Chapter-2

Free and Fair Competition

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2.0 Introduction

Since attaining Independence in 1947, India for the better part of half a century thereafter, adopted and followed policies comprising what are known as Command-and-Control laws, rules, regulations and executive orders. The competition law of India, namely, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, for brief) was one such. It was in 1991 that widespread economic reforms were undertaken and consequently the march from Command-and-Control economy to an economy based more on free market principles commenced its stride. As is true of many countries, economic liberalisation has taken root in India and the need for an effective compilation regime has also been recognized.

In the context of the new economic policy paradigm, India has chosen to enact a new competition law called the Competition Act, 2002. The MRTP Act has metamorphosed into the new law, Competition Act 2002. The new law is designed to repeal the extant MRTP Act. As of now, only a few provisions of the new law have been brought into force and the process of constituting the regulatory authority, namely, the Competition Commission of India under the new Act, is on. The remaining provisions of the new law will be brought into force in a phased manner. For the present, the outgoing law, MRTP Act, 1969 and the new law, Competition Act, 2002 are concurrently in force, though as mentioned above, only some provisions of the new law have been brought into force.

Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Pegging on the Directive Principles, the first Indian competition law was enacted in 1969 and was christened the Monopolies And Restrictive Trade Practices, 1969 (MRTP Act). Articles 38 and 39 of the Constitution of India mandate, inter alia, that 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, and the State shall, in particular, direct its policy towards securing.
1. That the ownership and control of material resources of the community are so distributed as best to serve the common good; and

2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

In October 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May 2000 [the report will be referred to hereinafter as High Level committee 92000]. The draft competition law was drafted and presented to the Government in November 2000. After some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002.
2.1 Salient features Of New Competition Policy

- 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.

- 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.

- The Board for Industrial Finance & Restructuring (BIFR) formulated under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 should be abolished.

- World Trade Organization (WTO) : There should be necessary provision and teeth to examine and adjudicate upon anti-competition practices that may accompany or follow developments arising out of the implementation of WTO Agreements. Particularly, agreements relating to foreign investment, intellectual property rights, subsidies, countervailing duties, anti-dumping measures, sanitary and psytosanitary measures, technical barriers to trade and Government procurement need to be reckoned in the Competition Policy/Law with a view to dealing with anti-competition practices. The competition law should be made extra territorial.

- MRTP Act

  It is suggested that :

  - The MRTP Act 1969 may be repealed and the MRTP Commission wound up. The provisions relating to unfair trade practices need not figure in the Indian Competition Act as they are presently covered by the Consumer Protection Act, 1986.

  - The pending UTP cases in the MRTP Commission may be transferred to the concerned consumer Courts under the Consumer Protection Act, 1986. The pending MTP and RTP Cases in MRTP Commission may be taken up for adjudication by the CCI from the stages they are in.
2.2 Components Of Competition Act

The rubric of the new law, Competition Act, 2002 (Act, for brief) has essentially four compartments:

2.2.1 Anti-Competition agreements
2.2.2 Abuse of Dominance
2.2.3 Combinations Regulation
2.2.4 Competition Advocacy

2.2.1 Anti Competition Agreements

Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between horizontal and vertical agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreement generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchasers seller relationship, an obvious example that comes to mind is an agreement between enterprises dealing in the same product or product. Such horizontal agreements, which included membership of cartels, are presumed to lead to unreasonable restrictions of competition and are therefore presumed to have an appreciable adverse effect on competition. In other words, they are per se illegal. The underlying principle in such presumption of illegality is that the agreements in question have an appreciable anti-competitive effect. Barring the aforesaid four types of agreements, all the others will be subject to the rule of reason test in the Act.

2.2.2 Abuse of Dominance

Dominant position has been appropriately defined in the Act in terms of the 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.

Section 4 enjoins, No enterprise shall abuse its dominant position. Dominant position is the position of strength enjoyed by an enterprise in the relevant market which enables it to operate independently of competitive forces prevailing in the market or affects its competitors or consumers or the relevant market in its favour. Dominant position is abused when an enterprise imposes unfair or discriminatory conditions in purchase or sale of goods or services or in the price in purchase or sale of goods or services. Again, the philosophy of the Competition Act is reflected in this provision, where it is clarified that a situation of monopoly per se is not against public policy but, rather, the use of the monopoly status such that it operates to the detriment of potential and actual competitors.

