue: did the conditional sale "substantially lessen competition or tend to create a monopoly. The Supreme Court upheld a lower court decision in favor of Magrane Houston--i.e., the exclusionary practice had substantially lessened competition in the market for garment patterns.

Tampa Electric v. Nashville Coal[70]

In 1955 Tampa Electric signed a long-term contract (20 years) with Nashville Coal for the delivery of bituminous coal to its power plants. The contract included a restrictive covenant--i.e., Tampa Electric agreed not to purchase coal from any supplier other than Nashville Coal. Tampa Electric filed a breach of contract suit after Nashville Coal reneged in 1960. Attorneys for Nashville Coal argued the restrictive contract clause violated section 3 of the Clayton Act and hence the Court should rule that the contract is illegal and therefore unenforceable.

Issue 1 : Is exclusive dealing illegal per se? Justice Clark: "In practical application, even though a contract is found to be an exclusive dealing arrangement, it does not violate the section unlessthe court believes it probable that the performance of the contract will foreclose competition in a substantial share of the line of commerce affected."

Issue 2 : Did the performance of the contract foreclose competition in a substantial share of the market of the market for coal? The key issue turned out to be geographic market definition. Tampa Electric accounted for 18 percent of coal purchased within the borders of the state of Florida, but less than 1 percent of coal procurements nationwide. Having decided on the "broad" market definition, the court ruled the contract clause was legal.

DGIR v. BAYER (INDIA) LTD[71]

Condition in ag with distributor that he will not make supplies to chemists, Doctors & Govt. or private institutions even though he accepts the order. Seller will sell directly to these customers without any commission to the distributor. Held it is anti competitive agreement.

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[68] 337 U.S. 293 (1949)
[69] 258 U.S. 346 (1922)
[70] [365 U.S. 320 (1961)]
[71] RTPE 121 of 1988 ,(1995) 81 Taxman 178n (Mag) (MRTPC)

DGIR v. TITAN Industries[72].

There was a clause in agreement with franchisee that the franchisee will not deal in products/goods of a similar nature-for a period of 3 years from the date of determination of ag within radius of 5 Kms from showroom. It is restrictive trade practice.

DGIR v. Rajshree Cement[73]

HELD-An agreement containing the clause that the dealer will concentrate on a particular area is permissible if there is no prohibition on him from effecting sales in other areas.

DELHI CLOTH & GENERAL MILLS Co LTD; DGIR v. MODI INDUSTRIES LTD; DG v. BHARAT COMMERCE & INDUSTRIES LTD; PIRAMAL HEALTH CARE LTD, In Re
Agreements with agents restrictions as to dealing in similar goods or as to territory permissible.

2.2.2. b. EXCLUSIVE DISTRIBUTION AGREEMENT

s.3 (4) Explanation (c)

"exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

Bharatia Cutler Hamme Ltd., In Re

Manufacturer of 'A' type of scooter stipulating that dealer of 'A' should not deal in any other type of scooter, i.e., manufacturer asking dealer not to deal in similar products of his competitor, directly/indirectly. Condition that dealer shouldn't deal in other's goods and discontinuation of supplies on the ground that dealer also deals in products of supplier's competitors, held resale price maintenance

DGIR v. Studds Accessories Pvt. Ltd.

Buyer asking manufacturer not to manufacture identical goods for any other buyer without consent of buyer. Held resale price maintenance

DGIR v. Mundipharma AG

Agreement that distributor will purchase goods only from the manufacturer or from other as may be nominated by him. Held resale price maintenance

Vadilal Enterprises Ltd., In re

Territorial restrictions, not to sale beyond prescribed territory. Held resale price maintenance

DGIR v. Kothari Electronics

Exclusive dealing cannot be permitted unless it is shown that it is in public interest.

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[72] (2001) 43 CLA 293 (MRTPC)
[73] (1995) 83 Comp. Cas. 712 (MRTPC)

TATA Engg.Works v. RRTA (Registrar Of Restrictive Trade)

Exclusive dealing & territorial restrictions were held reasonable as it led to prompt after-sales service to buyers & hence were permitted. Held not resale price maintenance

Gujarat Bottling Co. Ltd. v. Coca Cola

Negative covenant restraining franchises from dealing with competing goods during term of franchise agreement is valid and not resale price maintenance.

2.2.3. REFUSAL TO DEAL

s.3 (4) Explanation (d)

"refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

A *refusal to deal* or a *concerted refusal to deal* is an agreement between competing companies, or between a company and an individual or business, that stipulates that they refuse to do business with another. A refusal to deal violates s.3(4) of the Competition Act, 2002.

There can be a *horizontal* refusal to deal, which is an agreement between competitors not to compete; and a *vertical* refusal to deal, which is an attempt to control or leverage the market by only doing business with certain parties. This does not mean that a business is always prohibited from refusing to do business with another company. Businesses have the right to use their discretion in choosing whom to do business with. However, if this choice is made through a conspiracy with another competitor, business, or individual, they will likely be breaking the law.

A refusal to deal is a violation of the competition law because it harms the boycotted business by cutting them off from a facility, product supply, or market. By harming the boycotted business in this way, the competing businesses controls or monopolizes the market by unreasonably restricting competition. A refusal to deal can be an agreement between competing companies to boycott another company by refusing to do business with them, or it can be the use of coercion to keep an individual or business from doing business with another company. A refusal to deal may be against another competitor;

EXAMPLE: if one business refuses to do business with another company, customer or supplier, unless they agree to cease business with another company, the agreement would be a refusal to deal. Further, courts have found that there is refusal to deal when businesses refuse to do business with a competitor when this refusal unreasonably restricts competition.

> It means restricting by any method any person/classes of persons to whom goods are sold. Businesses have the right to use their discretion in choosing whom to do business with. However, if this choice is made through a conspiracy with another competitor, business, or individual, they will likely be in contravention of the law . A refusal to deal is a violation of competition law because it harms the boycotted business by cutting them off from a facility , product supply , or market. By harming the boycotted business in this way, the competing businesses controls or monopolizes the market by unreasonably restricting competition.

Example 7:

Enterprise A is an enterprise in the market for lead used to make pencils. Enterprise B is a major manufacturer of pencil in the market but its production is dependent on supply of lead by enterprise A. Enterprise A suddenly refuses to supply lead to B because a new company , C has entered the pencil market in direct competition to B and though A can supply to both B and C, A refuses to deal with B on entry of C in market. In such situation B can approach the Commission with information filed under Section 3 (4).

Inference: Refusal to deal is Anti-competitive

In Re Prime Mag. Subscription Services Pvt. Ltd[74].

A publisher had imposed maximum discount rate on the distributor but CCI acknowledged absence of a prima facie case and held that although imposing a maximum discount led to fixing of the lower limit of the price of journals, the impact of such RPM would be limited and not likely to have adverse effect on com petition given the negligible market shares of the publishers

In Kapoor Glass Pvt. Ltd. v Schott Glass Pvt. Ltd[75].

The CCI held the joint venture to be anti-competitive since it as created to finish off competition in the downstream market and that various agreements were in contravention of clauses (a), (b), (d) and (e) of section 3(4) .

2.2.4. RESALE PRICE MAINTENANCE

s.3 (4) Explanation (e)

"resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Resale price maintenance includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. RPM is a form of price fixing.

Illustrations[76]: A manufacturer Y and its distributor Z may agree that the distributor will sell Y's products at certain prices, at or above a price floor (Minimum RPM) or at or below a price ceiling (Maximum RPM). If Z refuses to maintain prices due to whatever reason, Y may stop doing business with it. Every case of RPM is to be judged on the basis of its effects to establish its nature. Usually, branded goods are subjected to RPM as opposed to non-branded goods.

a. RPM, however, may prove beneficial in following ways:
b. Ensuring efficient retail services
c. Addressing free rider problem (Free rider is one who enjoys the benefits of someone else's investment)

[74] Case No. 07 of 2016
[75] Case No.22 of 2010
[76] http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/03._competition_law/14._vertical_agreements_under_competition_act_2002__et/5654_et_14et.pdf (accessed on 15th October 2017)

Limiting inter-brand competition among retailers Also, in following situations RPM may not be a restraint of trade:

a. If manufacturer was in a position to use its dominant power then it would much rather use it through wholesale prices instead of going into resale price maintenance agreement or
b. A product or service might require brand specific promotion by the retailer. Such a promotional activity involves cost on retailer.

It means selling goods with condition on resale at stipulated prices. It generally occurs when an upstream seller (Producer) imposes a fixed or a minimum price that a downstream buyer (Distributor or Retailer) must resell.

For example, a manufacturer sets the price for which its products are sold at the retail level. The result is that resellers (e.g. retailers) do not compete on price. This is considered to be anti-competitive.

Example 8:

Producer: What brings you here? Is there any problem with my products?

Chain Store Owner: It' s not about your products. I'm just not happy with the small competitors! If I sell something for Rs.500 in my chain stores, smaller retailers sell the same for Rs.400, then my customers all ask me for discount.

Producer: Why don't you fix a resale price for each product and make sure that all the retailers will sell your products at your fixed prices. So everyone can make a profit, the customers don't have to shop around and we don't have to get into a price war.

Chain Store Owner: My business is built on reputation and integrity . I won't play dirty tricks to get business.

Inference: Resale price maintenance may restrict competition by preventing businesses setting their prices independently

Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited[77]

The CCI combined information filed against HMIL by authorised HMIL dealers, Fx Enterprise Solutions India Private Limited and St. Anthony's Cars Private Limited (Informants), alleging a contravention of Section 3 of the Act on the grounds that:

1. HMIL had restricted the informants from acting as dealers of competing brands by virtue of clause 5 of their dealership agreement, which required prior consent of HMIL for investing in any new or existing business which was unrelated to the Hyundai dealership.
2. HMIL had fixed the maximum retail price of the cars (which included the pre-fixed margin of the dealers) and the maximum discount which could be offered by the dealers through its Discount Control Mechanism (DCM).
3. HMIL tied the purchase of popular cars to the sale of high-end unwanted cars and also, designated certain companies as the preferred suppliers of complementary goods.

[77] Case No. 36 of 2014

The CCI found a prima facie case against HMIL and directed the Director General (DG) to specifically investigate the alleged contravention of Section 3 of the Act. On investigation, the DG concluded that HMIL had contravened the provisions of Section 3(4) of the Act on account of the above, except in respect of the allegation of tying in the sale of high end cars with fast moving cars. In addition, the DG also concluded that HMIL, being a dominant entity in the aftermarket for services of its cars, had violated Section 4 (relating to abuse of a dominant position) of the Act.

In respect to the contravention of the provisions of Section 3(4) of the Act, the CCI's findings were as follows:

1. Exclusive Supply Agreement and Refusal to Deal: The CCI observed that the requirement to get prior consent from HMIL for dealing with competing brands was not a prohibition. Hence, it did not amount to an exclusive supply agreement under Section 3(4)(b) and/or refusal to deal under Section 3(4)(d) of the Act.
2. Resale Price Maintenance: The CCI held that fixing of a maximum retail price and maximum permissible discount which could be given by dealers, effectively amounts to setting a minimum resale price, thereby resulting in RPM. Hence, HMIL's arrangement of setting a minimum resale price and monitoring the same through a penalty mechanism contravened Section 3(4)(e) of the Act, since it stifled intra and inter brand competition.
3. Tie-in Arrangement:

    a. CNG Kits: The CCI held that cancellation of warranty for use of non-designated CNG kits may be objectively justified. As such, this did not amount to a contravention of Section 3(4)(a) of the Act. Further, the CCI observed that HMIL may have a legitimate interest in ensuring that alternative brands of CNG kits are not used since ultimately HMIL would have to bear the costs of warranty.

    b. Lubricants: HMIL mandated its dealers to purchase engine oil only from its two designated vendors, at the price indicated by HMIL in its circular. In case of non-compliance by the dealers, HMIL threatened to terminate the dealership agreement. The CCI noted that this practice resulted in price discrimination, without accruing any benefit to the dealers or consumers, thereby contravening Section 3(4)(a) of the Act.

    c. Car Insurance Services: The CCI noted that it was a business norm to have a tie-up with insurance companies and, hence, merely recommending that the dealers suggest designated insurance companies to consumers does not amount to a tie-in arrangement, since it is not mandatory for the consumer to purchase the same.

The CCI, after considering factors such as proportionality, absence of supra-normal profits, HMIL's voluntary introduction of a competition law compliance programme into its business, and the penalty already imposed in the *Autoparts* case[78], imposed a penalty of INR 87 crore (0.3 per cent. of the average turnover of the past three years of HMIL which accrued from the sale of motor vehicles (i.e., the relevant turnover)).

Calcutta Goods Transport Assn. v. Truck Owners Operators Union

Association of lorry owners fixing freight rates & not allowing members of association to charge price lower than that fixed by association is resale price maintenance.

[78]Case No. 03 of 2011

DGIR v. Infar (India) Ltd.

If the price indicated is 'Maximum Retail Price'-it is obvious that the retailers are authorised to sell the product at prices below the maximum. It is not necessary to specifically state that price below the max retail price can be charged.

RRTA v. Bennet& Coleman Ltd.,

Newspapers are exempt from s.39 & 40 (i.e., they can prescribe minimum price). REASON-This is because speed is essence of publishing a newspaper. Allowing retailer or vendor to bargain the price would delay the process of reaching consumers fast. This will reduce circulation, which will lead to reduction in quality & also increase in costs. This will not being long term interest of public not resale price maintenance.

When direct prince maintenance is permitted.

Where the manufacturer sells goods through its own retail shops & fixes prices to be charged in such shops. Fixing price in such shops is not prohibited. Example: Bata, Adidas, Jockey etc.

2.3.HORIZONTAL VERSUS VERTICAL AGREEMENTS

The Act treats horizontal agreements differently when compared with vertical agreements. There is a presumption in the Act that the four types of horizontal agreements mentioned above are presumed to have adverse effect on competition which is similar to per se rule. In other words, they are per se illegal and the burden of proof will be on the defendant to prove that the agreement in question is not causing an appreciable adverse effect on competition. The presumptive rule is not applicable to vertical agreements which are subject to
the rule of reason analysis i.e. the positive as well as the negative impact of such agreements on competition will have to be taken into account before coming to any conclusion. This also applies to agreements entered into by way of joint ventures that increase efficiency in production, supply , distribution, storage etc. It is to be noted that Section 3(5) recognizes and protects intellectual property rights, permitting imposition of reasonable restrictions by their owners. Also agreements relating to exports to the extent to which they relate exclusively to the production, supply, distribution or control of goods or services are exempted.

