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Competition regime in India

In this chapter the researcher intended to discuss the evolution of the modern Indian Competition Law. The Indian economy had been characterized by significant government involvement marked with the dominance of large state–owned public enterprises (SOEs). There existed lacunae in the older laws and policies, which needed corrections as India moved ahead in creating a sound economic regulatory regime aimed at delivering higher growth, creating more employment and ensuring distributed justice to all. In order to realize this, India embarked on the path of economic reforms during 1990s by shifting to economic policies. Here in this chapter the researcher tries to evaluate the significance of competition policies and regulatory regimes including the government policies that impeded competition, the objects which are sort to be achieved by the Modern Competition Law. Further researcher intends to evaluate the amendments made to said Act and to other National statutes to make the Competition Law function without any hurdles.

Introduction

Competition law is all about economic behavior. It is being increasingly recognized that markets have an important role to play in any economy. Efficiency is associated with competition and the markets can fulfill their functions efficiently only if they remain competitive. As the role of the market expands, the role of the state also undergoes a change. The regulatory role of the state demands action to maintain competitive conditions in the markets. Legislation is therefore, required to prevent the degeneration of the markets to a monopolistic or a near-monopolistic situation. Competition law is a framework of legal provisions designed to maintain competitive market structures. Thus, competition Law, broadly, relates to efforts at promoting competition through legislative means. Competition law has grown enormously in recent years, especially since the early 1990s. Hundred s of countries across the world have adopted competition law. One of the motivations for introducing modern competition law s is to promote the growth of a competitive market. There is evidence that competition in domestic markets, through both inter-firm rivalry and entry of firms, results in higher levels and rates of growth in GDP per capita.
India's new competition law, the Competition Act of 2002, was passed by parliament in the year 2002 and received the assent of the President of India on 13 January 2003, thereby becoming the law of the land from that date. The Act has an overriding effect over any inconsistent provision in any other law for the time being in force and provided for the establishment of Competition Commission of India. The Act was amended in September 2007 providing for setting up of a Competition Appellate Tribunal. The replacement of the MRTP Act of 1969 by a new Competition Act is a natural corollary to economic liberalization and opening up of trade to competition. Following the report of the Ragavan Committee, After consultations with all concerned, including trade and industry association and the general public, the Government of India passed the Competition Act in December, 2002 which was enforced as All-Indian Legislation. The Act is a central law in India, i.e., a law of the Union Government and there is no corresponding law enacted at the level of the constituent States. The Competition Act, 2002 sought to regulate (a) Anti-competitive agreements ;(b) Abuse of dominance ; (c) Combination and mergers and to promote (d) competition Advocacy. The provisions relating to the above two are notified and provision relating to Combinations is not yet been notified since there are serious concerns on how the act applies to various commercial transactions. However, the need for a new law has its origin in the Finance Ministers budget speech in February 1999;

"The MRTP Act has become obsolete in certain areas in the light of international economic development relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions"128.

It is useful to understand the economic milieu which led India to enact this Act which aims specifically at dealing with issues relating to the protection of the process of competition. Number of factors impelled this step, the major ones being the obligations cast on India by the World Trade Organization (WTO) Agreements, viz. the General Agreement on Trade

and Services (GATS), Trade Related Aspects of Intellectual Property Rights (TRIPS), etc., and the entry of large multinational companies into India, consequent on India’s measures liberalizing trade. Most significantly Indian industry began to realize that, without legislation specifically aimed at protecting the significantly, competitive process, they would be at a disadvantage in the changed business environment. The government also considered that the MRTP Act which was enacted to prevent “Concentration of economic power’ and was not the right mechanism suited to deal with the issues relating to the preservation and protection of Competition. Furthermore being a member of WTO, it was also obligated that the Indian Government to provide a legal means that would assure reciprocal rights to the other members of the WTO. Thus, Owing to the International obligations and internal demands The Government of India’s appointed Committee on Competition policy and Law under the chairmanship of Mr. S.V.S Ragavan in October in 1999 for shifting the focus of the law from curbing monopolies to promoting competition in the line with the international environment. The Committee recommended the enactment of the Indian Competition Act, along with the setting up of a Competition Commission of India (CCI), repealing of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, and the winding up of the MRTP Commission. The committee noted the steps already taken to increase competition and suggested that;

“Although significant steps have 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 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 proactive advocacy function for the competition.”

129 The Committee submitted the report to the prime minister on May 22, 2000. The need of the comprehensive Competitive law was also felt when large multi-national companies, taking advantage of India’s liberalized economic policy, permitting greater participation of overseas companies in economic activities in India established their business in India.