At this point it is worth mentioning that the Act does not prohibit or restrict enterprises from coming into dominance. There is no contract whatsoever to prevent enterprises from coming into or acquiring position of dominance. All that the Act prohibits is the abuse of that dominance position. The Act therefore targets the abuse of dominance and not dominance per se. This is indeed a welcome step, a step towards a truly global and liberal economy.

2.2.3 Combinations

The Competition Act also is designed to regulate the operation and activities of combinations, a term, which contemplates acquisitions, mergers or amalgamations. Thus, the operation of the Competition Act is not confined to transactions strictly within the boundaries of India but also such transactions involving entities existing and/or established overseas.

Herein again lies the key to understanding the Competition act. The intent of the legislation is not to prevent the existence of a monopoly across the board. There is a realization in policy-making circles that in certain industries, the nature of their operations and economies of scale indeed dictate the creation of a monopoly in order to be able to operate and remain
viable and profitable. This is in significant contrast to the philosophy, which propelled the operation and application of the MRTP Act, the trigger for which was the existence or impending creation of a monopoly situation in a sector of industry, subsequently, that the combination has an appreciable adverse effect on competition. There is a rider that the CCI shall not initiate an inquiry into a combination after the expiry of one year from the date on which the combination has taken effect.

2.2.4 Competition Advocacy

In line with the High Level Committee’s recommendation, the Act extends the mandate of the Competition Commission of India beyond merely enforcing the law (high Level Committee, 2000). Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country’s legal and economic circumstances.

The Regulatory Authority under the Act, namely, Competition Commission of India (CCI), in terms of the advocacy provisions in the Act, is enabled to participate in the formulation of the country’s economic policies and to participate in the reviewing of laws related to competition at the instance of the Central Government. The Central Government can make a reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. The Commission will therefore be assuming the role of competition advocate, action pro-actively to bring about Government policies that lower barriers to entry, that promote deregulation and trade liberalisation and that promote competition in the market place.

Perhaps one of the most crucial components of the Competition Act is contained in a single section under the chapter entitled competition advocacy.
2.3 Can Competition Act Replace MRTP Act

In view of the policy shift from curbing monopolies to promoting competition, there was a need to repeal the Monopolies and Restrictive Trade Practices Act. Hence, the Competition Law aims at doing away with the rigidly structured MRTP Act. The Competition Law proposed is flexible and behavior oriented.

After the Act was placed on the web-site and came into the public domain, a question often asked is whether it is not still the old law in substance although not in form. A clear answer to this question is in the title of this section. The Act is a new wine in a new bottle. The differences between the old law (namely the MRTP Act, 1969) and the new law (the Competition Act, 2002) may perhaps be best captured in the form of a table displayed below:

<table>
<thead>
<tr>
<th>S.No.</th>
<th>MRTP Act, 1969</th>
<th>Competition Act, 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Based on the pre-reforms scenario</td>
<td>Based on the post-reforms scenario</td>
</tr>
<tr>
<td>2</td>
<td>Based on size as a factor</td>
<td>Based on structure as a factor</td>
</tr>
<tr>
<td>3</td>
<td>Competition offences implicit or not defined</td>
<td>Competition offences explicit and defined</td>
</tr>
<tr>
<td>4</td>
<td>Complex in arrangement and language</td>
<td>Simple in arrangement and language and easily comprehensible</td>
</tr>
<tr>
<td>5</td>
<td>14 per se offences negating the principles of natural justice</td>
<td>4 per se offences and all the rest subjected to rule of reason.</td>
</tr>
<tr>
<td>6</td>
<td>Frowns upon dominance</td>
<td>Frowns upon abuse of dominance</td>
</tr>
<tr>
<td>7</td>
<td>registration of agreements compulsory</td>
<td>No requirement of registration of agreements</td>
</tr>
<tr>
<td>8</td>
<td>No combinations regulation</td>
<td>Combination regulated beyond a high threshold limit.</td>
</tr>
<tr>
<td>9</td>
<td>Competition Commission appointed by the Government</td>
<td>Competition Commission selected by a Collegiums (search committee)</td>
</tr>
<tr>
<td></td>
<td>Very little administrative and financial autonomy for the Competition Commission</td>
<td>Relatively more autonomy for the Competition Commission</td>
</tr>
<tr>
<td>---</td>
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<td>---</td>
</tr>
<tr>
<td>10.</td>
<td>No competition advocacy role for the Competition Commission</td>
<td>Competition Commission has competition advocacy role</td>
</tr>
<tr>
<td>11.</td>
<td>No penalties for offences</td>
<td>Penalties for offences</td>
</tr>
<tr>
<td>12.</td>
<td>Reactive and rigid</td>
<td>Proactive and flexible</td>
</tr>
<tr>
<td>13.</td>
<td>Unfair trade practices covered</td>
<td>Unfair trade practices omitted (consumer for a will deal with them)</td>
</tr>
<tr>
<td>14.</td>
<td>Does not vest MRTP Commission to inquire into cartels of foreign origin in a direct manner</td>
<td>Competition Law seeks to regulate them.</td>
</tr>
<tr>
<td>15.</td>
<td>Concept of Group Act had wider import and was unworkable</td>
<td>Concept has been simplified</td>
</tr>
</tbody>
</table>