Factors considered for Inquiring into Agreements The Commission while determining whether an agreement has an appreciable adverse effect on competition under section 3, gives due regard to all or any of the following factors, namely:-

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;
(f) promotion of technical, scientific and economic development by means
of production or distribution of goods or provision of services

2.4. DIFFERENCES BETWEEN HORIZANTAL AND VERTICAL AGREEMENTS[79]

S. No.	HORIZONTAL ANTI-COMPETITIVE AGREEMENT	VERICAL ANTI-COMPETITIVE AGREEMENT
1	In Horizontal Agreements the parties to the agreement are enterprises at the same stage of the production chain engaged in similar trade of goods or provision of services competing in the same market. For e.g. agreements between producers or between wholesalers etc.	In Vertical Agreements the parties to the agreements are non-competing enterprises at different stages of the production chain. For e.g. agreements essentially between manufacturers and suppliers i.e. between producers and wholesalers or between manufacturers and retailers etc.
2	Horizontal Anti-Competitive Agreements are entered into between rivals or competitors	Vertical Anti-Competitive Agreements are entered into between parties having actual or potential relationship of purchasing or selling to each other.
3	Horizontal Anti-Competitive Agreements are per se void.	Vertical Anti-Competitive Agreements are not per se void.
4	The 'per se/rule of presumption' is applied to Horizontal anti-competitive agreement	The 'rule of reason' is applied to vertical anti-competitive agreements.
5	Horizontal Anti-Competitive Agreements that determine prices or limit/control production or share market/sources of production by market allocation or result in bid rigging or collusive bidding are presumed to have an appreciable adverse effect on competition.	Vertical Anti-Competitive Agreements are not presumed to have an appreciable adverse effect on competition and automatically prohibited. Whether a vertical agreement is anti-competitive or not is to be decided on a case by case basis considering the consequences of the agreement and whether they substantially restrict competition or not.
6	The burden of proof is on the defendant to prove that the agreement is not anticompetitive.	The burden of proof is on the party alleging the anti-competitive practice to prove that the agreement is anti-competitive.
7	Examples of Horizontal Anti-Competitive Agreements are cartels, bid-rigging, collusive tendering etc.	Examples of Vertical Anti-Competitive Agreements are resale price maintenance, tie-in agreements, exclusive supply and distribution agreements etc.

[79] Source: ANALYTICAL STUDY OF THE CONCEPT OF TIE-IN ARRANGEMENT IN INDIA Author: Sujata Mukherjee (file:///C:/Users/computer/Downloads/SSRN-id2427376.pdf), (accessed on 15th October 2017)

UNIT – III

PROHIBITION OF ABUSE OF DOMINANT POSITION

Monopoly is a situation where production and supply with one industry or situation where there is absence of competition in the market and oligopoly[80] is market with few sellers. The competition doesn't prohibits dominance as like MRTP Act but prevents abuse of dominant position. Section 4 of the Act and some of the definitions are clearly helps to regulate the dominant position.

s. 4. Abuse of dominant position
[(1) No enterprise or group shall abuse its dominant position.][81]
(2) There shall be an abuse of dominant position [82][under sub-section (1), if an enterprise or a group] –

(a) directly or indirectly, imposes unfair or discriminatory-
(i) condition in purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or service.
Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause
(i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause
(ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts-(i) production of goods or provision of services or market therefor; or
(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [83][in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of Supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.
Explanation - For the purposes of this section, the expression –

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –
(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means 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.

Section 4 prohibits any enterprise from abusing its dominant position[84]. The term 'dominant position' has been defined in the Act as "a position of strength, enjoyed by an enterprise, in the relevant market, in India,

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[80] In 1516, Sir Thomas Moore, who first coined the term 'oligopoly' in his 'Utopia'
[81] Subs. by Competition (Amendment) Act, 2007 for "No enterprise shall abuse it's dominant position."
[82] Subs by Competition (Amendment) Act, 2007 for " under sub-section (1) if an enterprise
[83] Ins. by Competition (Amendment) Act, 2007

which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour".

The definition of the dominant position provided in the Competition Act is similar to the one provided by the European Commission in ***United Brand v. Commission of the European Communities***[85]case. In the *United Brands case* the Court observed that "a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers."

3.1. MARKET POWER

Market power, defined as 'the ability of a firm or group of firms to raise prices, through the restriction of output, and maintain them for a significant period of time above the level that would prevail under the competitive conditions and thereby to enjoy increased profits from the action', can be exerted anti-competitively by dominant firms or by multiple firms which, although not individually dominant, form a cartel. There are no specific market share thresholds provided under the Act to assess the 'dominance' of an enterprise. The CCI has considered market share in most cases of abuse of dominance it has reviewed, but has also considered subjective factors such as vertical integration, countervailing buyer power, economic power of the enterprise, entry barriers, statements in the public domain etc.

This is evident from two important orders passed by the CCI relating to abuse of dominance, i.e. the **MCX Stock Exchange v. National Stock Exchange of India Limited** (NSE case) and the **Belaire Owners' Association v. DLF Limited (DLF case)**However, in the Apple case, the CCI observed that the Act did not lay down a specific market share threshold for determining dominance of an enterprise in the relevant market and in this particular case, the CCI regarded market shares to be the 'screening criterion'. In **Hiranandani case**, the CCI while reiterating its position with respect to market share thresholds, further observed that the market share of an enterprise was only one of the factors in establishing dominance and could not be the 'decisive proof' of dominance. Therefore, in context of Indian competition law, the market share of allegedly dominant enterprises is required to be considered in conjunction with numerous factors given in Section 19(4) of the Act.

3.2 DEFINITIONS TO DETERMINE MARKET POWER

s.2 (r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

In abuse of dominant position, the first and foremost step is to define the scope of relevant market in which the alleged firm competes. In order to do that the term market has to be understood first. The term market has not been defined under the Act but in common parlance it means the place where sellers and buyers meet and includes the whole mechanism through which exchange of goods and services takes place for consideration. The relevant market for an undertaking is that part of whole market, which can influence or be influenced by the conduct of an undertaking.

It important to understand that relevant market does not exist in abstract; it exists in relation to an undertaking. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers. The European Commission's Notice on the "Definition of relevant market

[84]Nishit Desai, Competition Law in India, Jurisprudential Trends and the way forward.Published April 2013.
[85] [1978] ECR 207

for the purposes of Community competition law" prescribes three methods for defining relevant market, these methods are –

The expression "relevant market" on the other hand has been defined under section 2(r) and 19 (5) to mean a market which may be determined by the Competition Commission of India (hereinafter referred as the Commission) with reference to either or both –

1. Relevant product market, or
2.Relevant geographic market.

Thus, the Act defines relevant market as the combination of relevant product and geographic markets. The Supreme Court of United States defines the relevant market as the area of effective competition within which the defendant operates. It is pertinent to note that it is not mandatory for the commission to consider both the aspect while determining the relevant market. The commission can even consider either relevant product market or relevant geographic market while defining the relevant market for a firm.

s.2 (s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. Some factors relevant to geographic dimension are consumption and shipment patterns, transportation costs, perishability and existence of barriers to the shipment of products between adjoining geographic areas. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility. The Act defines the term "relevant geographic market" to mean a market comprising the area in which the conditions of competition for[86] –

1. Supply of goods or provision of services, or

2. Demand of goods or services are distinctly homogenous, and can be distinguished from the conditions prevailing in the neighbouring areas. The Act also prescribes some factors and any or all of these factors can be considered by the Commission while defining the scope of relevant geographic market, these factors are

(a) regulatory trade barriers;
(b) local specification requirements;
(c) national procurement policies;
(d) adequate distribution facilities;
(e) transport costs;
(f) language;
(g) consumer preferences;
(h) need for secure or regular supplies or rapid after-sales services

s.2 (t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

[86] http://www.compcom.co.za/abuse-of-dominance/ (accessed on 15th October 2017)

The expression "relevant product market" has been defined under the Act as "market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use[87]."

Relevant product market thus includes all reasonable substitutable products or services of nearby competitors, to which consumers could turn without compromising substantially with their needs. A good example of this would be the market of toothpastes and tooth powder. Even though they are quite different products but acts as a competitive restrain on each other and thus part of same relevant product market. The Act prescribes certain factors and all or any of them can be considered by the Commission while defining the relevant product market. These factors can be listed as follows –

(a) physical characteristics or end-use of goods;
(b) price of goods or service;
(c) consumer preferences;
(d) exclusion of in-house production;
(e) existence of specialised producers;
(f) classification of industrial products.

Hoffmann-La Roche v. Commission[88]

The defendants contested that due to the technological use Vitamins C and E are part of much larger market comprising of other products suitable for the same and the Commission has exaggerated its share in the said market. The court did not agree and held that each of these groups must be placed in separate market, one comprising of vitamins for bio-nutritive use and other vitamins for technological use. The Court of Justice pointed to Roche's highly developed sales network as a relevant factor conferring upon it commercial advantages over its rivals. The Commission has treated both vertical integration and the benefit of well-established distribution systems as a barrier to entry in several other decisions, since this could impede access for a would- be entrant to the market

AKZO v. Commission[89]

The Court of Justice referred to the passage from Hoffmann- La Rochequoted above and continued that a market share of 50 per cent could be considered to be very large so that, in the absence of exceptional circumstances pointing the other way, an undertaking with such a market share will be presumed dominant; that undertaking will bear the evidential burden of establishing that it is not dominant.

Hilti AG v Commission[90]

Firms are at risk of being found to be dominant where they fall considerably short of being monopolists in the strict sense of that term.

[87] http://globalcompetitionreview.com/chapter/1067003/india-abuse-of-dominance (accessed on 15th October 2017)

[88] (85/76) [1979] ECR 461, [1979] 3 CMLR 211
[89] Case C- 62/86 [1991] ECR I- 335
[90] Case T- 30/89 [1991] ECR II- 1439

Tetra Pak 1 (BTG Licence)[91]

The acquisition by Tetra Pak of a company that had the benefit of an exclusive patent and know- how licence was regarded as a factor indicating dominance, as it made entry to the market more difficult for other firms that would be unable to gain access to the licensed technology.

Hugin v Commission[92]

Court of Justice seems to have accepted that Hugin was dominant in the market for spare parts for its cash registers because other firms could not produce spares for fear of being sued by Hugin in the UK under the Design Copyright Act 1968.

Continental Can Case[93]

In this case the court applied the supply side substitution while defining relevant market. In this case the defendants contended that the market for light containers for containers for canned meat products, the market for light containers for canned seafood and the market for metal closures for the food packing industry, other than crown corks are different from each other and must be considered separately. The court rejected their contention and held that all these market formed part of one "light metal container market" and not there different types of market applying the supply side substitution.

United Brands v. Commission[94]

The Court of Justice described the extent to which UBC's activities were integrated – it owned banana plantations and transport boats and it marketed its bananas itself – and said that this provided that firm with commercial stability which was a significant advantage over its competitors

s.2 (h)"enterprise" means a person or a department of the Government, who or whichis, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Malwa Industrial & Marketing Ferti-Chem Cooperative Society Ltd. v. CCI &Ors[95]

The appellant, Malwa Industrial & Marketing Ferti-Chem Cooperative Society Ltd. had averred before the Commission that the Registrar, Co-operative Societies, was not allowing different co-operative agricultural societies to purchase micro-nutrients and agro-chemicals from the appellant and had issued instructions making it mandatory to make such purchases from Punjab State Co-operative Supply and Marketing Federation only. The Commission had passed an order under Section 26(2) on the ground that the Registrar, Co-operative Societies did not fall within the ambit of the term 'enterprise'.

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[91] OJ [1988] L 272/27, [1988] 4 CMLR 88
[92] Case 22/78 [1979] ECR 1869, [1979] 3 CMLR 345
[93] JO [1972] L 7/25, [1972] CMLR D11
[94]Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429.
[95] Appeal No. 25/2015

The COMPAT analyzed the definition of 'enterprise' and 'goods' in the Act and observed that though the Registrar, Cooperative Societies, Punjab had issued circulars in the purported exercise of his powers under the Punjab Cooperative Societies Act, 1961 and the
Rules and Regulations framed thereunder, the fact remains that the same were definitely relating to the goods which could be purchased by primarily agricultural societies from Punjab State Co-operative Supply and Marketing Federation only. Therefore, the Registrar would fall within the ambit of term 'enterprise' as defined in Section 2(h) for the purpose of the Act and will be amenable to the jurisdiction of the Commission.

*s.2(y) **"turnover"** includes value of sale of goods or services;*

The Competition Act defines the relevant market as 'with the reference to the relevant product market or the relevant geographic market or with reference to both the markets'. The relevant geographic market is defined as "a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas".

The Competition Act further provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors: (s.19 read with s.27)

1. regulatory trade barriers;
2. local specification requirements;
3. national procurement policies;
4. adequate distribution facilities;
5. transport costs
6. language
7. consumer preferences
8. need for secure or regular supplies or rapid after-sales services

The relevant product market is defined in as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use'. The Competition Act provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors,

a) physical characteristics or end-use of goods
b) price of goods or service
c) consumer preferences
d) exclusion of in-house production
e) existence of specialized producers
f) classification of industrial products.

The abuse of dominance analysis under the Competition Act starts with the determination of market, once the relevant market has been determined; the CCI's next task is to establish whether the enterprise enjoys a dominant position. It is important to note here that the Competition Act does not prohibit the mere possession of dominance that could have been achieved through superior economic performance, innovation or pure accident but only its abuse. The Competition Act sets out following factors which the CCI will take into account to establish the dominant position of an enterprise

1. market share of the enterprise
2. size and resources of the enterprise

3. size and importance of the competitors
4. economic power of the enterprise including commercial advantages over competitors
5. vertical integration of the enterprises or sale or service network of such enterprises
6. dependence of consumers on the enterprise
7. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise
8. entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers
9. countervailing buying power
10. market structure and size of market
11. social obligations and social costs
12. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition
13. any other factor which the Commission may consider relevant for the inquiry

Once the dominance of an enterprise in the relevant market is determined the CCI has to establish the abuse of its dominance by an enterprise. The Competition Act sets out a list of activities that shall be deemed abuse of dominant position

1. anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices,
2. limiting the supply of goods or services, or a market or technical or scientific development, denying market access,
3. imposing supplementary obligations having no connection with the subject of the contract, or
4. using dominance in one market to enter into or protect another relevant market.

The list of abuses provided in the Competition Act is meant to be exhaustive, and not merely illustrative. This broadly follows the categories of abuse identified under 102 of TEFU. The Competition Act also exempts certain unfair or discriminatory conditions in purchase or sale or predatory pricing of goods or service from being considered an abuse when such trading conditions are adopted to meet competition.