Furthermore, the Raghavan Committee Report stated that the essence and spirit of competition should be preserved positioning the competition policy and laid stress on the need to harmonize the conflict between the competition policy and other government policies. It also highlighted that the Competition Policy has, as its central economic goal, the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers’ demand at the lowest possible cost. The report also emphasized that the formulation and implementation of government policies should take into account competition principles.

**Thus, the basic questions rises why do we need competition Law /Policy?**

Well, the question was often asked what’s the need to have a new law for the protection of the consumers when we already had the Monopolistic and Restrictive Trade Practices Act, 1969 (MRTP Act) and Consumer Protection Act of 1986 and even doubted whether they are not sufficient enough to deal with anti-competitive practices. Well, India needs a law to curb anti-competitive activity and it was observed that MRTP Act was limited in its sweep and hence fails to fulfill the need of a competition law in an age of growing liberalization and globalization. Competition makes enterprises more efficient and offers wider choice to consumers at lower prices. This ensures optimum utilization of available resources. It also enhances consumer welfare since consumers can buy more of better quality products at lower prices. Fair competition is beneficial for the consumers, producers/sellers and finally for the whole society since it induces economic growth. Further, competition is desirable because, among other things, it leads to at least three positive economic effects ;(i) the allocation of resources to their most valued use (i.e. allocative efficiency) ;(ii) causing firms to react to competition by reducing costs (i.e productive efficiency); and (iii) causing firms to innovate and introduce new products and new ways of producing products (i.e. innovative or dynamic efficiency). Indeed, it has been observed that effective competition is necessary for a domestic economy to realize the benefits of integration into the international economy.
and to encourage foreign investment\textsuperscript{131}. Economic benefits can be achieved through competition Law. Thus, it is understood from the above observation that, Competition is not static, as it is designed to produce winners and losers. Furthermore, a competition law primarily has three main items on its agenda. First and foremost, it aims to control the formation of oligopolies and Carterlisation of economic activities. Firms colluding to fix prices would be subjected to the terms of competition law. Secondly, competition law concerns itself with affecting the working of existing monopolies. For instance, competition law may constrain a natural monopoly (i.e. a firm in an industry where the market naturally only supports the existence of one firm) attempting to set a price that may be considered “excessive”. Finally, competition law also aims to prevent firm actions that serve to extend, or move the market towards, a monopoly. Supplier’s actions, such as offers of exclusive territorial rights to retailers that reduce retailer’s incentive to compete, are potentially subject to competition law. Thus, Competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. The Raghavan Committee defines free competition as total freedom to develop optimum size competition without any restriction. The main object behind the competition policy is to ensure development and growth of Indian market and protection of consumer interest by increasing fair competition and prohibiting anti-competitive practices. This object has also been incorporated in the preamble of the Competition Act. The Preamble of the Competition Act says;

\textquotedblleft An Act to provide, keeping in view of the economic development of the country for the establishment of a Commission 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 other participants in markets, in India, and for matters connected therewith or incidental thereto\textsuperscript{132}.

The Raghavan Committee report discusses both Policy and Law of Competition. It recommended that the competition law should cover all consumers who purchases goods or services, regardless of the purpose for which the purchase is made. The State Monopolies,

\textsuperscript{132}Preamble of Competition Act, 2002 ;( 2003) 1 Comp LJ 184 (St)
Government procurement and foreign companies should be subject to the competition law. Thus the Competition Act, therefore, seeks to:

- Ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets in India;
- Promote and sustain competition in markets;
- Protect the interest of the consumers;
- Ensure the freedom of trade carried on by the other participants in the markets in India;

The objective of the Act is to protect the interest of the consumers. In order to do so, it seeks to promote and sustain competition and to ensure fair competition and freedom of trade. The use of the word ‘protect’ in the preamble furnishes the key to the makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control the otherwise plain meaning of a provision. The Act provides for the establishment of a quasi-judicial body called Competition Commission of India (CCI) with the following two basic functions:

- Administration and enforcement of the Competition Law and Competition policy to foster economic efficiency and consumer welfare;
- Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.