The Act is therefore a new wine in a new bottle. Wine gets better as it ages. The proposed Law provides for a Competition fund, which shall be utilized for promotion of competition advocacy, creating awareness about competition issues and training in accordance with the rules that may be prescribed. The extent MRTP Act 1969 has aged for more than three decades and has given birth to the new law (the Act) in line with the changed and changing economic scenario in India and rest of the world and in line with the current economic thinking comprising liberalisation, privatization and globalization.\(^{10}\)

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\(^{10}\) [www.google.com/mrtp&competition article](www.google.com/mrtp&competition article)
2.4 Acquisition and mergers

There has been a drastic change and enhancement in this process of globalization and also liberalisation during the last three decades. In the pursuit of this globalization, India has responded by opening up its economy, removing controls and resorting to liberalisation in 1991. The result of the globalization and liberalisation is that the Indian market is facing competition from within and outside. The last 2 years have witnessed significant cross-border mergers and acquisitions activity by Indian companies in India and abroad on a scale that is unprecedented. It is understood the Merger & Acquisition (M&A) deals in India will cross $100 billion this year, which is double last year's level and quadruple of 2005. Thus, keeping in view the economic developments of the country, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by participants in markets, in India, a new competition Law has been enacted. The companies use merger, a type of combination, as a business strategy to grow and consolidate and to eliminate competition. Though mergers are considered as a legitimate means by which firms may grow and are generally as much part of industrial evolution and restructuring as new entry, growth and exit; mergers and amalgamation a create market power, which may be abused. In order to control the abuse of such mergers and amalgamation the Competition Act 2002 now provides are regulatory mechanism.

Mergers and Effects:

In competition Law Merger is used in broad sense. It covers a proper merger, amalgamations, acquisition of shares, voting rights, assets, or acquisition of control over an enterprise. A Merger is broadly speaking, a transaction that brings about a change in the control of different business entities enabling one business entity effectively to control a significant part of the assets or decision making process of another. Though Merger is a normal activity within the economy and used to expand the business by the companies. However some mergers could adversely affect the competition.
Through Mergers companies trying to achieve the Market Power, which in turn can impact negatively upon competition. Mergers lead to concentration and use of market power because of two reasons (a) Reduction of number of entities in the market and; (b) Increased market share of the merged entity. As a result the merged entity is able to exercise market power and in turn, this may lead to the prices being raised above the normal level, restricted output, increase n rival cost, increased barrier to the new entities etc.

**Competition Act, 2002 and the Regulation of Mergers**

Prior to the Competition Act, 2002, the Companies Act, 1956 and the Monopolies and restrictive trade Practices Act, 1969 (before the 1991 amendments) are the statutes, which regulate mergers. MRTP Act, 1969 still had powers under provisions relating to restrictive trade practices (RTP) and monopolistic trade practices (MTP) to take action against merger that was anti competitive but due to amendment in 1991 in the MRTP Act for making easy the liberalization process it failed to completely control the unfair mergers.