It is important to note that the abusive practices listed in section 4 (2) are only prohibited under section 4 (1), these practices are not declared void as per section 3 and section 6 dealing respectively with the anti-competitive agreement and combination regulation

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Belaire Owner's Association v. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana[96]

Belaire Owners' Association filed this complaint against three Respondents namely, DLF Limited, HUDA and the Department of Town and Country Planning, Haryana. The informants alleged that DLF Ltd had

[96] Case No. 19 of 2010

abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the Housing Complex 'the Belaire', which has serious adverse effects and ramifications on the rights of the allottees.

The CCI concluded that DLF Ltd. was in contravention of Section 4(2)(a) (i) of the Competition Act in particular on account of the size and resources that DLF Ltd. had and the duration for which the abuse had continued leading to great advantages for DLF Ltd. and immense disadvantages to consumers. The CCI imposed a penalty at the rate of 7% (Rs 630 crores)of the average of the turnover for the last three preceding financial years on DLF Ltd.

For any violation of Section 4 of the Competition Act, the following components are key issues of determination:

1. What is the 'relevant market'?
2. Is the firm a dominant undertaking?
3. If the response to the query (ii) is in the affirmative, do the actions of the dominant undertaking constitute an abuse of its dominance?

3.3 'APPRECIABLE ADVERSE EFFECT ON COMPETITION IN INDIA'

The substantive test for determining liability under the Act is that of causing or likelihood of causing an AAEC in the relevant market in India. The Act provides guidance in relation to the factors that are required to be considered in determining whether or not there is likely to be an AAEC in the relevant market in India. Under Section 19(3) of the Act, the CCI is required to have due regard to all or any of the following factors in determining whether or not a particular agreement is anticompetitive:

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services; and

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

In relation to abuse of dominance, it should be noted that the Act interestingly does not specify any factors to determine whether or not conduct would amount to an abuse of dominance, resulting in the interpretation that abuse of dominance is a per se offence and is not determined by the 'rule of reason' approach. However, the Act does specify a set of factors to determine whether or not an enterprise may be considered dominant, in Section 19(4). It should be noted that the CCI has, however, in practice adopted a rule of reason approach in determining whether an enterprise has abused its dominance in the relevant market in India, such as in **DhanrajPillai v. Hockey India**[97] and Others and **Arshiya Rail case.**

Kapoor Glass Pvt Ltd v Schott Glass India Private Limited[98]

The COMPAT overturned the CCI's finding of abuse of dominance by Schott Glass, holding that a discriminatory discount policy was one where equivalent transactions are treated differently and that

[97] Case No.73 of 2011
[98] Case NO.22 of 2010

charging different prices and conditions for different quantities does not amount to imposing discriminatory conditions or prices, especially if the discrimination is on the basis of quantity sold.

The COMPAT observed that granting more favourable terms to customers who purchase large quantities is not an unfair practice, allowing manufacturers to incentivize customers to provide the certainty of demand and recoup large capital investments. The CCI, on the other hand, had imposed a minimal penalty of INR 566.6 million (approximately USD 9.16 million) on Schott Glass for abuse of dominance, based on the facts that Schott Glass was offering higher and more favourable discounts to Schott Kaisha and required execution of the trademark licensing agreement in relation to functional discounts, the terms of which were heavily tilted in its favour.

Shubham Srivastava v. Department of Industrial Policy & Promotion (DIPP) Ministry of Commerce & Industry[99]

Where the CCI while considering foreign direct investment policy of the Central Government which did not permit foreign airlines to invest in Air India, held that since the policy did not appear to be hampering competition, there was no AAEC.

Micromax v. Ericsson[100]

It was alleged by Micromax that Ericsson, the holder of a number of patents in 2G, 3G and 4G technologies, had abused its resultant dominant position by demanding unfair, discriminatory and exorbitant royalty for use of such patents. The CCI, observing that patent holders are required to grant irrevocable licenses on Fair, Reasonable and Non Discriminatory (FRAND) terms to similarly placed players, has directed an investigation by the DG under Section 26(1) of the Act for any violations under the Act. An order under Section 26(1) asking the DG to investigate the matter is not the final conclusion on the merits of the case. As such, the view that the CCI will take in relation to the complex interface of IPRs and competition law is unclear.

Maharashtra State Power Generation Ltd v. Coal India Ltd &Ors

The CCI imposed a hefty fine of INR 17730.5 million (approximately USD 286.51 million) on Coal India Limited (CIL). This was the first decision in relation to an abuse of dominance finding by a public sector undertaking. The CCI found that CIL had contravened Section 4 of the Act, by imposing onesided and unfair conditions in relation to the supply of coal to power companies, without any bilateral discussions.

The CCI restricted the definition of the relevant geographic market to India, based on the reasoning that Section 4 of the Act defined a 'dominant' position as a position of strength enjoyed by an enterprise, in the relevant market, in India. Further, CIL's dominant position finding was attributed to its market share of 63% in the relevant market and the nationalization Acts and the government policy by virtue of which it had been was vested with the ownership of coal mines. In addition to imposing a penalty, the CCI also directed that CIL modify the fuel supply agreements in consultation with all stakeholders.

In Kansan News Pvt. Ltd v. Fast Way Transmission Pvt. Ltd &Ors.

The CCI considered abuse of dominance by a group of enterprises and held that the respondents (cable transmission companies) abused their dominant position in the relevant market for cable TV service in Chandigarh and Punjab, by disrupting the broadcast of the news channel owned by the complainant thus

[99] Case No. 39/2013.
[100] Case No. 04 of 2015

denying market access to the complainant. The CCI established dominance on the basis of market shares, size, resources, market structures, the ability of the respondents to operate independent of competitive forces as well as to affect the competitors, consumers and the relevant market in its favour. A penalty of INR 80.39 million (approximately USD 1.30 million) was imposed on the respondents. The CCI's order has been appealed by Fast Way Transmissions before the COMPAT

Surinder Singh Barmi v Board for Control of Cricket in India

The CCI imposed a penalty of INR 524 million (approximately USD 8.47 million) on the Board of Control for Cricket in India (BCCI). The CCI investigated an alleged abuse of dominance by BCCI in relation to irregularities while granting franchise rights for team ownership, media rights for coverage of the league, sponsorship rights and other local contracts related to the organization of Indian Premier League (IPL). BCCI's dominance in this case was established inter alia on the basis of BCCI's regulatory powers, the infrastructure owned and controlled by BCCI and its role as an organizer of first class/international cricket. The CCI found the BCCI to have abused its dominant position by denying market access to potential competitors through agreements for 10 years duration, where the BCCI undertook not to organize, sanction, recognize, or support any another professional domestic Indian T20 competition that was competitive to the IPL.

DLF case

The CCI imposed a significant penalty of INR 6300 million (approximately USD 101.80 million) on DLF Limited (DLF) for abusing its dominant position in the relevant market for 'highend residential apartments in Gurgaon' by imposing unfair and unilateral terms and conditions on the buyers in the apartment buyer's agreement and requiring them to make substantial payments upfront. The CCI concluded that DLF had a dominant position on the basis of DLF's large asset base, market share of over
55% in Gurgaon and 3040% all over India, vertical integration, significant partnerships and joint ventures, vast experience in real estate development in the relevant market, statements issued by DLF Limited in the public domain (relating to its dominance in the market, in its red herring prospectus, annual report) etc.

It is pertinent to note that a supplementary order has recently been passed by the CCI in this case based on direction received by the COMPAT to modify the agreement entered into between the real estate developer (i.e. DLF) and the buyers (i.e. flat owners). This order will have huge implications on the way agreements are drafted by real estate developers, keeping in mind the interests of the buyers.

Exclusive Motors Pvt. Limited v. Automobili Lamborghini S.P.A[101]

The COMPAT dismissed the appeal against CCI's order, holding that there was no primafacie case against Automobili Lamborghini SPA (Lamborghini) and Volkswagen Group Sales India Pvt Ltd for contravention of Sections 3 and 4 of the Act. With respect to abuse of dominant position by Lamborghini, the COMPAT reiterated CCI's findings and observed that since in the last 5 years, only 93 cars of all manufacturers of sports cars had been sold in India, the relevant market was miniscule and as such, none of the super sports car manufacturers in the Indian market could be said to be dominant as far as their market share was concerned. The COMPAT further noted that every enterprise had the right to appoint its own group company as an importer and this could not be a ground for alleging contravention.

The CCI's aggressive enforcement action in relation to abuse of dominance cases reflects a lack of consistency with which the CCI defines the relevant market in abuse of dominance cases. The same can also

[101] Case No. 52 of 2012

be said for CCI's application of economic evidence while determining the relevant market. Given that the test of dominance is based on the relevant market, it would be useful for the CCI to provide definitive guidance in the form of guidelines, in addition to factors under Section 19(5) and (6) of the Act, for defining and delineating the relevant market.

Indian Exhibition Industry Association against Ministry of Commerce and Industry, Case (Pragatimaidan case)[102]

unfair and discriminatory condition imposed by a dominant player is relating to the PragatiMaidan in Delhi. This case was against the Indian Trade Promotion Organization (ITPO) for abusing its dominant position in the relevant market for "provision of venue for organizing international and national exhibitions, trade fairs (events) in Delhi". It was held in this case that PragatiMaidan is the only established venue for holding international and national trade fairs/exhibitions (events) in Delhi and ITPO as venue provider for holding events in Delhi has absolute control and dominance.

It was further found that ITPO has abused its dominant position by imposing unfair and discriminatory condition on the third-party event organisers for example the time gap restriction between two "third partyevents" was 15 days before and after the event whereas in case of ITPO's own organised events/exhibitions, the time gap restriction was 90 days before and 45 days after the event (which was amended to 90 days before and after the event in 2011). This was held to be unfair and discriminatory by CCIxii. A penalty of 2% of the average turnover of preceding three years was imposed on ITPO which amounted to Rs. 6.75 crores.

Maharashtra State Power Generation Company and Gujarat State Electricity Corporation Limitedagainst Mahanadi Coalfields Limited, Western Coalfields, South-eastern Coalfields and Coal India Limited and others[103]

CCI passed a common[104] order against Coal India Limited and its subsidiary finding it to abuse its dominant position by imposing unfair/discriminatory conditions and indulging in unfair/discriminatory conduct in the matter of supply of noncoking coal to power producers by way of unequal Fuel Supply Agreements (FSAs) imposed upon the purchasers of coal who do not have any option but to approach Coal India for supply of coal. While finding the abuse under section 4(2)(a)(i) of the Act, CCI found the following specific clauses to be unfair and discriminatory:

(i) Clauses relating to the sampling and testing procedure. (ii) Clauses relating to charging the transportation and other expenses from the buyers on supply of ungraded coal and the clauses relating to DDO. (iii) Clauses relating to capping on compensation for supply of stones for new power producers. (iv) Clauses relating to review and termination provisions of the agreement. (v) Discrimination between existing and new power producers with respect to review of grade. (vi) Clauses relating to force majeure for new power producers. A penalty of Rs. 177305 crores, i.e. 3% of the average turnover of last preceding three years was imposed on Coal India. The matter is under appeal before COMPAT. As regards promoting competition in this sector and requirement of a regulator, CCI observed: "However, there is an imperative need to carry forward this reform momentum further by restructuring the sector by introducing more number of players so that it can reduce the dominance of any one player and can facilitate competition. Bringing the coal sector under the independent regulatory oversight would only help if there are enough players in the market."

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[102] Case 74 of 2012

[103] Case 03, 11 & 59 of 2012

[104] http://cpgp.inflibnet.ac.in/cpgpdata/uploads/cpgp_content/law/03._competition_law/17._identification_of_abusive_use_of_dominant_position_/et/5656_et_17et.pdf (accessed on 15th October 2017)

Faridabad Industries Association (FIA) v. M/s Adani Gas Limited[105]

Similar to Coal India case (supra), CCI found that Adani has imposed unfair conditions on the buyers by way of Gas Supply Agreement (GSA), for example "likely termination of contract by the opposite party on account of failure to off-take 50% or more of the cumulative DCQ by the buyer during a period of 45 consecutive days as against the longer period available to the opposite party from GAIL." CCI imposed a penalty of 4% of the average turnover, i.e. Rs. 2567 lakhs on Adani in this casexv along with the orders to cease and desist and modification of the unfair and discriminatory clauses of the GSA. The aforesaid cases provide adequate example as to the approach of dealing with the untair and discriminatory conditions imposed by a dominant enterprise in India. It appears from the interpretation of the Commission's order that the dominant enterprise or group in India has a special responsibility to discharge and cannot behave as they like which leads to detriment of the market.

3.4. PREDATORY PRICING

S.4(2) (e) Explanation (b) "predatory price" means 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.

Under explanation (b) to Section 4 of the Act, predatory pricing refers to sale of goods or provision of services, at a price, which is below cost (as defined in the Competition Commission of India (Determination of Cost of Production) Regulations, 2009) with a view to reduce competition or eliminate competitors. Unfair and discriminatory conditions imposed in the purchase or sale of goods or services and unfair, discriminatory and predatory pricing may be justified if such conduct is adopted to meet competition. Therefore, predatory pricing will only be prohibited where there is an intention to reduce competition or eliminate competitors.

Standard Oil Co. of New Jersey v. United States[106]

Standard oil was a company established in New Jersey. It set up an oil refining monopoly in the United States of America (US) through the organized use of predatory price discrimination. Standard oil quashed its contenders in one market at a time until it enjoyed a monopoly position everywhere. It had acquired majority of stocks of a large number of companies in the oil industry. This combination was charged with having obtained a complete mastery over the oil industry controlling 90 per cent of the business of producing, shipping, refining and selling of petroleum and its products and thus, they were in a position to fix cutting prices of crude and refined petroleum selectively, wherever competitors entered. It gradually acquired a position of monopoly. The key to its dominance and the devise for its maintenance was the process of price discrimination. The combination abused its control and the anti-competitive practices leveled against them were:

a. Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies.

b. Restraint and monopolization by control of pipelines and unfair practices against competing pipelines.

c. Contracts with competitors in restraint of trade.

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[105] Case 71 of 2012

[106] 221 U.S.1 (1911).

d. Unfair methods of competition.

e. Espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent.

f. The division of the US into districts, and limiting the operations of the various subsidiaries corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed.

The Supreme Court of the US found Standard Oil guilty of entering into contracts in restraint of trade and monopolizing the petroleum industry through a long convoluted series of anticompetitive actions. Thus, this combination was in violation of Section 1 and Section 2 of the Sherman Act. Therefore the court held dissolution of the combination was appropriate.