The aim of the Competition Act 2002 is to prevent practices having adverse effect on competition and abuse of dominance of enterprises either by entering into anti-competitive agreements, or combinations. The Act typically focuses on four areas;

i. Anti-competitive agreements
ii. Abuse of the dominance
iii. Combination regulations and,
iv. Competition Advocacy
However the 2002 Act essentially remained dormant due to the filing of a writ petition before the Supreme Court\(^\text{133}\), which objected to the Rule allowing the government to select the key members of the Commission. According to the petitioner, “the Competition Commission envisaged by the 2002 Act was more of a judicial body having adjudicatory powers” and thus, in keeping with the constitutionally recognized doctrine of separation of powers, “the right to appoint the members should rest with the Chief Justice of India or his nominee.” The Supreme Court ultimately dismissed the writ on January 20, 2005, noting that it would be in the best interest of the Government to create two separate bodies, one with expertise for advisory and regulatory functions, and the other for adjudicatory functions. Following the dismissal of the writ, the Indian government took action to adopt a bill that would protect consumers from anticompetitive conduct, while remaining true to the doctrine of separation of powers. In this backdrop, the Act was amended in September 2007 providing for setting up of a Competition Appellate Tribunal headed by a Judicial member to adjudicate appeals and the compensation claims arising out of the decisions of Commission. Ever since its enactment in 2002, the provisions of the Act have selectively been brought into effect. As of now only section 3, section 4 have been enforced and rest are yet to be notified\(^\text{134}\). In competition law, there seems to be a duopoly situation as far as the regulatory sphere is concerned. The Competition Commission of India is already in place with several provisions of the Competition Act, 2002 having been notified take effect from May 20, 2009. Moreover, the CCI has also begun acting on cases involving cartelization. Curiously enough, the Monopolies and Restrictive Trade Practices Commission (MRTPC) continues to be in existence and continues to receive cases as it is yet to be dissolved. The government is yet to notify Section 66\(^\text{135}\) of the Competition Act and unless it is notified MRTPC would continue to function like before. In fact, the MRTPC has been getting new cases even after the CCI has become operational.


\(^{134}\) Section 5, 6, sec 18 to 21, 26 to 33, 35 38-39, 41-48 and 66 are yet to be enforced.

\(^{135}\) Section 66 of the Competition Act deals with repealing and dissolution of the MRTPC Act, 1969.
How the Competition Law beneficial to the Indian economy?

The opening up of national boundaries to trade in the era of globalization has seen a quantum leap in international trade and has placed increasing competitive pressure on all economies, whether developed, developing or transitional. It has forced most governments to reassess their national competition policy and to institute necessary changes in light of the developments in the world trade regime. Modern business operates in a world that is highly economically integrated, but at the same time it is politically, culturally and legally diverse. Notwithstanding the liberalization and the globalization, policies of states still continue to be influenced by national sovereign concerns which are idiosyncratic to a particular state reflecting significant social and political differences between states.\(^{136}\) A fragmented international regulatory environment has evolved in which each government has developed its own unique approach to promote or maintain market competition by regulating anticompetitive conduct that affects its territory, often without regard to the effect of that regulation on other state. These domestic competition laws are not usually concerned with activity beyond territorial borders unless it has significant domestic effects.\(^{137}\)

In India, the importance of competition policy and related regulatory regimes has increased greatly since 1991 when a massive wave of liberalization eliminated many controls on investment, capital market, foreign trade and prices. Prior to 1991, the public interest was sought to be served more through direct regulations that required the prior approval of government for many commercial decisions. Post-1991, in most sectors of the economy, the protection of public interest objectives rests with the laws governing competition and the regulatory regimes that have been set up for “natural” monopolies and network industries (where the production patterns of one producer are linked to that of others). Competition, though seen as a means of attaining efficiency and fairness, might not have necessarily promoted these objectives unless it has dealt with tradeoffs in its objectives and instruments.

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This concern led to a shift from a structural to a behavioral approach in drafting a new competition regime. After all, in a fiercely competitive market, even a duopoly can produce an outcome that a perfectly competitive market generates. Thus, it may not be necessary to have a highly-competitive market structure provided appropriate rules of the game are designed and enforced so that the market players behave in a competitive manner. This approach may, however, become ineffective when competition in natural monopolies cannot be ensured as such. Situations can also arise where there may be a number of players in the market but the market itself is so segmented that individual players become monopolists. The only way to get ‘competitive outcomes’ in such markets is to put effective regulation in place. Thus, regulation in different sectors becomes an integral component of competition policy. Apart from this, due to the LPG, India was made to face a severe competition from the world over. Thus the need for the introduction of domestic competition law was felt to prevent international cartels from indulging in anti-competitive practices in the country. One of the advantages of the having domestic competition law is that apart from fostering the competition is that it also makes possible for the countries to reach memorandum of understanding between themselves. At least one of the motivations for introducing modern competition laws is to promote the growth of a competitive market. There is evidence that competition in domestic markets, through both inter-firm rivalry and entry of firms, results in higher levels and rates of growth in GDP per capita. Thus, the aim of all regulatory authority whether it is Telecommunications, power, Oil and Gas, Ports, Airports, Water etc, is to protect and promote the interest of consumers.