On August 28, 2009 the Ministry of Corporate Affairs issued a notification pursuant to which the Monopolies and restrictive Trade Practices Act 1969 was repealed and replaced by the Competition Act 2002 with effect from September 1 2009. The Competition Act attempts to make a shift from curbing monopolies to curbing practices that have adverse effects on competition both within and outside India. $125 million) to notify the Competition Commission before acquiring a company outside India.

**Relevant Market**

Compromising 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.

For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission will have due regard to all or any of the following factors, namely.
• actual and potential level of competition through imports in the market;
• extent of barriers to entry into the market;
• level of combination in the market;
• degree of countervailing power in the market;
• likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices of profit margins;
• extent of effective competition likely to sustain in a market;
• extent to which substitutes are available or are likely to be available in the market;
• market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
• likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
• nature and extent of vertical integration in the market;
• possibility of a failing business;
• nature and extent of innovation;
• relative advantage, by way of the contribution to the economic development by any combination having or likely to have appreciable adverse effect on competition; and
• whether the benefits of the combination outweigh the adverse impact of the combination if any

Thus, if a merger within the jurisdictional requirement of the enactment and is having in appreciable adverse effect on competition to be determined on the basis of the aforesaid factors within the relevant market in India, the combination will be void as per the Competition Act, 2002,
Forms Filing and Cost

The Competition Commission has prescribed certain forms under The Competition Commission of India (Combination) Regulations, in which the notice to the Commission shall be given. A fee of approximately $50,000 which may increase to $100,000 in certain cases, shall be paid with the notice. Further, the Competition Commission will issue a show-cause notice if it is of a prima facie opinion that the combination is likely to cause an appreciable adverse effect on competition in India. A fee of $40,000 is to be filed along with the response to the show-cause notice.

Exemptions

The Competition Commission of India (Combination) Regulations, exempts 13 transactions from the preview of combinations but these exempted transactions are also required to notify to the commission. It means these transactions are not exempt from the reporting requirements.

Extra Territorial Jurisdiction of the competition act

Section 3 of the act governs anti-competitive agreements and prohibits

“Agreements involving production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an ‘appreciable adverse effect on competition in India.’”

Section 4 of the act prohibits the abuse of a dominant position by an enterprise. Under the Monopolies Act, a threshold of 25% constituted a position of strength.

Section 6 of the competition Act states that no person or enterprise will enter into Combination which cause or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination will be void. A ‘combination’ is either a merger of two enterprises or the acquisition of the control, shares, voting rights or assets of an
enterprise or an enterprise that belongs to a group if it meets the jurisdictional requirements set forth below. Although the Act does not expressly so state, the term ‘combination’ include horizontal, vertical and conglomerate mergers.

**Criteria under Section 5 (threshold for mergers)**

The most important legal issue in merger analysis is jurisdictional, that is, which mergers or amalgamations are important enough to be considered ‘combinations’ which attract regulatory scrutiny. Section 5 of the competition act defines combination by providing threshold limits on assets and turnovers. At present, any acquisition, merger or amalgamation falling within the ambit of the thresholds constitutes a combination. The following transactions will constitute a combination.

- Transactions among Indian companies with combined assets of $250 million; or $750 million in turnover of the merged entity
- Cross-border transactions involving both Indian and foreign companies with combined assets of $500 million or $1.5 billion in turnover; and
- Transactions that have a territorial nexus with India, where the acquirer has $125 million in assets or $375 million in turnover in India.

**For acquiring groups, the threshold figures are much higher :**

- $1 billion in assets and $3 billion in turnover in India respectively;
- Assets in excess of $2 billion; or
- Turnover of more than $6 billion outside India.

The threshold criterion could create a deadlock because once an entity or group grows to a size of the prescribed limits, all combinations – however small will be covered by the regulations. It is to be noted that the Competition Act, 2002, does not make a distinction between horizontal, vertical and conglomerate mergers and provides the same threshold test for all of them.
**Regulatory Provisions of Competition Act, 2002**

According to the present amended act it is mandatory for any company to notify mergers when the combined assets or turnover are beyond the threshold limits provided in section 5 of the Competition Act. The act makes it mandatory to give notice to the commission within 30 days of the decision of the parties’ boards of directors or of execution of any agreement or other document for effecting the combination. The terms ‘agreement’ and ‘other document’ are not defined. The general industry perception is that a memorandum of understanding or a letter of intent will qualify as an ‘agreement.’