The idea of predatory price cutting is simple enough: that a dominant firm deliberately reduces prices to a loss- making level when faced with competition from an existing competitor or a new entrant to the market; the existing competitor having been disciplined, or the new entrant having been foreclosed, the dominant firm then raises its prices again, thereby causing consumer harm. Attempts to eliminate an existing competitor may be more expensive and difficult to achieve than deterring a new one from entry, especially where the existing competitor is committed to remaining in the market. Where a dominant undertaking has a reputation for acting in a predatory manner, this in itself may deter new entrants: not only predatory pricing itself but also the reputation for predation may be a barrier to entry.

It is the essence of competition that firms should compete for custom by reducing prices. It has already been pointed out that rebates and similar practices are an essential component of the competitive process, and that the law should not condemn practices, even on the part of dominant firms, that are pro- competitive; in particular a dominant firm should not be deterred from passing on its efficiency to customers in the form of lower prices. The law on predatory price cutting has to tread a fine line between not condemning competitive responses on the part of dominant firms on the one hand and prohibiting unreasonable exclusionary conduct on the other: this takes us back to the debate on 'false positives' and 'false negatives' It would be perverse if the effect of competition law were to be that dominant firms choose not to compete on price for fear that, by doing so, they would be found guilty of an infringement.

Two Phases of predatory pricing[107]

1. Sacrifice phase: In this phase the enterprise suffer from heavy losses due to the predatory pricing which it has resorted to in order to drive away its competitors from the market.
2. Recoupment phase: In this phase the enterprise make up for the losses which was caused to her in the sacrifice phase.

Recoupment

Tetra Pak II was the primary case in which the question of whether an undertaking was able to recuperate it losses[108] was part of the test for predatory pricing. The Court of First Instance (CFI) held that recoupment was not a necessary part of the test for predatory pricing stating that: "It would not be appropriate ... to require in addition proof that Tetra Pak had realistic chance of recouping its losses".

[107]AshishAhluwalia, CCI Internship report ABUSE OF DOMINANCE: PREDATORY PRICING (http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.646.9414&rep-rep1&type-pdf) (accessed on 15th October 2017)

[108]https://www.lawteacher.net/free-law-essays/commercial-law/the-concept-of-predatory-pricing.php (accessed on 15th October 2017)

The court were not willing in this case, to apply recoupment as a criteria for predatory pricing, however whether this approach was restricted to the individual circumstances of this case remains to be seen. There is much debate about whether recoupment should be part of the test for predatory pricing.

Lang and Donoghue are primarily against the enforcement of this as criteria. They state "predatory pricing by a dominant company may have anti-competitive effects even if the dominant company does not or could not recoup it's losses" On the contrary, Attorney General Fenelly is of the view that recoupment should be part of the test for predatory pricing. In a competition discussion paper it was further reiterated that "The commission does therefore not consider that it is necessary to provide further separate proof of recoupment in order to find an abuse". In France Telecom the community courts cited paragraph 44 of Tetra Pak II and came to the conclusion "The Commission was therefore right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing"

CCI Test to predatory pricing

The Indian competition law has adopted AVC as the appropriate measure of cost, which is by and large the measure of cost adopted in all jurisdictions. There is a presumption in most cases that where the enterprise sets its price below its AVC, it has engaged in a predatory pricing practice. However, prices falling between the ATC and AVC are also subject to inquiry, but in such case specific intent would have to be shown. Prices set above the ATC are unlikely to be challenged. The CCI also has proposed certain regulations with respect to determining cost in cases of multi-product enterprises (Reg. 5), Joint products and By-products (Reg. 6), transfer pricing (Reg. 7)And captive consumption (Reg. 8). Once a predatory price allegation is established, the enterprise would be said to have abused its dominant position. Where after inquiry, the CCI finds that an enterprise in a dominant position is in contravention of the provisions of Section 4, it may pass any of the orders specified under Section 27 of the Act and may further under Section28 of the Act direct the division of an enterprise enjoying a dominant position to ensure that such an enterprise does not abuse its dominant position.

AKZO v. Commission[109]

In ECS/AKZO the Commission imposed a fine of €10 million on AKZO for predatory price cutting. ECS was a small UK firm producing benzoyl peroxide. Until 1979 it had sold this product to customers requiring it as a bleach in the treatment of flour in the UK and Eire. It then decided also to sell it to users in the polymer industry. AKZO, a Dutch company in a dominant position on the market, informed ECS that unless it withdrew from the polymer market it would reduce its prices, in particular in the flour additives market, in order to harm it. Subsequently AKZO did indeed reduce its prices. In holding that AKZO had abused its dominant position the Commission declined to adopt the Areeda and Turner test of predatory price cutting, according to which pricing above AVC should be presumed lawful.

While accepting that cost/price analysis is an element in deciding whether a price is predatory, the Commission considered that it was also relevant whether the dominant firm had adopted a strategy of eliminating competition, what the effects of its conduct would be likely to be and what a competitor's likely reaction to the conduct of the dominant firm would be. At paragraph 79 of its decision the Commission suggested that even a price above ATC might be predatory when assessed in its particular market context.

On appeal the Court of Justice upheld the Commission's finding of predatory pricing, saying that not all price competition can be considered legitimate. The Court of Justice held that where prices were below AVC predation had to be presumed, since every sale would generate a loss for the dominant firm. The Court

[109] OJ [1985] L 374/1, [1986] 3 CMLR 273

of Justice did not say that the presumption could never be rebutted; in France Télécom v Commission the Court said that prices below AVC are 'prima facie abusive', an important difference. It would be wrong to have a per se rule that selling below AVC is always illegal.

For example it is arguable that a dominant firm should sometimes be able to sell below cost: sales promotions sometimes involve below- cost selling; and the disposal of old stock at the end of the season at a price below cost would presumably not be unlawful. The Court of Justice in AKZO v Commission went on to hold that where prices are above AVC but below ATC they will be regarded as abusive if they are part of a plan which is aimed at eliminating a competitor such a pricing policy might mean that a dominant firm drives from the market undertakings that are as efficient as it but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them. The Court of Justice therefore upheld the Commission's rejection of the Areeda/Turner test.

3.5. TEST TO FIND ABUSE OF DOMINANCE BASED ON PREDATORY PRICING[110]

There is no single cost measure used by all responding agencies and, as described below, frequently agencies have used more than one measure. The most commonly cited measures are discussed below,

1. Marginal cost ("MC") is the increase in total cost attributable to producing the last unit actually produced. MC is almost never used as a benchmark for a number of reasons, including the complexity of its calculation.

2. Average variable cost ("AVC") is the total variable cost divided by the number of units produced. Variable costs may include items such as materials, fuel, labor, utilities, repair and maintenance, per unit royalties and license fees. Almost all jurisdictions use or have used this measure.

3. Average avoidable cost ("AAC") consists of the costs that can be avoided by not producing any given number of units divided by that number of units. The Canadian authority uses an avoidable cost test in determining whether prices are predatory on the basis that a firm selling at prices that do not cover its avoidable costs will not be profit maximizing unless there is an expectation that its pricing policy eventually will create or enhance the firm's market power. Canada considers avoidable costs to be all costs that would be avoided if the firm chose not to produce or sell the relevant product(s) during the period of time the firm engaged in its alleged predatory pricing policy.

   These costs include:
   - i) variable costs such as labor, materials, energy, use-related plant depreciation, promotional allowances, etc.;
   - ii) non-sunk, product-specific fixed costs ("quasi-fixed costs"); and
   - iii) incremental fixed and sunk costs associated with sales generated by the firm during the period the pricing policy is in place.

   Average avoidable cost of incremental output was used in the U.S. Department of Justice's (DOJ) case against American Airlines. In its one case, the Chilean Competition Court wanted to use AAC, but had information only on AVC and therefore used AVC as a "proxy" for AAC. The UK's OFT has used both AVC and AAC. For the EC, pricing below AAC is used as a starting point in the analysis and in most cases is understood to be a clear indication of conduct that entails a sacrifice

[110] http://www.internationalcompetitionnetwork.org/uploads/library/doc354.pdf (accessed on 15th October 2017)

(loss). The European Commission notes that average avoidable cost may be the same as AVC on the basis that often only variable costs can be avoided.

4. Long run average incremental cost ("LRAIC") is the sum of the variable and product specific fixed costs divided by the number of units produced. Long run average incremental cost has been used in addition to other measures to analyze costs of multiproduct firms when some costs cannot be uniquely attributed to a particular product. Some agencies consider LRAIC an appropriate benchmark. in particular for industries characterized by high fixed costs and low variable costs. such as telecommunications or postal.

5. Average total cost ("ATC") is total cost divided by units produced. It equals the sum of AVC plus average fixed cost. Eighteen of the responding agencies use or have used this measure, in addition to other measures, most frequently in addition to AVC tests. 32 See Sections B and C below.

Tetra Pak v Commission[111]

In Tetra Pak II the Commission found Tetra Pak guilty of predatory pricing in relation to its non- asceptic cartons; it considered that Tetra Pak was able to subsidise its losses from its substantial profits on the market for asceptic cartons, where it had virtually no competition. The Commission said that in seven Member States the non- asceptic cartons had been sold at a loss. However the Commission concentrated on the position in Italy, where the cartons had been sold below AVC.

France Telecom v. Commission[112]

In this case the Commission applied the rule in AKZO case and imposed a fine of € 10.35 million. The European Commission found that, up to October 2001, the retail prices charged by Wanadoo Interactive, a subsidiary of France Telecom, were below cost and had abused its dominant position by predatory pricing in ADSL- based Internet access services for the general public. This practice restricted market entry and development potential for competitors, to the detriment of the consumers, on a market essential for the development of the information society. In commission's view Wanadoo's behavior was designed to take lion's share of the booming market.41 On appeal ECJ also upheld the order of the Commission.

Compagnie Maritime Belge v Commission[113]

The Commission investigated the policy of 'fighting ships', whereby members of a liner conference in the maritime transport sector, Cewal, reduced their charges to the level, or to below the level, of their one competitor, Grimaldi and Cobelfret ; they also operated t he fighting ships on the same route and at the same time as Grimaldi's. The Commission **concluded that** the policy was one of selective price cutting intended to eliminate the competitor and that Article 102 was infringed. The Commission's decision was upheld by General Court. Th e Court of Justice agreed that there was an infringement of Article 102, although the fines were annulled for technical reasons.

The Napp Pharmaceutical case[114]

In Napp Pharmaceutical Holdings Ltd the OFT concluded that Napp was guilty of charging predatory prices for sustained release morphine by selling some products to hospitals at less than direct cost. which it

[111] OJ [1992] L 72/1, [1992] 4 CMLR 551
[112] e IP/03/1025
[113] OJ [1993] L 34/20, [1995] 5 CMLR 198.
[114] [2001] UKCLR 597

considered, on the facts of the case, to be a proxy for AVC. The OFT rejected Napp's argument that sales below cost to hospitals were objectively justified since Nappwould be able to recover the full price from follow- on sales to patients in the community; indeed the very reason that Napp was able to earn high margins on sales to the community was that it had been successful in stifling competition in relation to sales to hospitals.

On appeal the CAT held that Napp, as an undertaking which it considered to be 'super- dominant', had abused its dominant position by charging prices below cost to hospitals in order to ward offa competitor. The CAT held that, as Napp had offered prices below AVC to hospitals, it was not necessary to determine whether it had a plan to eliminate competition; however the CAT found that such a plan existed in any event.

United Brands v. Commission[115]

The Court of Justice held that UBC had abused its dominant position by charging different prices for its bananas according to the Member State of their destination. It sold bananas to distributors/ripeners at Rotterdam and Bremerhaven, and charged the lowest price for bananas destined for Ireland and the highest for those going to West Germany. The different prices were not based on differences in costs: in fact transport to Ireland, for which UBC itself paid, cost more than to other countries so that, if anything, prices should have been higher there. UBC was also condemned for including clauses in contracts with distributors which had the effect of preventing parallel imports from one country to another by prohibiting the export of unripened bananas.

MatushitaElec Industrial Co. and others v. Zenith Radio Corp. and others[116]

In this case the action was initiated under sections 1 and 2 of the Sherman Act, 2(a) of the Robinson-Patman Act by certain American companies manufacturing and selling television sets, against a group of Japanese companies or Japanese controlled American companies. The charge was that the Japanese companies had entered into an illegal conspiracy to drive American firms from the American consumer electronic products market by engaging in a scheme to fix and maintain artificially high prices for the television sets sold by the petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in US.

The Court explained the concept of predatory pricing conspiracy as 'A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forego the profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. The Court also held that predatory pricing conspiracies were generally unlikely to occur where the prospect of attaining monopoly power, necessary for recouping the losses caused by below cost prices, seemed slight, as in this case. Two American companies held the largest share of the American retail market in colour television sets and it was held that the Japanese companies did not resorted to predatory pricing.

[115] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429
[116] 475 US 574 (1986)

Cargill, Inc. v. Monfort of Colorado, Inc[117]

The decision of this case came in the same year as of Matushita case. It made certain observations about predatory pricing. Predatory pricing was defined as a practice of pricing below an appropriate measure of cost, aimed at eliminating competition in the short run and reducing competition in the long run. In this case the plaintiff wanted an injunction against the impending acquisition of the second and third largest beef packer companies in the US, contending that it would alter the market structure in a way that would subject them to elevated costs, lower prices and reduced profits by the means of injury from below-cost pricing.

In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Therefore for it to be successfully established both conditions, elimination of competition and recoupment must be taken into consideration. The merged company would not have been capable of successfully pursuing a predatory scheme due to the lack of entry barriers and a low market share because of which it will not be able to recoup its losses.

Brooke Group Ltd v. Brown & Williamson Tobacco Corp[118]

In this case, Liggett (new name of Brooke Group Ltd) charged that the volume rebates offered by Brown & Williamson to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition in violation of section 2(a) of the Clayton Act. as amended by the Robinson-Patman Act. The complaint was that the system of rebates was part of a predatory pricing scheme under which Brown & Williamson set prices for generic cigarettes below average variable costs, forcing Liggett to raise its list prices on its generics, restraining the growth of the economy segment. This helped preserve Brown & Williamson supra competitive prices on branded cigarettes.

The first requirement for a claimant seeking to establish competitive injury resulting from a rival's low prices was to prove that the prices complained of were below an appropriate measure of the rivals cost. The second requirement was 'a demonstration that the competitor had a reasonable prospect, or, under s-2of Sherman Act, a dangerous probability of recouping its investment in below-cost prices.