Need for a National Competition Policy for India

The reforms initiated since 1991 recognized the need for removing fetters on trade and industry with the view to unleash the competitive energies. The Industrial Policy Statement of 1991 emphasized the attainment of technological dynamism and international competitiveness. It noted that the Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment. To enhance competition in the domestic markets and to generate/promote a culture of competition in the country is part of this broader agenda of reforms. Further reforms would be facilitated by means of a comprehensive overarching national competition policy. There are several
policies and laws that can have significant bearing on competition. These are often not competition-friendly, sometimes by design and often due to ignorance; such policies are anachronistic in the present economic milieu and adversely affect the competitive forces and the competition culture in the economy. This situation can be addressed only by adopting a comprehensive National Competition Policy and harmonizing all other policies keeping in view competition dimensions. The economic reforms undertaken by the Government have been generally on sector by sector basis and the progress across sectors has not been uniform. The sector by sector approach also carries the risk of inconsistency between sectoral policies. A broad based, overarching National Competition Policy will promote coherence in the reforms and establish uniform competition principles across different sectors. This will ensure that the competition dimension is taken into account while formulating various policies and consistency is maintained across all sectors. The national Competition Policy will facilitate creation of a national market. The competition policy recognizes the need for removing the barriers on trade of goods and services across all states. It will help integrate the national market and create a uniform level playing field across the country. The Raghavan Committee on competition policy also highlighted the need for a competition policy in its report. In fact, it regarded it as the fourth cornerstone of Government economic framework policies along with monetary, fiscal and trade policies. The competition policy has been laid down in the Raghavan’s Committee report. The object of the competition policy is as follows; “Competition policy” in this context, thus becomes instruments to achieve efficient allocation of resources, technical progress, consumer welfare and regulations of concentration of economic power. Competition policy should thus have the positive objective of planning consumer welfare.\(^{138}\)

**Competition Policy and Competition Law**

Competition policy has been so widely embraced in recent years; there is probably a greater global consensus on the desirability of competition and free markets today than at any time in the history of human economic behavior. Competition policy is defined as “those government measures that directly affects the behavior of enterprises and the structures of

\(^{138}\) See Raghavan’s Committee report Para 1.2-0
industry. The object of competition policy is to promote efficiency and maximize welfare. Competition policy, has, as its central economic goal, the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resources deployment follows market success in making consumers demand at the lowest possible cost. The objective of competition policy is to promote efficiency and maximize welfare. In this context, the appropriate definition of welfare is the sum of consumer’s surplus and producer’s surplus and also includes any taxes collected by the government. It is well-known that in the presence of competition, welfare maximization is synonymous with allocative efficiency. There are two elements of such a policy. The first involves putting in place a set of polices that enhance competition in local and national markets. These would include a liberalized trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is legislation designed to prevent anti-competitive business practices and unnecessary government intervention—competition law. An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. Competition law-policy in several countries is based on a multiple set of values that are neither easily quantifiable nor reduced to a single economic objective. These values may reflect the society’s wishes, culture, history, institutions and other factors that cannot nor should necessarily be ignored. It is worth to note that, the scope and objectives of competition law-policy tends to vary across countries and over time. For example, in countries such as Canada and New-Zealand, the primary objective of the competition legislation is to maintain and encourage competition with emphasis being placed on the promotion of economic efficiency. In the United Kingdom, emphasis is placed on ‘public interest’—a broader concept than that of competition alone. In the United States, the enforcement of competition laws has increasingly focused on the
consumer welfare and economic efficiency. In India, the objectives of the Competition Act are ‘….. Keeping in view the economic development of the country…. To prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interest of the consumers and to ensure the freedom of the trade. To strengthen the forces of competition in the market, both competition law and competition policy are required. The two complement each other. Competition law prohibits and penalizes anti-competitive practices by enterprises functioning in the market; that is, it addresses market failure. The aim of competition policy is to create a framework of policies and regulations that will facilitate competitive outcomes in the market. The competition policy and competition law need to be distinguished. The former can be regarded as a genus of which the latter is specie. Competition law provides necessary teeth to the authority concerned to enforce and implement the competition policy. Competition policy thus has the positive objective of promoting consumer welfare. It is now acknowledged that major distortions in market could also be the result of state interventions that aim at protecting in efficient domestic markets contributing sub-standard and high –priced goods thereby depriving the consumer of access to cheaper goods of better quality. Thus, state intervention appears appropriate only when the free market left to its own dynamics, fails to render an efficient result that would be in the large public interest. For example, when a merger occurs that is anti-competitive, it is certainly easier to resolve without affecting the competition through state intervention. Even at the global level greater co-ordination between state regulators to combat anti-competitive occurrences is more feasible since policy choices are clear and stakes are generally common. A well laid Competition policy thus helps in establishing a predictable environment for investor and consumers of market s and in preventing artificial barriers in the market. The legislative approach also helps in setting a conduct benchmark for market players to avoid potential conflict with the polices of state. One more supporting view for regulatory approach is that an ideal setting of market that serves public good at large is generally the exception than the rule, as the profit motive is the nucleus of a free market. Thus the regulatory objectives of competition policy are intended to serve as follows;