**210-day waiting period and thresholds**

The Competition Act provides for a post-filing review period of 210 days, during which the merger cannot be consummated and within which the Competition Commission is required to pass its order with respect to the notice received. If the commission fails to pass an order within the time limit, the proposed combination will be deemed to be approved. The 210-day period applies in case of cross-border transactions outside India where one of the contracting parties has a substantial presence in India. Regardless of the size of the transaction, notification is required where the combined asset value or turnover in India exceeds a certain value. This means that it is mandatory for a foreign company with assets of more than $500 million that has a subsidiary or joint venture in India with a substantial investment. In the Indian Competition Act, 2002 has the extra territorial jurisdiction. Section 32 provides that the commission shall have the power to Competition Commission shall have the power to enquire into an agreement or abuse of dominant position or combination even if the act has taken place outside India or the party or enterprise is outside India provided it has an appreciable adverse effect on competition in India. Further the Commission is allowed under proviso to section 18 to enter in the memorandum or arrangement with the prior approval of the Central Government. Section 32 states that, notwithstanding that any restrictive agreement, any party to such agreement any enterprise
abusing the dominant position, or any combination or party to the combination is outside India, the competition Commission of India has the power to enquire into if it has an anti competitive effect within the relevant market in India.

**Inferences**

The Competition Act, 2002 contains a comprehensive Merger review process. It brings various new concepts under the provision of combinations like relevant market, assets/turnover outside India and the new test of appreciable adverse effect etc. Undoubtedly, the Competition Act will play a significant role in the development of the Indian economy. Indian markets cannot function in isolation; they need to align themselves with their investors in an increasingly flat world to the commission. It means these transactions are not exempt from the reporting requirements.

**Extra Territorial Jurisdiction of the competition act**

In the Indian Competition Act, 2002 has the extra territorial jurisdiction. Section 32 provides that the commission shall have the power to Competition Commission shall have the power to enquire into an agreement or abuse of dominant position or combination even if the act has taken place outside India or the party or enterprise is outside India provided it has an appreciable adverse effect on competition in India. Further the Commission is allowed under proviso to section 18 to enter into memorandum or arrangement with the prior approval of the Central Government. Section 32 states that, notwithstanding that any restrictive value. This means that it is mandatory for a foreign company with assets of more than $500 million that has a subsidiary or joint venture in India with a substantial investment (above $25 million) to notify the Competition Commission before acquiring a company outside India.
Relevant Market

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’. Relevant geographic market means’ a market comprising the are in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and may be distinguished from the conditions prevailing in the neighboring areas. 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 product or services, their prices and intended use.

For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission will have due regard to all or any of the following factors, namely;

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

Thus, if a merger within the jurisdictional requirement of the enactment and is having an appreciable adverse effect on competition to be determined on the basis of the aforesaid factors within the relevant market in India, the combination will be void as per the Competition Act, 2002.
2.5 The MRTP Act, 1969, and competition Act, 2002

**MRTP Act, 1969**

As stated earlier, the Mahalanobis Committee in 1964 and the Monopolies Enquiry Commission in 1965 revealed the tendencies of increasing concentration in the industrial sector of the economy. To curb these tendencies and control the monopolistic and restrictive trade practices of the large business houses, the Government of India adopted the Monopolies and Restrictive Trade Practices (MRTP) Act in 1969 and the MRTP Commission was set up in 1970. The preamble to the Act described it thus: “An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices: and matters connected therewith or incidental thereto.”

**Inter-Connected and Dominant Undertakings.** The MRTP Act covered two types of undertakings viz., national: monopolies and product monopolies. National monopolies were covered by Section 20(a) of the Act and were either, ‘single large undertakings’ or ‘groups of inter-connected undertakings’ (i.e., large houses) which had assets of at least Rs. 100 crore (prior to 1985, this limit was Rs. 20 crore). Product monopolies covered under Section 20(b) and called ‘dominant’ undertakings' were those which; controlled at least one-fourth of production or market of a product and had assets of at least Rs. 3 crore (earlier on; this limit was Rs. 1 crore). By the end of March 1990; 1,854 undertakings were registered under the MRTP Act. Of these 1,787 belonged to large industrial houses and the remaining 67 were dominant undertakings. The New Industrial Policy, 1991, scrapped the assets limit for MRTP companies.