The Court added 'Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced'. The Court decided that there was no evidence to support the likelihood of an oligopolistic price coordination and sustained supra competitive pricing in the generic segment of the national cigarette market. In the absence of these, there was no reasonable prospect of Brown & Williamson recouping its predatory losses and no injury to the competition could be caused.

Consumers Guidance Society v. Hindustan Coca Cola Beverages Pvt. Ltd[119][120]

In this case CCI decided on abuse of dominance in relation to the sale of its aerated drinks and bottled water at high prices by Coca-Cola in multiplex theatres), the CCI held that Coca-Cola was not dominant, by defining the market to be all multiplex theatres in India, as opposed to any single multiplex theatre, which would no doubt have led to the obvious conclusion that Coca-Cola was dominant.

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[117] 479 U.S. 104 (1986)
[118] 509 US 209 (1993)
[119] CCI Case No. UTPE 99 of 2009
[120] Ayushi Gupta, Article on DOMINANT POSITION –MARKET - SECTIONS 2 (R), 2 (S) AND 2(T) OF THE COMPETITION ACT, 2002

The Complaint in this case was filed before the Monopolies and Restrictive Trade Practices Commission ("MRTPC") on 01.10.2008 by the Consumer Guidance Society, Vijayawada (hereinafter referred to as "Informant") against Hindustan Coca Cola Beverages Pvt. Ltd (hereinafter referred to as "HCCBPL") and INOX Leisure Private Limited (hereinafter referred to as "ILPL") for their alleged restrictive and unfair trade practices.

It was alleged that the Opposite Parties, HCCBPL and the ILPL have entered into an agreement and in pursuance of that agreement HCCBPL has been supplying its products which, inter- alia, include the package drinking water and soft drinks at an inflated and exorbitant price which is in sharp variance with normal price of same products in open market. Thus, the HCCBPL and ILPL are indulging into discriminatory pricing policy by selling products with same quality, quantity, standard and package at different prices to different buyers' i.e. higher prices from the buyers at ILPL complex and lower prices from the buyers in open market.

CCI noted that, "HCCBPL in its reply has submitted that there is intense competition between suppliers of non-alcoholic beverages to compete for obtaining such contract with multiplexes and to buttress this argument they have pointed out that many multiplex owners like Adlabs/Big Cinemas, Cinemax and Waves Cinema have been switching over their suppliers periodically. HCCBPL has also submitted that it has been able to enter into such agreements with multiplexes having only 214 screens in India whereas its competitor PEPSICO has entered into similar agreements with a large number of multiplexes having about 600 screens".

CCI observed that, "there are about 900 multi-screen theatres out of which HCCBPL is having exclusive supply agreement with multiplexes having 214 screens and PEPSICO with multiplexes having 600 screens, the relevant geographical market cannot be confined to the closed market inside the premises of multiplexes owned by ILPL who is only operating 38 multiplexes in India. If the relevant geographical market is taken as defined by the DG it would certainly lead to illogical conclusion and in that case every retail outlet, restaurant or store having exclusive supply agreement with a supplier will be deemed dominant within the boundaries of its premises and at the same time because of such agreements supplier will also be deemed dominant within the closed premises of that retailer. All this leads to the irresistible conclusion that there is not sufficient material on record to establish that either HCCBPL or ILPL is enjoying dominant position in the relevant market, properly so defined".

Fast Track Call Cab Private Ltd. (Informant) & M/s Ani Technologies Pvt. Ltd.[121]

The Informant alleged that the Opposite Party commands about 69 per cent of the market share, thus enjoying a dominant position in the relevant market. Unfair conditions and predatory pricing had set up its monopoly and disposed of generally similarly effective contenders who can't enjoy such predatory pricing in the radio taxi services market in the city of Bengaluru. It was also contended that the Opposite Party, under the brand name Ola taxis, is putting forth different unlikely rebates and rates to bait the clients and unviable incentives to its drivers, thereby bringing about business failure for the Informant. It was likewise asserted that such practice is bringing about removing the current players out of the market and is additionally making entry barriers for the potential players.

Unleashing such assault of anti-competitive schemes in March 2014 amounted to a fall of Informant's market share from Rs. 23 lakh in March, 2014 to Rs. 9.5 lakh in December, 2014 causing significant financial losses. Despite the prima facie order of the Commission, the Opposite Party did not stop its practices of charging predatory prices. The Commission was of the view that since the pricing is below average variable cost, there was no need to intent. The opposite being a dominant player in the market could

[121] Case No. 06 of 2015

not provide any justification as to such pricing behaviour in the relevant market. There was an impending threat of the Informant and even other players in the relevant market of completely getting quashed from the relevant market within a short period of time, and there is an immediate requirement to stop the Opposite Party from practicing predatory pricing any further. This even threatened the competition from being eliminated in the relevant market, leading to monopolization.

MCX Stock Exchange against National Stock Exchange of India Ltd. (NSE)[122]

The question of predatory pricing came up for the Competition Commission of India in the MCX case. The NSE and MCX-Stock Exchange (MCX-SX) had entered into currency derivatives trading in August 2008 and October 2008 respectively, followed by United Stock Exchange (USE) in 2010. However, in November 2009, MCX-SX filed a complaint against NSE for abusing its dominant position and thus violating the Competition Act. MCX alleged that NSE had abused its dominant position in the form of waiver of transcription fees, data feed fees and admission fees. The commission found out that the Currency Derivative (CD) and Over the Counter Exchange (OTEC) market are the relevant market and NSE has dominant position in it and has abused its dominant position.

NSE countered this asserting that there was no concrete evidence to impute any intent to capture the market to NSE. Further, they credited the low pricing to the nascent stage of the market, claiming that the pricing was penetrative and promotional. not predatory. Further, NSE claimed the waivers were made with a view to expand the market and make it more lucrative to buyers having been introduced in 2008, following the economic downfall. The Commission found out that that the segment was no longer in its nascent stage –it had moved on to its immature/infant stage, so there was no need for the zero pricing policy. NSE's pricing was found to be beyond promotional and penetrative. However, the CCI did not consider the pricing to be predatory. Instead it was considered to be 'unfair'. NSE's zero pricing was considered a consequence of its deep pockets and declared unfair by the CCI due to its inability of its weaker competitor to sustain such policies.

The Commission noted, —If even zero pricing by dominant player cannot be interpreted as unfair, while its competitor is slowly bleeding to death, then this Commission would never be able to prevent any form of unfair pricing including predatory pricing in future. The concept of 'unfair pricing' was in issue wherein CCI held 'predatory price' to be a subset of 'unfair price' and held that 'zero pricing' by NSE in 'currency derivative market' was annihilating or destructive pricing as it was beyond the parameters of promotional or penetrative pricing. CCI further directed NSE to maintain separate accounts for each segment of the market and modify its zero pricing policy.

The CCI imposed a penalty of INR 555 million (approximately USD 8.97 million) on National Stock Exchange of India Ltd. (NSE), based on NSE's market position in other related yet distinct markets. The CCI held that NSE had abused its dominance in the relevant market (i.e. the CD segment of the securities market) although at the time of passing of the order, NSE's market share in the relevant market was 30% while the complainant's market share was 34%.

In its assessment of whether there was an 'abuse' of dominance, the CCI developed a concept of 'unfair pricing' distinct from 'predatory pricing' and arrived at the conclusion that NSE was drawing on its economies of scale with the intention to impede future market access to potential competitors and foreclose existing competition, which it deemed completely unfair from a competition law perspective;

[122] Case 13 of 2009

UNIT - IV

REGULATION OF COMBINATIONS

Regulation of combination[123] under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad. The words combination and merger are used interchangeably in this booklet. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.

s. 5 Combination

The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if –

(a) any acquisition where –

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have, -

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have, -

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if-

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, -(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

[123] CCI Advocacy Booklet on Combinations (http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/combination.pdf) (accessed on 15th October 2017)

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,-

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]

(c) any merger or amalgamation in which -(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, -

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,-

(A) either in India, the assets of the value of more than rupees fourthousandcrores or turnover more than rupees twelve thousand crores; or

(B) [in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars,

including at least rupees fifteen hundred crores in India;]

Explanation - For the purposes of this section, -

(a) "control" includes controlling the affairs or management by -(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise;

(b) "group" means two or more enterprises which, directly or indirectly, are in a position to —

(i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered

proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

s. 6. Regulation of combinations

(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within [thirty days] of –

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

[(2A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.]

(3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation - For the purposes of this section, the expression-

(a) "foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961(43 of 1961);

(b) "venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961);.

4.1 THRESHOLDS FOR COMBINATIONS UNDER THE ACT

India is one of the fastest growing economies in the world. The growth process is driven both by organic and inorganic (through the mergers and acquisition route) growth of enterprises. It is neither feasible nor advisable to review all the mergers and acquisitions. It is natural to presume that in the case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India. The Act provides for sufficiently high thresholds in terms of assets/turnover, for mandatory notification to the Commission.

The Act also provides for revision of the threshold limits every two years by the government, in consultation with the Commission, through notification, based on the changes in Wholesale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies. Vide notification S.O. 480 (E) dated 4th March, 2011, the government has enhanced the value of assets and turnover mentioned in section 5, by fifty percent. The current thresholds for the combined assets/turnover of the combining parties are as follows: Individual: Either the combined assets of the enterprises would value more than (INR) 1,500 crores in India or the combined turnover of the enterprise is more than (INR) 4,500 crores in India. In case either or both of the enterprises have assets/turnover outside India also, then the combined assets of the enterprises value more than US$ 750 millions, including at least (INR) 750 crores in India, or turnover is more than US$ 2250 millions, including at least (INR) 2,250 crores in India.

Group: The group to which the enterprise whose control, shares, assets or voting rights are being acquired would belong after the acquisition or the group to which the enterprise remaining the merger or amalgamation would belong has either assets of value of more than (INR) 6000 crores in India or turnover more than (INR) 18000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US$ 3 billion including at least INR 750 crores in India or turnover more than US$ 9 billion including at least INR 2250 crores in India. The term Group has been explained in the Act. Two enterprises belong to a "Group" if one is in position to exercise at least 26 per cent voting rights or appoint at least 50 per cent of the directors or controls the management or affairs in the other3 . Vide notification S.O. 481 (E) dated 4th March, 2011, the government has exempted "Group" exercising less than fifty per cent of voting rights in other enterprise from the provisions of section 5 of the Act for a period of five years

The turnover shall be determined by taking into account the values of sales of goods or services. The value of assets shall be determined by taking the book value of the assets as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation. The value of assets shall include the brand value, value of goodwill, or Intellectual Property Rights etc. referred to in explanation (c) to section 5 of the Act.

4.2 EXEMPTION FROM NOTIFICATIONS

In exercise of the powers conferred by clause (a) of Section 54 of the Act, the Central Government, in public interest, has exempted: a an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than INR 250 crore in India or turnover of not more than INR 750 crore in India from the provisions of Section 5 of the said Act for a period of five years.4 a a banking company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Act for a period of five years.

4.3 COMBINATION NOTICE

[124] ***Regulation 5.*** *Form of notice for the proposed combination.-*

(1) Any enterprise which proposes to enter into a combination shall give notice of such combination to the Commission in accordance with sub-section (2) of section 6 of the Act and these regulations.

(2) The notice under sub-section(2) of section 6 of the Act, shall ordinarily be filed in Form 1 as specified in schedule II to these regulations, duly filled in and accompanied by evidence of payment of requisite fee by the parties to the combination.

[124] CCI (Procedure in regard to the transaction of business relating to combinations) Res. 2011.

(3) Notwithstanding anything contained in sub-regulation (2) and without prejudice to the provisions of sub-regulation (5), the parties to the combination may, at their option, give notice in Form II, as specified in schedule II to these regulations,

preferably in the instances where-(a) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than fifteen percent (15%) in the relevant market;

(b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than twenty five percent (25%) in the relevant market.

(3A) The parties to the combination shall give notice in Form I or Form II, as the case may be, in accordance with the notes to Form I and Form II issued by the Commission and published on its official website, from time to time.

(4) Where in the course of inquiry, it is found by the Commission that it requires additional information, the Commission may direct the parties to the combination to file such additional information

Provided that the time taken by the parties to the combination in filing such additional information shall be excluded from the period provided in sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(5) Having due regard to the provisions of sub-regulations (2) and (4), in cases where the parties to the combination have filed notice in Form I and the Commission requires information in Form II to form its prima facie opinion whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market, it shall direct the parties to the combination to file notice in Form II as specified in schedule II to these regulations:

Provided that the fee already paid by the parties to the combination while filing notice in Form I shall be reduced from the fee payable for filing notice in Form II:

Provided further that the time period mentioned in sub-section (2A) of section 6 of the Act, sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations shall commence from the date of receipt of notice in Form II.

(6) If the requisite details are not available for any of the columns in Form I or Form II, the date on which they may be submitted should be clearly indicated against those columns, by the parties to the combination:

Provided that the time taken by the parties to the combination to submit the requisite details shall be excluded from the period provided in sub-section (11) of section 31 of the Act and sub-regulation (1) of regulation 19 of these regulations.

(7) The reference to the "board of directors" in clause (a) of sub-section (2) of section 6 of the Act, shall mean and include,-(a) the individual himself or herself including a sole proprietor of a proprietorship firm;

(b) thekarta in case of a Hindu Undivided Family (HUF);

(c) the board of directors in case of a company registered under the Companies Act, 1956;

(d) in case of a corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) or an association of

persons or a body of individuals, whether incorporated or not, in India or outside India or anybody corporate incorporated by or under the laws of a country outside India or a cooperative society registered under any law relating to cooperative societies

or a local authority, the person or the body so empowered by the legal instrument that created the said bodies;

(e) in the case of a firm, the partner(s) so authorized;

(f) in the case of any other artificial juridical person not falling within any of the preceding sub- clauses, by that person or by some other person competent to act on his behalf.

(8) The reference to the "other document" in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets:

Provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the "other document":

[Provided further that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the "other document".]

(9) Where, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.

4.4. PROCEDURE FOR COMBINATION

The review process for combination under the Act involves mandatory pre-combination notification to the Commission. Any person or enterprise proposing to enter into a combination shall give notice to the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of the proposal relating to merger or amalgamation by the board of directors or of the execution of any agreement or other document in relation to the acquisition, as the case may be. In case, a notifiable combination is not notified, the Commission has the power to inquire into it within one year of the taking into effect of the combination. The Commission also has the power to impose a fine which may extend to one per cent of the total turnover or the assets of the combination, whichever is higher, for failure to give notice to the Commission of the combination. Any combination for which notice has been filed with the Commission would not take effect for a period of 210 days from the date of notification or till the Commission passes an order, whichever is earlier. If the Commission does not pass an order during the said period of 210 days, the combination shall be deemed to have been approved.