a. Safety and stability of domestic markets
b. Transparency of business practices
c. Prevention of abusive practices
d. Institutionalization of supervision over barriers to fair competition
e. Sustained benefits to consumers

Thus the powerful and effective competition law must stimulate the domestic production and enable domestic business enterprises compete with foreign business enterprises in the international markets. In this direction, the competition policy constitutes not only the regulatory mechanism, but also the dispute settlement mechanism in the matters relating to trade.

**Consumer Interest and Public Interest**

Consumer, in terms of the plain dictionary meaning, is one who consumes or one who uses an article produced or a service. The term ‘consumer’ would therefore include not only the consumer of the final product, but also the consumer of raw material and intermediate products. The term ‘Consumer’ finds defined in Competition laws\(^{139}\) and Consumer protection laws\(^{140}\). While the definition of “consumer” may vary from one competition law / consumer protection law to another, the veneer is almost the same with the emphasis on purchasing, consuming or using a good or service. The expression “consumer interest” therefore, does not require any special delineation or treatment, as the expression is self explanatory. While Public Interest requires a somewhat detailed treatment as it means many things to many people. Public interest is an elusive abstraction meaning general social welfare or regard for social good. In other words, it predicates the interest of the general public in matters where regard for the social good is of the first moment. Thus Public Interest is understood as public good, public welfare, general interest and interest of the community over individual good etc. Often consumer interest and public interest are considered synonymous. But they are not and need to be distinguished. Consumer is a member of a broad class of people who purchase, use maintain and dispose of products and services. Consumer interest is affected by pricing policies, financing practices, quality of

\(^{139}\) See Section 2(f) of Competition Act of 2002.

\(^{140}\) See Section 2(d) of the Consumer Protection (Amendment) Act 2002.
goods and services and various trade practices. While public interest on the hand is something, in which the public or the community at large has some pecuniary interest or some interest by which their legal rights or liabilities are affected. The expression ‘public’ thus pertains to and concerns a multitude of people. However unbridled competition policy could hurt public interest. The government legislative and executive polices may generally cover the large public interest in a country, while competition policy may cover a smaller group of consumers in the country. An effective competition policy and competition law could bring in their wake easy and cheap imports thus making the consumers happy.

It is desirable to keep in view that while competition policy is a desirable objective, it has to be laced with certain safeguards for a limited period to protect the domestic industry, till it is enabled to stand up to and face competition, particularly from the overseas. In other words, if competition policy were to be given an unbridle run, it may benefit the consumers and serve consumer interest, but it is quite possible that some of the MNCs may oust or exist the domestic industries because of the former’s financial and marketing clout. The apprehension is that many domestic industries, which have invested their capital and labour and other resources, may not be able to stand up to competition with giants and conglomerate, which, with their size and economies of scale, will have an advantage in the competitive market. Public interest may get hurt and even prejudiced, if competition policy is allowed an unruly run. Harmonization of public interest and consumer interest is desirable but the contours of the harmony must be understood appreciated by the policy makers.