**Monopolistic, Restrictive and Unfair Trade Practices.** According to the MRTP Act, a restrictive trade practice (RTP) means a trade practice which has, or may have, the effect of, preventing, distorting or restricting competition in any manner. A monopolistic trade practice (MTP) is a trade practice which has, or is likely to have, the effect of (i) maintaining prices at an unreasonable
level, or (ii) unreasonably preventing or lessening competition, or (iii) limiting technical development or capital investment to the common detriment, or (iv) allowing the quality to deteriorate. Prior to 1984, the MRTP Act was restricted to monopolistic and restrictive trade practices only. In 1984 the Act was extended to unfair trade practices also.

**Purview of the MRTP Act.** A large number of types of agreements were specified in the MRTP Act which fell under its purview. Each one of these was required to be duly registered with the Registrar of Restrictive Trade Practices including the names of parties to the agreement. Registered undertakings were subject to the following control on their industrial activities: (a) if it was proposed to expand substantially the activities of the undertaking by issuing fresh capital or by installation of new machinery or in any manner, notice to the Central Government was required to be given and approval taken (Section 21); (b) if it was proposed to establish a new undertaking the prior permission of the Central Government was required to be obtained (Section 22); and (c) if it was proposed to acquire or merge or amalgamate with another undertaking the sanction of the Central Government was required to be taken (Section 23). The responsibility to see that there was no concentration of economic power to the common detriment was that of the government.

**The Process of Liberalisation.** With a view to expanding industrial production, the government considerably liberalised the Operations of the MRTP Act from time to time. The result was that the large business houses were given the green signal to enter a number of industrial fields which were formerly closed for them. Even the illegally set Up industrial capacity was regularised. Some of the important liberalisation measures announced over time were as follows:

1. The 1973 industrial policy statement opened up a large number of industries to the large houses. These included not only the core industries but also industries having direct linkages with such core industries and industries with a long-term export potential. Initially there were 19 such industries (listed in Appendix I) and gradually their number rose to 35.
2. With a view to providing fillip to production in industries of high national priority and/or those meant exclusively for export, the government introduced Section 22-A in the MRTP Act whereby it could notify industries or services to which Section 21 and 22 of the Act would not apply, (a) In October 1982 all 100 per cent export-oriented industries established in the Free Trade Zone were exempted from Sections 21 and 22 of the Act. (b) In May 1983 the government notified that companies registered under the MRTP Act was eligible to set up, without the approval of the government, new capacities in industries of high national priority or industries with import substitution potential or those using sophisticated technology. However, the companies were required to fulfil certain conditions to avail the exemptions.

3. The government identified some industries which were specially important from export angle. These industries were allowed 5 per cent automatic growth per annum, up to a limit of 25 per cent in a plan period over and above the normal permissible limit for 25 per cent excess production over the authorised capacity. Large houses did not require separate approval under the MRTP Act for such automatic growth.

4. In a major liberalisation of the industrial licensing policy announced on December 24, 1985, the government permitted the unrestricted entry of large industrial houses and companies governed by the Foreign Exchange Regulation Act (FERA) into another 21 high-technology items of manufacture. With this permission, the large industrial houses falling within the purview of the MRTP Act and FERA companies were allowed to freely take up the manufacture of 83 items (previously the number of items was 60).

5. Under the provisions of the Sick Industrial Companies (Special Provisions) Bill 1985, the government removed sick industrial companies from the purview of the MRTP Act for purposes of modernisation, expansion, amalgamation or merger.

6. For promoting the development of backward areas, the government extended the scheme of delicensing in March 1986 to MRTP/FERA companies in respect of 20 industries in Appendix-I for location in centrally
declared backward areas. The scheme was later extended to 49 industries for location in any centrally declared backward area and to 23 non-Appendix-I industries for location in category 'A' backward districts. The conditions permitting MRTP and FERA companies to establish non-Appendix-I industries were also liberalised.

7. The government announced a new scheme on April 7, 1988. Effective from April 1, 1988, as per this scheme, the industrial licences/registrations with technical authorities were to be automatically re-endorsed at the highest level of production actually achieved by the industrial undertaking in any of the financial years between April 1, 1988, and March 31, 1990. This was a major concession as it implied automatic re-endorsement of capacity at the highest level of production achieved during 1988 and 1990.