ACQUISITION OR FINANCING FACILITY BY PFIs, VCFs Etc.

In case of share subscription or financing facility or any acquisition, inter alia, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement, details of such acquisition are required to be filed with the Commission within seven days from the date of acquisition.

PROCEDURE FOR INVESTIGATION OFCOMBINATIONS

As per the Combination Regulations, the Commission shall form its prima facie opinion as to whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market in India within 30 days from the receipt of the notice. If the Commission is prima facie of the opinion that a combination has caused or is likely to cause adverse effect on competition in Indian markets, it shall issue a notice to show cause to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the prima facie opinion that the combination has or is likely to have appreciable adverse effect on competition, the Commission shall deal with the notice as per the provisions of the Act.

EVALUATION OF 'APPRECIABLE ADVERSE EFFECT ON COMPETITION'

The Act envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in sub section (4) of section 20. Factors to be considered by the Commission while evaluating appreciable adverse effect of Combinations on competition in the relevant market:

1. actual and potential level of competition through imports in the market;
2. extent of barriers to entry into the market;
3. level of concentration in the market ;
4. degree of countervailing power in the market;
5. likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
6. extent of effective competition likely to sustain in a market;
7. extent to which substitutes are available or are likely to be available in the market;
8. market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
9. likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
10. nature and extent of vertical integration in the market;
11. possibility of a failing business;
12. nature and extent of innovation;
13. relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
14. whether the benefits of the combination outweigh the adverse impact of the combination, if any.

FAILURE TO FILE NOTICE (Regulation 8.)

(1) Where the parties to a combination fail to file notice under sub-section (2) of section 6 of the Act, the Commission may under sub-section (1) of section 20 of the Act, upon its own knowledge or information relating to such combination, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition within India.

(2) Where the Commission decides to commence an inquiry, referred to in sub regulation (1), the Commission, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, shall direct the parties to the combination to file notice in Form I or Form II, as decided by the Commission.

(3) The notice, referred to in sub-regulation (2), shall be filed, within 30 days of receipt of communication from the Commission, by the parties to the combination.

APPEALS

Under the relevant provisions of the Act, an appeal to NCLT (National Company Law Tribunal) may be filed within 60 days of receipt of the order /direction/decision of the Commission

Thomas Cook v. Competition Commission of India[125]

Thomas Cook (India) Limited ('TCIL') and its subsidiary, i.e., Thomas Cook Insurance Services (India) Limited ('TCISIL') decided to take-over the business of Sterling Holiday Resorts (India) Limited ('SHRIL') pursuant to a scheme of amalgamation & arrangement under the Companies Act. The Commission held that the scheme of amalgamation and arrangement and all the acquisitions (share purchase from promoters, share subscriptions, acquisition pursuant to open offer and the market purchases) envisaged by the parties are parts of one composite combination, whereas TCISIL had consummated the amalgamation even before filing the notice to the Commission.

Therefore, the Commission held that the parties failed to give notice in terms of Section 6(2) of the Act. It imposed a penalty of Rs.1 crore on the parties under Section 43A of the Act for non-filing of the notice for the said combination in-time. However, it approved the combination under Section 31 (1) of the Act as it did not find AAEC.

The COMPAT allowed the appeal on the ground that the appellants had not suppressed the information regarding the market purchases of equity shares of SHRIL for the purpose of obtaining any advantage under the Act. Further, object of Regulation 9(4) is to facilitate filing of one notice in respect of various interconnected transactions implying that if the parties take several steps for achieving the object of combination, they are not required to file separate notices under Section 6(2). The violation was purely technical and penalty cannot be sustained on that alone.

[125]APPEAL NO. 48 OF 2014

UNIT V

COMPETITION COMMISSION OF INDIA

Chapters III & IV ss.7 -40 speaks about Establishment, composition, duties, functions and powers of the Competition commission of India. It is being a market regulator plays a major role to protect the best interest of the consumers and enterprises in the market. The Competition Act, 2002, which establishes the Competition Commission of India (CCI), provides a regulatory regime that prohibits abuse of market power, whether acquired through concert, dominance, or combination, and thereby protects freedom of enterprises at market place.

This enables the enterprises to compete among themselves on merits on a level playing field for a larger share of the market. As a consequence, each enterprise tries to do better than others by improving its efficiencies: technological, productive, dynamic (innovation) and so on. Some enterprises thrive, others lose and may even have to exit, but the economy always gains, for it is only the most efficient ones that survive. The surviving enterprises generate the highest return on resources. The result of this approach has been astounding. From a largely controlled, state-owned and inward-looking economy, India has become a more liberal, more private sector led and more globalized economy. Importantly, the success of reforms reinforced faith in the market: a faith that demand for and supply of goods and services determine the two major economic outcomes, namely, quantities to be produced in the economy and prices at which these are to be exchanged, in a manner that is best for the economy.

5.1 Establishment and composition of CCI

s. 7. Establishment of Commission

(1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India".

(2) The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the Commission shall be at such place as the Central Government may decide from time to time.

(4) The Commission may establish offices at other places in India.

s.7 Composition of Commission

[.(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members.]

s. 9 Selection Committee for Chairperson and Members of Commission

[1) The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

a) the Chief Justice of India or his nominee - Chairperson;

b) the Secretary in the Ministry of Corporate Affairs - Member;

c) the Secretary in the Ministry of Law and Justice - Member;

d) two experts of repute who have special knowledge - Members of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy

(2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.]

The objective of CCI is to play an overarching role as a market regulator across all sectors with the focus on anti-competitive behaviour of enterprises that may distort competition. Sector rules and regulations are framed ex ante (laying down performance criterion) after consultation with industry and consumers, and reviewed from time to time for correction, whereas the market regulator, CCI, performs mostly ex post functions only to curb concentration in the market (laying down criterion for fair play).

Here lies the essential difference in their approaches as anti-competitive activities or any conduct that may harm competition usually involve collusion/cartelization or strategies to concentrate in a particular market. Legislation with regard to sectors neither defines cartels or abuse of dominance nor provides the investigative mechanism to establish such economic irregularities. Therefore, the Competition Act, 2002, has overriding effect and envisages that it shall have jurisdiction in addition to and not in derogation of other laws (section 60-62).

The idea to oversee deals ex ante before they are executed is to pre-empt combinations that could potentially have an adverse impact on competition in the relevant market. The analysis of competition concerns in any market invariably require an assessment of market power to see if the market dynamics would allow the parties to concentrate and deny market access to new entrants. Competition authorities intervene only for prevention of market failures, restriction or removal of anti-competitive practices, and promotion of public interest.

While the market dynamics keep changing with additional players and varied spectrum of services, how can the sector regulators gauge the impact of harm or benefit of consolidation in the market until the terms of a deal are assessed with the market structure at that time? On the other hand, mergers and acquisitions control by CCI is based on size of business test (as opposed to market share). On triggering of the thresholds specified under the Competition Act, CCI will look at the terms of the deal and impact on market from prevailing circumstances.

Regulatory bodies are institutionalized for independent management of the sector. The Supreme Court has recently enunciated the important role of a regulator while considering the powers or competence of the Telecom Regulatory Authority of India. However, several high courts are failing to appreciate the role of regulators, particularly CCI, which was set up in 2009. Its jurisdiction is still questioned and high courts are brisk in stalling investigations initiated by them. The question then arises—do courts have a so-called mental

picture of how the markets are watched by competition authorities in other jurisdictions? The success or failure of CCI will have no small significance for the Indian economy, but failure cannot be afforded.

TERM OF OFFICE

s.10 Term of office of Chairperson and other Members

(1) The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment:

[Provided that the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years]

(2) A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9.

(3) The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.

(4) In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(5) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

The term of office of all the members of CCI is 5 years or till the attainment of age of 65 years(whichever is early). The members are eligible for re-appointment. The Chairperson and other members of CCI cannot hold any further employment for a period of two years from the date they cease to hold office in the Commission. But this restriction does not applies to any employment in the Union and State Government authority.

5.2. OBJECTIVES OF COMPETITION COMMISSION OF INDIA:

The Competition Commission of India (CCI) has been entrusted with the following task –

1. To promote and then sustain an enabling competition culture through engagement and enforcement which would inspire businesses to be fair, competitive and innovative.
2. To enhance the consumer welfare
3. To support economic growth.
4. The Competition Commission of India aims to establish a robust competitive environment through proactive engagement with all the stakeholders including the consumers, industry, government as well as international jurisdictions.
5. Functions of Competition Commission of India (CCI):
6. It is the duty of the CCI to eliminate such practices that have adverse effect on competition.
7. It is mandated to promote and sustain competition while protecting the interests of consumers.
8. CCI ensures freedom of trade in the Indian market.

9. The Commission also gives opinion on competition issues when asked by a statutory authority which is established under law.
10. It is also required to undertake competition advocacy.
11. The CCI also creates public awareness and imparts training on competition issues.
12. Additionally, an appellate body called 'Competition Appellate Tribunal' was also set up based on the Amendment Act of 2009, which allows for final appeal to Supreme Court of India.
13. CCI is therefore, fully empowered to carry out the mandated functions.
14. The Competition Appellate Tribunal:
15. The tribunal is established by the Central Government to hear, and dispose of appeals against orders and directions passed by the Competition Commission of India.
16. The Competition Appellate Tribunal adjudicates on claims for compensation that may have arisen from the findings of the Competition Commission of India.

5.3. COMPETITION APPELLATE TRIBUNAL

s. 53 A Establishment of Appellate Tribunal:

(1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub- section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

(2) The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

The Competition Appellate Tribunal is composed of a Chairperson and maximum 2 members. Their term of office is 5 years or till they attain the age of 65 years. The members of the tribunal are eligible for re-appointment. The provisions of the Tribunal allow for a final appeal to the Supreme Court of India if the aggrieved parties are not satisfied with the adjudications of the tribunal.

Under Section 2(g) of the Competition Act, 2002, "Director General" means the Director General appointed under subsection (1) of section 16 and this may include any Additional, Joint, Deputy or Assistant Directors General appointed under that section. Under section 16(1) Central Government can appoint a Director General for the purposes of assisting the Competition Commission of India ("**CCI**") in conducting inquiry into contravention of any of the provisions of this Act and for performing other functions as provided in the Act.

Section 19 of the Act empowers the CCI to inquire into any alleged contravention of the provisions of Section 3(1) and 4(1)either on its own motion or (a) on receipt of any information, from any person,

consumer or their association or trade association in the prescribed manner; (b) a reference made to it by the Central Government or a State Government or a statutory authority.

Section 26 of the Act, further provides that pursuant to Section 19, if CCI is convinced that there exists a prima facie case, it can direct the Director General to cause an investigation to be made into the matter. As per Section 26(3), Director General, on receipt of such direction from CCI, is required to submit a report on his findings within the period specified by the Commission. CCI may then forward a copy of the report to the parties concerned. If the report of the Director General recommends that there is any contravention, and CCI is of the opinion that further inquiry should be called for, it can inquire into such contravention in accordance with the provisions of this Act *vide* Section 26(8).

As per Section 35, a person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission. Most importantly, Section 36(1) of the Act clearly provides that CCI shall, in the discharge of its functions, be guided by the principles of natural justice, provided that CCI shall have, subject to the other provisions of the Act and of any rules made by the Central Government, the powers to regulate its own procedure. Section 41(1) vests the power to assist the Commission in investigating into any contravention of the Act and rules made thereunder to the Director General, when so directed by CCI.

The Competition (Amendment) Act, 2007 provided for the establishment of Appellate Tribunal for either it thoroughly amends the existing MRTP Act to match the changed economic scenario of India as well as of the other jurisdiction or the other was to repeal the law and enact a new piece of legislation which would contain features of the latest international best practices 'concepts'.the kind of amendments that could make sense was felt to be identical to writing a new legislation – as such a high – powered committee was set - up in 1999 to assess all aspects of the situations. The Committee headed by SVS Raghavan found that MRTP Act to be falling short of squarely addressing competition and anti - competitive practices.

It found that the MRTP Commission s powers under the Act were quite restrictive and it was ill equipped. The Committee emphatically stated that; the MRTP Act, in comparison with Competition Laws of many countries are inadequate for fostering competition in the market and trade and for reducing, if not eliminating , anti - competitive practices in the country s domestic and international trade". Based on this analysis, the Raghavan Committee found it expedient to have a new competition law. It will be useful to understand the underlying principles that led to the new enactment. As a result of the report submitted by the committee s recommendations, the Competition Act of 2002 came into being in January 2003. The preamble of the Competition Act provides for establishment of the Competition Commission of India (CCI) .The CCI was established on 14th October 2003. The Chairman and a Member were appointed by the Central Government.

5.4. Raghavan Committee Report

It is to be noted that, while competition cases are tried by courts in many countries, the Ragavan Committee did not found it suitable for India, given the inexperience of the Judiciary in dealing with free market problems. According to the Committee, a specialized agency is preferable. The report go on saying that , in many developed countries and economies in transition, the judiciary therein may be inexperienced in dealing with free market problems. The problems relating to free and fair trade and relating to restrictive and other prohibited trade practices like abuse of dominance , require certain level of specialized adjudicating claim for the Compensation and for hearing appeal against the direction of decision made or order passed by the Commission.

It is worth to observe that the Commission established under the earlier legislation i.e. MRTP Act, which was enacted primarily to curb monopolies and concentration of economic power, had only limited powers. The MRTPC was empowered to submit its recommendatory opinions to the
Central Government on Monopolistic Trade Practices and Unfair Trade Practices (UTP) matters. It is only empowered to investigate and enquire into Restrictive Trade Practices (RTP). Inquiries into the RTPS and UTP s remained the two most important areas of activities of the Commission. Between the two, UTP gained the momentum because the impact of the orders benefited the aggrieved consumer significantly. Award of compensation as an interlocutory application to an UTP enquiry further enhanced the credibility of the MRTPC in the eyes of the consumers and the society. But with the coming up of the consumers courts , post 1986 , at all places , the jurisdictions of the MRTPC and Consumer Courts got overlapping and resulted in ushering in of 'forum shopping' and multiplicity of litigations on some issues between the parties.

Important RTP s, involving big ticket enterprises, very rarely got concluded at the commission s level and invariably travelled up to the Supreme Court in appeal. Supreme Court, more often than not, found infirmities in the order of the commission and set aside most of the Orders of the Commission. Besides forgoing, came the further amendments to the MRTP Act in 1991 in the wake of economic liberalization and consequently Chapter III of the Act was deleted. With this deletion the Commission lost its feeble power of recommendation into Merger and Acquisition activities in India. Post -1991 scenarios forced the Government of India to ponder over the issues relating to as to whether or not to continue with the MRTP Act and the Commission established under it.