8. An important relaxation came in 1985 when the government raised the limit of assets for the purpose of MRTP Act from Rs. 20 crore to Rs. 100 crore. After the Government of India decided to liberalise economic policy in 1991, provisions in respect of concentration of economic power were deleted by omitting Part A of Chapter III of MRTP Act with effect from September 27, 1991. After omission of these powers, MRTP Commission became a toothless tiger as it was now required to look after cases relating to unfair trade practices and restrictive trade practices only.

**Competition Act, 2002**

Since the adoption of the economic reforms programme in 1991, corporates have been pressing for the scrapping of the MRTP Act. The argument is that the MRTP Act has lost its relevance in the new liberalised and global competitive scenario. In fact, it is said that only large companies can survive in the new competitive markets and therefore ‘size’ should not be a constraint. Thus, there is a need to shift our focus from curbing monopolies to promoting competition. In view of this, the government appointed an expert committee headed by **SVS Raghavan** to examine the whole issue. The Raghavan Committee submitted its Report to the Government on May 22, 2000 wherein it proposed the adoption of a new competition law and doing
away with the MRTP Act. Accordingly, the government decided to enact a law on competition. Competition Bill, 2001 was introduced in Parliament and passed in December 2002. The Act is called Competition Act, 2002. The Act was amended in September 2007.

Competition Commission of India. The Act provides for the establishment of the Competition Commission of India (CCI). According to Section 18, it shall be the duty of the Commission to eliminate practices having adverse effects on competition, to promote and sustain competition in markets in India, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in market in India. Some protagonists of private sector have argued that that there is no requirement of CCI because all that is required is removal of licensing requirements and knocking down of entry barriers. However, the fact of the matter is that the market does not always guarantee competition. There will always be unfair and restrictive business practices. Besides, mergers and acquisitions would need to be scrutinised. It is on account of this reason that most countries have competition or free trade commissions. This explains the rationale of CCI in India.

Overall Scheme. Competition Act, 2002 is designed for the following purposes: (1) Prohibition of anticompetitive agreements, (2) Prohibition of abuse of dominant position, and (3) Regulation of combinations.

1. Prohibition; of Anti-Competitive Agreements. Section 3 of the Act makes provision for prohibition of anticompetitive agreements. According to Section 3(1) of the Act, "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." Section 3(2) states that any agreement entered into in contravention of the provisions contained in Section 3(1) shall be void.

Section 4(1) of the Act states that “no enterprise shall abuse its dominant position”. It may be noted that 'dominant position' itself is not prohibited. What is prohibited is its misuse.

'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.

3. Regulation of Combinations. Section 5 of the Act defines combination while Section 6 is concerned with regulation of combinations. According to Section 5, the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be treated as 'combination' of such enterprises and persons or enterprises in the following cases: (a) acquisition by large enterprises; (b) acquisition by group; (c) acquisition of enterprises having similar goods/services; (d) acquiring enterprises having similar goods/services by a group; (e) merger of enterprises; and (f) merger in group company;

Section 6 of the Act relates to 'regulation of combinations.' According to Section 6 (1), no person or enterprise shall enter into a combination which causes is likely to cause an appreciable adverse effect on competition, within the relevant market in India and such a combination shall be void.

The definition and heading of the section itself means that it is 'regulation of combination'. Thus, combination, in itself, is not prohibited. It will be held void only if adversely affects competition.

**Competition Act, 2002 vs. MRTP Act 1969**

While the focus of MRTP Act, 1969 was on controlling, the concentration of economic power, the focus competition Act, 2002 is on ensuring free and fair competition the markets. The spirit behind the petition Act is that big is no more bad, hurting competition and consumer interest is.
For instance, S. Chakravarthy (a member of the Raghavan Committee) has 5d out that “size is no longer the issue. It could become when consumer interest is compromised”. Moreover while MRTP Act, 1969 frowned upon dominance, competition Act, 2002 frowns upon abuse of dominance, ‘dominance’ is not prohibited in Competition Act. Only ‘abuse of dominance’ is prohibited.