There were two clear options available with the Government. One knowledge in economics, trade and relevant law for adjudication. Even if the judiciary has the reputation and exposure to commerce and market -related matters, the competition law administration will be better handled, if a specialized agency is set –up for the purpose. With due respect to the judiciary around the world and in particular in India, it needs to be understood that, in the area of specialization, competition law would be better administered and consumer welfare better sub served, if placed in the hands ofa specialized agency.

Therefore the Ragavan Committee recommended that the administration and enforcement of competition law in India should be under a specialized court/ Tribunal .The Committee emphasized that, a body should be independent and autonomous. Its investigative, prosecutorial, and administrative functions need to be separate and its proceedings should be transparent and rule –bound. The competition authority s reach should be extra-territorial and it should have powers to punish the guilty andlevy fines. Further the committee felt that there is a low awareness of competition issues among the stake holders and the Governments (Central and States) in India, so, it laid great emphasis on a Competition Advocacy. And thus, "Competition Commission of India' was proposed. The Competition Commission of India (CCI) will hear competition cases and also play the role of competition advocate.

Accordingly the Competition Act, 2002, provides for the establishment of the Competition Commission of India. Section 7 of the Act deals with establishment of "Competition Commission of India". It provides that with effect from such date as the Central Government may, by notification, appoint there shall be established a Commission called the 'Competition Commission of India. The Competition Act 2002 provides for the establishment of CCI to prevent those malpractices that adversely affect competition. Additionally, it was enacted to promote and sustain competition in markets as well as to protect the interestsofconsumers. The Competition Commission is the sole authority to receive complaints against the infringement of Competition Law from individuals, business firms, entities, Central or State Governments. Thus, it was enacted to ensure free and fair trade amongst participants in Indian markets and such other matters connected therewith. It provides for both substantive and procedural provisions of Law.

The Competition Commission of India shall have the following two basic functions:

1. Administration and enforcement of Competition Law and Competition Policy to foster economic efficiency and consumer welfare.
2. Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open flexible and adaptable.

The Commission is a body corporate having perpetual succession and common seal with power to acquire hold and dispose of property both movable and immovable and to contract and shall sue and be sued. Its head office shall be at such places as the Central Government may decide from time to time. The Commission is to consists of Chairperson and not less than two members and not more than six members. Thus Competition Commission has come in the place of MRTP Commission; MRTP Act was established and constituted under section 5 of the MRTP Act 1969. Further the Competition Commission of India may be compared with SEBI, IRDA and TRAI as a regulating agency. Under sub-section 2 of section 7, CCI has been established as a body corporate. A body corporate is a person in the eye of law, it is not a natural person but a legal or an artificial person may be created or established by forming ,for example 'company" under the Companies Act , 1956 or it may be created or established by an Act of legislation in which case it is known as statutory company. CCI is a statutory corporation having its existence under an Act of parliament namely the Competition Act 2002.

Composition of the Commission: The Competition Commission shall consist of a Chairperson and not less than two and not more than ten other members to be appointed by the Central Government. The Chairperson and the members are appointed by the Central Government from the panel of names recommended by the selection committee consisting of;

1. The Chief Justice of India or his nominee (chairperson of the committee);
2. Secretaries in the Ministries of Corporate Affairs and Law and Justice;
3. Two experts of repute having special knowledge of and professional experience in international trade, economics, business, commerce, law , finance, accountancy, management, industry , public affair or competition matters including competition law and policy in international trade , economics, business, commerce, law , finance, industry;
4. RBI Governor.

The Chairperson and every other member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment. The Act provides that the salaries of the staff and other expenses shall be met by the Competition Fund. The Central Government is empowered to remove the chairperson and any member of the commission on certain specific grounds and the procedure as specified in the Act. The 'Persons' appointed shall be whole time Members. The Act prohibits Chairperson and the members to accept employment nor connect with the management or administration of any enterprise which has been party to the proceedings before the Commission, within two years of demitting the office. The Chairperson and the members of the commission have been given protection of the service in as much as their salary, allowance and other terms and conditions of the service will be varied to their disadvantage after their appointment.

The Chairperson and the other staff of the Commission are deemed to be public servants within the meaning of section 21 of the Indian Penal Code. No suit or proceedings shall lie against Central government. Commission or the officers/ staff of the commission for anything done in good faith or intended to be done under this Act or the rules or regulations framed there under. The Chairperson has general power of superintendence, direction and control over the administrative matters of the Commission. The Competition

Commission will also have suomoto powers for initiating action against any perceived infringement. The Commission shall be assisted by a Director General (DG) appointed by the central government.

5.5. APPOINTMENT OF DIRECTOR GENERAL AND OTHER OFFICIALS

The Central Government appoints the Director General (DG) for assisting CCI in conducting enquiryinto contravention of any of the provisions of the Act or to perform other functions as provided by or under the ActThe Additional, Joint, Deputy and Assistant Director General or such other advisers, consultant and officers so appointed shall exercise his powers and discharge his functions, subject to the general control, supervision and direction of the Director General. The DG shall, when directed by the Commission assist the Commission in investigation into any contravention of the provision s of the Act. The Commission shall hold the meetings for the purpose of discharging the functions and all the questions which come up for before the commission shall be decided by the majority of the members present and voting. The quorum for the meetings shall three members. The Raghavan Committee had recommended that the Commission should be independent from political and budgetary controls of the Government and that independent functioning of the members needs to be ensured by having an appropriate provision for their removal, only with the concurrence of the Supreme Court. It is worth to note here that, the constitutional validity of the establishment of the Competition Commission came to be challenged in the case **BrahmDutt v. Union of India**, the details of the case is as follows,

The constitutional validity of the Competition Commission was mainly challenged on the ground that Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or the Judge of the Supreme court or of the High Court, to be nominated by the Chief Justice of India or by a Committee preside over by the Chief Justice of India. In other words, the contention is that the Chairmen of the commission had to be a person connect with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary.

The contention was based upon the principle of separation of powers on the lines of the case of ***Sampath Kumar v. Union of India.*** The contention to uphold the composition of the Competition Commission was that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and members of the judiciary who can , of course . adjudicate upon matters in dispute cannot supply such expertise. It is further contented that so long as the power of judicial review of the High Court and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the constitution. It was also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers.

BrahmDutt v. Union of India[126]

J U D G M E N T P.K. BALASUBRAMANYAN, J.

The Competition Act, 2002 received assent of the President of India on 13.1.2003 and was published in the Gazette of India dated 14.1.2003. It is an Act to provide for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith. The statement of objects and reasons indicates that the Monopolies and Restrictive Trade Practices Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the country's focus from curbing the monopolies to promoting competition. Section 1(3)of the Act provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and provided that different dates may be appointed for different provisions of the Act.

Pursuant to this, some of the sections of the Act were brought into force on 31.3.2003 vide S.O. 340 (E) and published in the Gazette of India dated 31.3.2003 and majority of the other sections by notification S.O. 715 (E) dated 19.6.2003. In view of bringing into force Sections 7 and 8 of the Act, the Central Government had to make prescription for the appointment of a Chairman and the members as composing the Commission in terms of Section 9 of the Act.

2. In exercise of the Rule making power under Section 63(2)(a) read with Section 9 of the Act, the Central Government made "The Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003" and published the same in the Gazette of India on 4.4.2003. Section 9 of the Act provides for the selection of the Chairperson and the other members as may be prescribed. The Rules above referred to was that prescription. Under Rule 3, the Central Government was to constitute a Committee consisting of a person who has been retired Judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more, a person who had special knowledge of and professional experience of 25 years or more in international trade, economics, business, commerce or industry, a person who had special knowledge of and professional experience of 25 years or more in accountancy, management, finance, public affairs or administration to be nominated by the Central Government.

The Central Government was also to nominate one of the members of the Committee to act as the Chairperson of the Committee. The function of the Committee was to fill up the vacancies as and when vacancies of Chairperson or a member of the Commission exits or arises or is likely to arise and the reference in that behalf had been made to the Committee by the Central Government. It is said that the Committee so constituted made a recommendation in terms of Rule 4(3) of 'the Rules' and a Chairman and a member were appointed. Though, the member claims to have taken charge immediately after being appointed, the person appointed as Chairman, has taken the stand that he had not taken charge since he was content to await the orders of this Court in view of the filing of this Writ Petition.

3. The present Writ Petition was filed in this Court by a practicing Advocate essentially praying for the relief of striking down Rule 3 of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 (hereinafter referred to as 'the Rules') and for other consequential reliefs including the issue of a writ of mandamus directing the Union of India to appoint a person who is or

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has been a Chief Justice of a High Court or a senior Judge of a High Court in India in terms of the directions contained in the decision in **S.P. Sampath Kumar v. Union of India & Others**, (1987) 1 SCC 124.

The essential challenge was on the basis that the Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention is that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary.

The arguments in that behalf are met by the Union of India essentially on the ground that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and such expertise cannot be supplied by members of the judiciary who can, of course, adjudicate upon matters in dispute. It is further contended that so long as the power of judicial review of the High Courts and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the Constitution. It was also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers. Since the main functions of the expert body were regulatory in nature, there was no merit in the challenge raised in the Writ Petition.

4. During the pendency of the Writ Petition, two additional counter affidavits were filed on behalf of the Union of India, in which it was submitted that the Government was proposing to make certain amendments to the Act and also Rule 3 of 'the Rules' so as to enable the Chairman and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. This position was reiterated at the time of arguments. Of course, it was also pointed out that the question of amendment had ultimately to rest with the Parliament and the Government was only in a position to propose the amendments as indicated in the additional affidavits. But it was reiterated that the Chairman of the Commission should be an expert in the field and need not necessarily be a Judge or a retired Judge of the High Court or the Supreme Court.

5. We find that the amendments which the Union of India proposes to introduce in Parliament would have a clear bearing on the question raised for decision in the Writ Petition essentially based on the separation of powers recognized by the Constitution. The challenge that there is usurpation of judicial power and conferment of the same on a non- judicial body is sought to be met by taking the stand that an Appellate Authority would be constituted and that body would essentially be a judicial body conforming to the concept of separation of judicial powers as recognized by this Court. In the Writ Petition the challenge is essentially general in nature and how far that general challenge would be met by the proposed amendments is a question that has to be considered later, if and when, the amendments are made to the enactment. In fact, what is contended by learned counsel for the petitioner is that the prospect of an amendment or the proposal for an amendment cannot be taken note of at this stage. Since, we feel that it will be appropriate to consider the validity of the relevant provisions of the Act with particular reference to Rule 3 of the Rules and Section 8(2) of the Act, after the enactment is amended as sought to be held out by the Union of India in its counter affidavits, we are satisfied that it will not be proper to pronounce on the question at this stage.

On the whole, we feel that it will be appropriate to postpone a decision on the question after the amendments, if any, to the Act are carried out and without prejudice to the rights of the petitioner to

approach this Court again with specific averments in support of the challenge with reference to the various sections of the Act on the basis of the arguments that were raised before us at the time of hearing. Therefore, we decline to answer at this stage, the challenge raised by the petitioner and leave open all questions to be decided in an appropriate Writ Petition, in the context of the submission in the counter affidavits filed on behalf of the Union of India that certain amendments to the enactment are proposed and a bill in that behalf would be introduced in Parliament.

6. We may observe that if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognized by the Constitution. Any way, it is for those who are concerned with the process of amendment to consider that aspect. It cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well.

7. Thus, leaving open all questions regarding the validity of the enactment including the validity of Rule 3 of the Rules to be decided after the amendment of the Act as held out is made or attempted, we close this Writ Petition declining to pronounce on the matters argued before us in a theoretical context and based only on general pleadings on the effect of the various provisions to support the challenge based on the doctrine of separation of powers.

8. The Writ Petition is thus disposed of leaving open all the relevant questions.

5.6. COMPETITION (AMENDMENT) ACT, 2007

The Apex court refrained from giving a judgment as there were the affidavits filed by the union of India stating that there has been proposed some amendments to the effect so as to enable the Chairman and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. Hence the court stated that one should look at the amendments as and when notified and then address the issue of constitutionality. In this backdrop, The Government passed a Competition (Amendment) Bill 2006 in the light of the above judicial dicta of the Supreme Court. The mentioned bill was passed by both the Houses and the necessary changes were made under the Competition Act 2002 vide the Competition (Amendment) Act 2007.

The various changes were made to make Competition Act so as to make CCI fully operational on a sustainable basis. The Competition (Amendment) Act, 2007 provides for the establishment of Competition Appellate Tribunal (COMPAT) for adjudicating claim for competition and for hearing appeal against the direction of decision made or order passed by the Commission. The Commission has the investigative and decision – making power. In order to enable it to exercise that power effectively, the Act empowers the Commission to penalize who obstructs the investigation, contravenes orders, destroys or falsifies documents, supplies misleading information.

In context of the needs of economic development of India, the Competition Commission is entrusted with the following duties;

1. Eliminate practices having adverse effect on competition;
2. Promote and sustain competition;
3. Protect the interests of the consumers; and;
4. Ensure freedom of trade carried by other participants in markets, in India.

POWERS AND THE FUNCTIONS OF THE COMPETITION COMMISSION OF INDIA

The Commission has duty to eliminate the practices having adverse effect on competition, to promote and sustain competition in the market, to protect the consumer interests and to ensure freedom of trade carried on by other participants in the market in India. For the purpose of discharging its duties or performing its functions, the Commission may enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

5.7. OBSERVATIONS OF HIGH LEVEL COMMITTEE ON COMPETITION REGULATORY AUTHORITIES

Although significant steps have been taken to increase competition in various sectors of the economy, a number of important things need to be done that are essential for a competition policy. There is the need for a Competition Law Tribunal (Competition commission of India) that will act as a watch –dog for the introduction and maintenance of the Competition policy. It will promote the introduction of the required changes in the policy environment and once this is done, it will perform a proactive advocacy function for competition. Competition law should deal with anti –competitive practices, particularly caterlisation, price – fixing and other abuses of the market power and should regulate mergers. It is important to ensure that such legislation does not itself become anti-competitive and this is a real danger. For this, it is necessary to ensure that the law is precise and discretion is kept at a minimum.