**Competition (Amendment) Bill, 2007**

The Competition (Amendment) Bill 2007 was introduced passed in August-September 2007. The bill, piloted by corporate Affairs Minister P.C. Gupta, said the Competition of India (CCI) would eventually replace the monopolies and Restrictive Trade Practices Commission (MRTPC). MRTPC would continue to deal with pending cases even two years after the establishment of CCI and Id be dissolved thereafter. However, MRTPC would entertain any new cases after the CCI is constituted, main features of Competition (Amendment) Bill, 2007 as follows:

1. The Supreme Court had held that if an expert body is to be created by the government, it might be appropriate to Create two separate bodies one with expertise for advisory and regulatory functions (CCI) and the other for adjudicatory functions (Competition Appellate Tribunal or CAT). Accordingly, the Competition (Amendment Bill, 2007 provides for constitution of both CCI and CAT. The CCI will be an expert body, which would function as a market regulator to prevent and regulate anticompetitive practices in the country. It would also have advisory and advocacy functions in its role as regulator. It would have four members, with the chairman being the Chief Justice of India or his nominee. The CCI will exercise its powers through various benches, including those designated for mergers. CAT would be a three-member quasi-judicial body. It would be headed by a person who is or has been a justice of the Supreme Court or the Chief Justice of a High Court and would hear appeals against any direction issued by the commission.
2. The new law has sought to make mergers and acquisitions (M&A) deals more transparent. Companies will have to inform the CCI about the deal within 30 days. Companies could be penalised if they fail to do so.

3. If any agreement between companies results in a cartel, they might have to pay hefty financial penalties upto thrice the value of profits earned. This has been done to prevent corporations from building dominant market positions artificially.

4. The new law seeks to empower the CCI to impose penalty of upto Rs. 25 crore or upto three year imprisonment or both in cases of continued contravention of its orders if the chief metropolitan magistrate deems fit.

5. While earlier it was voluntary for an enterprise proposing to enter into a combination to intimate the competition commission, the new law makes such intimation of the combination to the commission mandatory. In fact, such a coupling shall not take effect until 210 days from the date of notification or approval from the commission, whichever is earlier.

A Critical Review

1. The new law focuses on the provision of a domestic nexus (a nexus with assets and operations in India) in connection with the limits applicable to acquisitions in which a foreign entity and an Indian entity are involved. According to critics, this would narrow down the scope for an acquisition being covered under combinations to be regulated by the commission. Thus, if the acquirer is a foreign company without any Indian presence, the competition act trigger will not apply due to the provision of the Indian nexus."

2. As stated above, coupling shall not take effect until 210 days from the date of notification or approval from the commission. Whichever is earlier. This is likely to result in a long gestation period of about seven to eight months from the date of approval of the proposal. This long gestation period will add a significant element of uncertainty and can be a drag on ‘big-ticket’ M&A activities in India.
According to Dalal, the uncertainty has several implications, including the following.

- Perception among customers.

- Uncertainty as regards the identity of the enterprise could create reluctance among customers who could choose to shift to a more stable competitor.

- Inability to make strategic and operational decisions. Strategic and operational business issues could remain in limbo.

- Human resources: in any acquisition or merger, the human resources element is crucial. This has dimensions relating to alignment of titles, roles and responsibilities. A long period of uncertainty could seriously dent morale and heighten attrition.

- Enterprise value(s): as a result of the uncertainty, including the above factors, the market value of both enterprises could be severely dented due to the long period of uncertainty.

While reference to a regulatory body is mandatory in a number of countries, the time limit prescribed by most of them is much shorter, ranging from 25-35 days for an initial investigation. Only when there are serious doubts regarding the effects of the combination on competition, the next level investigation is required within a time limit of 90-180 days.\textsuperscript{11}

\textsuperscript{11} The MRTP Act, 1969, and competition Act, 2002
2.6 Conclusion

The message is loud yet clear that a well planned exhaustive competition compliance programme can be of great benefit to all enterprises irrespective of their size, area of operation, jurisdiction involved, nature of products supplied or services rendered and the same is essential for companies, its directors and the delegate key corporate executives to avoid insurmountable hardships of monetary fines, civil imprisonment, beside loss of hard-earned reputation when the Competition Authorities, the media and others reveal the misdeeds in public.

In the changed scenario, India do needs a fresh law for competition and a new regulatory authority, which under this policy is the Competition Commission of India. The law will serve the purpose only if it is made independently, runs independently and is less expensive.