It may be stated here that Act has been enacted to carry out the objectives of the Article 38 and 39 of the Constitution of India. Further, the Act prescribes that the commission in discharge of its functions shall be guided by the principles of natural justice and the concerned parties can appear before the commission in person or shall though authorized Chartered Accountants, Company Secretaries, Costs Accountants or Legal Practitioners. It is relevant to note here that, the Draft regulations of the Commission being issued in terms of the Act attempt to provide the detailed procedure that the commission intends to follow while implementing various provisions of the Act. It has so far drafted seven regulations. The Draft Regulations provide for the procedure to be adopted by the CCI in exercise of its functions and powers.

The procedure shown reflects a transparent process consistent with the principles of natural justice as enshrined in the law. It is noteworthy, that at present the Commission is currently engaged in reviewing the present version of the draft regulations with a view to finalize and issue the same. The CCI have the powers not only to formulate own rules and regulations to govern the procedures and conduct of its business and administration, but also have the powers to frame 'Regulations 'which could supplement the provisions of competition law.

Since some of these regulations which will supplement the economic conditions, the CCI could from time to time review and amend these regulations. This would have the added benefit of ensuring consistency and would minimize the risk of uneven application of law that emerge as a result of following a case by case basis of examination. Most importantly, these regulations would put trade and industry at advance notice on how the competition commission was likely to look at certain aspects of their conduct and behavior , i.e. what is acceptable and what is not acceptable . All policy direction s by the Government should be binding on the Competition Commission.

MERGER COMMISSION

The Mergers, Amalgamation etc were given a treatment under the competition perspective and the recommendations would be kept in view in suggesting an agency for having surveillance over them. For those cases of mergers, amalgamation etc, which need to be examined on the touchstone of competition, before the event takes place, the Act designed the Merger Commission, which will be a part of the

Competition Commission of India, but which will be a separate Bench to handle pre-merger scrutiny cases. This is to ensure that there is no avoidable delay in dealing with such scrutiny, as delays can prevent bodies corporate from being competitive globally. An appropriate rider in the merger provisions should be that, if the Merger Commission does not finally decide against a merger within stipulated period of say ninety days, it would be deemed that approval has been accorded. The Merger commission, at least two members will be detailed to deal with cases of merger, amalgamation s, acquisition and takeovers.
It is to be noted that aims and objects of the Indian competition law afford guidelines to the Commission when it examines the effect of an agreement, combination or dominant position, i.e. whether it has an influence, direct or indirect, actual or potential, on the pattern of trade within India. Trade may appear to increase, but that increase is not an end itself as the object of this Act is to create a system of undistorted competition to protect the interest of consumers. Initial spurt in the trade as a consequence of the agreement is not important if it leads to development differently from the way in which it would have done without such agreement. If it is capable of constituting a threat to the freedom of trade within India in a manner which might harm the attainment of the aforesaid objects, it is to be declared void. That threat may be direct or indirect, actual or potential.

5.8. PROCEDURE FOR ENQUIRY INTO ANTI - COMPETITIVE AGREEMENTS BY THE COMPETITION COMMISSION OF INDIA.

The CCI upon receipt of reference or its own knowledge or information received under section 19 with regard to anti - competitive agreement has to come to a prima facie opinion that a case exits and once it comes to such conclusion, it shall direct the Director General (DG) to make an investigation. If the CCI does not find a prima facie case, it will close the case, pass an appropriate Order and forward the Orders to the concerned persons. The Director General is required to submit a report on his finding to the CCI within the time as may be specified by the Order of the Commission. Orders that CCI can pass:

After CCI comes to the conclusion that there is an anti - competitive agreement, which has caused or is likely to cause appreciable adverse effect on competition within India, it may pass all or any of the following orders:

1. Direct the parties to the said agreements to discontinue the said agreement and not to re-entered such agreements ;
2. Impose penalty which shall not be more that 10 percent of the average turnover of the last three preceding financial years upon each of the parties to the said agreements;
3. If the anti- competitive agreement has been entered by a cartel , the CCI may impose upon each member of the cartel a penalty of up to three percent of its profit for each year of continuance of such agreement or ten per cent of its turn over for each year of continuance of such agreement, whichever is higher;
4. Direct modification of the agreements;
5. Direct compliance of its orders /directions including payment of costs;
6. The CCI can also pass orders /directions and impose penalties upon a group or its members if, during investigations, it finds that:
    a) The enterprise which has contravened the provision s of the Act is a part of a Group and
    b) Other members of the group are also responsible for or contributed to such contravention.

Further, the CCI has jurisdiction and is empowered to pass ex-parte interim Orders temporarily restraining a party from carrying out an act until conclusion of an investigation or until further orders. In case of cartel:

1. Impose penalty on each member of cartel up to three times of its profit for each year of the continuance of agreement or ten percent of its turn over for each year of continuance of such agreement , whichever is higher;
2. Modify the agreement;
3. Pass any order/ direction which deems fit;
4. Order division of the enterprise enjoying dominant position.

Failure to comply with the aforesaid penalty shall be punishable with further risks as it may lead to imprisonment for a term which may extend to three years or with fine which may extend to rupees 25 crores or with both , as the Chief Metropolitan Magistrate (CMM), Delhi may deem fit. Whenever companies contravene Orders of the Commission, the person who is in charge of and is responsible to the company shall be deemed to guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Every Orders /decisions /directions passed by the Commission may be appealed by the party aggrieved by such Orders/ decisions before the Competition Appellate Tribunal (COMPAT) within 60 days of such orders. Further, the parties aggrieved by the decision or Orders of the COMPAT may file an appeal to the Supreme Court within 60 days from the date of the communication of the decision or Order of the COMPAT to them.

5.9. PROCEDURE FOR INQUIRY INTO ABUSE OF DOMINANCE BY THE COMPETITION COMMISSION OF INDIA

The Commission must arrive at a prima facie opinion that a case of abuse of dominance exists. Once it comes to such conclusion, it shall direct the Director General DG to investigate into the matter. If the Commission does not find a prima facie case, it will close the case, pass an appropriate order and forward the orders to the concerned persons. DG is required to submit a report on his findings to the Commission within the time as may be specified by the order of the Commission.

5.10. ORDERS THAT CCI CAN PASS IN RESPECT OF ABUSE OF DOMINANT POSITION

Orders that Commission can pass After the competition of the investigation, if Commission comes to the conclusion that there is an anti-competitive agreement, which has caused or is likely to cause appreciable adverse effect on competition within India , it may pass all or any of the following Orders;

a. Direct the parties to continue the abuse of dominance;
b. Direct compliance of its orders /directions including payment of costs;
c. Direct for the division of an enterprise abusing the dominant position to ensure that it does not abuse its dominance;
d. Pass such other order or issue such other direction as the Commission deems fit.
e. The Order directing the division of an enterprise may provide for all or any of the following matters;
    i. The transfer or vesting of property ,rights ,liabilities or obligations;
    ii. The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

iii. The creation , allotment , surrender or cancellation of any shares , stocks or securities;

iv. The formation or winding up of an enterprise or the amendment of memorandum of association or article of association or any other instruments regulating the business of any enterprise;

v. The extent to which, and the circumstances in which, provision of the Order affecting an enterprise may be altered by the enterprise and the registration there.

It is worth to note that, the Commission is vested with the power to pass ex-parte interim Order temporarily restraining a party from carrying out any act until conclusion of an investigation or until further Orders. Further, that any enterprise abusing the dominant position is outside India, the Commission is empowered to: a) inquire into such abuse of dominance; and pass such orders as it may deem fit in accordance with the provision of the Act. The Act further provides for imposing significant penalties or imprisonment up to a period of three years or both in case parties who have not preferred appeals against the orders of the Commission within the stipulated period of 60 days have defaulted in complying with the Orders of the Commission. Contravening Orders of Appellate Tribunal would also invite huge pecuniary penalties or imprisonment up to three years or both.

5.11. ORDERS THAT CCI CAN PASS IN RESPECT OF COMBINATIONS

The commission is empowered to pass the following orders after the due process:

a) Approve the combination where no appreciable adverse effect on competition in the relevant market in India;

b) Direct that combination shall not take effect where the Commission is opinion that there is or is likely to have appreciable adverse effect on competition;

c) Propose modification in the combination where the commission is of the appreciable adverse effect cause or likely to be caused by the combination can be eliminated by the modification

Two scenarios have been envisaged in the Act in case of the modification proposal:

(a) The parties may accept and carry out the modification within the specified time. If they fail to carry out the modification to the combination with in the specified time, such combination shall be deemed to have appreciable adverse effect on competition;
(b) The parties to the combination may within 30 days of the modification proposal submit an amendment to the modification proposal,whereupon:

1. If the Commission agrees with the amendment to the modification proposal ,shall approve the combination;
2. If it does not agree with the amendment, the Commission will give further 30 days to the parties to accept the modification. If they fail to accept the modification. the combination shall be deemed to have adverse effect on competition and shall not be given effect.

Once the Commission has passed an order a combination to be void, the acquisition, acquiring of the control or merger or amalgamation shall be dealt by the authorities as if such acquisition, acquiring control or merger or amalgamation had not taken place. It is worth to refer here that the Commission is vested with the power to pass ex parte interim order temporarily restraining a party from carrying out an act or until the conclusion of the investigation.

5.12. LENIANCY PROGRAMME

s.46 Power to impose lesser penalty

The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:

[Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.]

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who [has] made the full, true and vital disclosures under this section.

[Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.]

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
(b) had given false evidence; or
(c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

Based on section 46 The CCI has established an immunity policy for companies and individuals who have been involved in a cartel to report their involvement to the CCI. The Competition Commission of India (Lesser Penalty) Regulations 2009 (Lesser Penalty Regulations), which governs the procedure and extent to which leniency (reduced penalties) is granted to applicants who make vital disclosures on cartel activity.

To claim leniency under the Lesser Penalty Regulations, an applicant is required to submit all material information and evidence relating to the establishment or existence of a cartel. The applicant should also not have any further participation in the cartel, from the time of making disclosures, unless the CCI directs otherwise and the applicant should co-operate to the best of its ability with the CCI in a genuine, fully continuous, and expeditious manner, inter alia, by providing all relevant information, documents, and evidence as required. Such co-operation is required throughout the investigation and other proceedings before the CCI.

Further, relevant evidence should not be concealed, destroyed, manipulated, or removed by the applicant. The CCI can grant up to a 100% penalty reduction to the first applicant, up to 50% to the second applicant (for a disclosure of evidence that provides significant added value to the evidence the CCI already possesses), and up to 30% to the third applicant under the leniency framework. Only a single participant is entitled to immunity in each tier and once the first three participants have been granted leniency, no other participant will receive any reduction in penalty. Any information submitted under the Lesser Penalty

Regulations is treated as confidential (including the identity of the applicant) unless such information is already in the public domain, or is required to be disclosed by law.

However, the reduction of penalty is the sole prerogative of the CCI. Leniency being a discretionary relief, it is imperative that industry be first convinced of the efficacy of the leniency program before any cartel member can develop the courage to be forthcoming and approach the regulator.

One of the drawbacks of the Lesser Penalty Regulations is that the reduction of penalty is the sole prerogative of the CCI and is discretionary. There is also limited clarity on what constitutes a 'vital' disclosure, making it difficult to determine priority status in an immunity application. Further, the grant of leniency does not bar claims of compensation from third parties before the COMPAT. The CCI has recently received its first leniency application filed by an Indian subsidiary of a German company.

Leniency programme and Rationale of Leniency Programme

It is an incentive to those cartel members who choose to share information and cooperate with the Commission. Leniency programme is a type of whistle-blower protection, i.e. an official system of offering lenient treatment to a cartel member who reports to the Commission about the cartel.

Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anticompetitive agreements and assist the competition authorities in lieu of immunity or lenient treatment. a Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own.

Salient Features of the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017

To carry out the leniency provisions in the Act, section 64 empowers the Commission to draft regulations for matters in respect of which provisions is to be made by regulations. In pursuance of such powers, the Competition Commission of India (Lesser Penalty) Regulations, 2009 were brought out in August 2009. These Regulations provide the framework in which the Commission can give lower punishments than statutorily provided in the case of cartel membership. There are three main components of a leniency programme. These are - a set of conditions to be satisfied for getting benefits under the leniency programme, the procedure for grant of lesser penalty, and the quantum of penalties that are waived when lenient treatment is meted out to the cartel member who cooperates with the Commission by submitting information on the cartel. Each of these components is described below:

Conditions to avail Benefits of Leniency Provisions: The applicant must:

1. provide the information before the receipt of the report of investigation directed under section 26 of the Act
2. cease to further participate in the cartel from the time of its disclosure unless otherwise directed by the Commission
3. provide vital disclosure in respect of violation under subsection (3) of section 3 of the Act
4. provide all relevant information, documents and evidence as may be required by the Commission
5. co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission
6. not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.

The reduction in monetary penalty will depend upon following situations:-- the stage at which the applicant comes forward with the disclosure

a) the evidence already in possession of the Commission
b) the quality of the information provided by the applicant
c) the entire facts and circumstances of the case.

Procedure for Grant of Lesser Penalty

The applicant can make application as per the contents specified in the Schedule either orally, or through e-mail or fax to the designated authority. The Commission shall mark the priority status of the applicant and the designated authority shall convey the same to the applicant but mere acknowledgement shall not entitle the applicant for grant of lesser penalty.

The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority. unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission. Lack of continuous cooperation entitles Commission to reject the application after providing due opportunity of hearing to that applicant. After rejection of the priority status of first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission

Quantum of Immunity under Leniency Provisions

The quantum of immunity available under leniency provisions in comparison to penalty prescribed under clause (b) of the section 27 of the Act is as under:-Benefit of reduction in penalty upto or equal to 100% is available to the applicant if he is the first to make a vital disclosure enabling the Commission to form a prima-facie opinion regarding the existence of a cartel on the basis of evidence submitted. Further,

Benefit of reduction in penalty upto or equal to 100% is available even if the matter is under investigation but without disclosures made by the applicant; the Commission or the Director general did not have sufficient evidence to establish such a contravention

1. Benefit of reduction in penalty upto or equal to 100% will only be considered, if at the time of the application, no other applicant has been granted such benefit by the Commission.
2. The second or third applicant in the priority status may also be granted benefit of reduction in penalty to the tune of 50% and 30% of the full leviable penalty respectively on making
3. disclosure by submitting evidence, which provide a fillip to the already available evidence with the Commission

Confidentiality (R.6)

under the Competition Commission of India (Lesser Penalty) Regulations, 2009, it has been specifically mentioned that the identity of the applicant as well as information obtained from it shall be treated as confidential and it shall not be disclosed save under the three situations stated below:-a when the disclosure is required by law; or a when the applicant has agreed to such disclosure in writing; or a when there has been a public disclosure by the applicant. such an arrangement of maintaining confidentiality would encourage submission of vital information with the Commission.

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