**Conflict between Public Interest and Consumer Interest**

Despite the desirability of harmony between public interest and consumer interest, they could be in conflict. Trade policy s which are predicated on public interest and competition policy s which are predicated on consumer interest sometimes manifest the conflict. Trade laws, which regulate trade policy s and competition laws which regulate competition policy s, have a certain common core objective namely to maximize economic welfare by improving the environment for more efficient resource allocation. They are regarded to
have complementary effects as well as contradictory effects with each other. In a broad sense, competition policy can be said to refer to policies directly aimed at enhancing the scope for competition between firms. It is concerned with both government interventions that have implications on the competitive environment and private sector anti-competitive practices. Competition policy is important because it fosters economic efficiency, encourages firms to offer consumers good price/quality options and increases the international competitiveness of downstream users. It seeks to promote the efficient allocation of resources by means of open and competitive markets. Trade policy, on the other hand, primarily regulates competition amongst firms across national boundaries. ‘It is the complete framework of laws, regulates, international agreements and negotiating stances adopted by governments to achieve legally binding market access for domestic firms’. A trade policy addresses two broad and interrelated issues. First, it seeks to create trading opportunities to ensure freer trade by removing tariff and non-tariff barriers. Second, it seeks to ensure fair trade by eliminating anti-competitive practices in international trade. This second objective is more difficult to define and achieve. Fair trade implies the creation of an equitable trading system where the conduct of trade is governed by the competitive advantage of market players rather than the economic power and influence of government.

A liberal trade policy is no longer restricted to the consideration of reduction of traditional border restrictions such as tariff and import licensing but the consideration of the reduction of non-tariff barriers including sanitary, phytosanitary measures and technical regulations which limit cross-border access. It aims to address domestic and export subsidies and other forms of assistance, which discriminate in favour of domestic producers. Thus, competition policy and liberal trade policy seek to achieve the same objective namely economic efficiency. However, competition policy seeks to achieve economic efficiency by liberalizing domestic markets and by having laws that protect and promote competition. A liberal trade policy seeks to achieve economic efficiency by liberalizing markets by removing the barriers to trade at the border. Free trade and competitive behavior are thus necessary conditions for efficiency.
Interestingly there is always the primacy of Public Interest over Consume Interest. Public interest needs to be measured in terms of outcomes that benefit the community as a whole rather than in providing benefits for a smaller group like a limited number of consumers. The trade-offs between the interests of the different groups would have to be assessed and made explicit in adjudicating between consumer interest and public interest. However the consumer interest must generally have primacy, while applying competition principles and enforcing competition law, public interest should also be kept in view in the larger interest of society. Competition policy's public interest objectives would provide the means to deliver improved living standards for the whole community, if the policy is well implemented. What is more important is that beyond facilitating and implementing economic reforms through a competition policy, it is the responsibility of the government to ensure that the benefits are shared by the society as a whole and not by a small set of consumers. In a number of countries—both developing and developed—there appears to be a shift away from use of competition laws to promote broad public interest objectives and use of public interest based authorization procedures and exemptions in the competition laws. Public interest objectives include, for example, the promotion of Employment, Regional Development, Economic Stability, and Anti-inflation polices, Social progress, welfare, Poverty Alleviation, Security Interest etc. While competition policy objectives across countries have a certain measure of commonalities like maintenance and encouragement of process of competition, promotion of efficient use of resources and protection of the freedom of economic action of various market participants, they also seek to achieve a number of other objectives as well. Multiple objectives like, de-centralization of economic decision-making, promoting small and medium business, preventing abuses of economic power, pluralism and other social-political goals form a wide spectrum. Thus while there exist core objectives of competition policy, many countries tend to address current concerns through refinement and adoption of competition policy. Thus, since competition seek to ensure that markets remain open, free, flexible and adaptable, competition authorities need to be more pro-actively involved in government policy formulation.
Therefore the lesson to be noted is that competition law should protect competition, and another lesson to be noted is that in formulating a policy, it is important to distinguish between welfare-reducing outcome and welfare-enhancing outcome. This brings to the fore, that, Consumer interest and public interest are not necessarily negating to each other. Primacy of one over the other will depend upon the circumstances and situations of each case. It is the responsibility of both the government and the competition agency to bring in the harmony to ensure that the sectoral consumer interest and the general public interest live side by side. Furthermore, Competition law-policy apply to all sectors and firms in the economy engaged in commercial economic activity, in practice various types of exemptions and exceptions are granted for social, economic and political reasons. The granting of exemptions and exceptions does not necessarily imply the weakening of competition law enforcement. Indeed, it may well be that such instances are necessary for furthering the objectives of competition law-policy, for example, virtually all competition laws strictly prohibit horizontal price agreements between competitors, as they tend to lessen competition. However, various forms of non-horizontal agreements do not necessarily have the same effect and may be in the public interest if inter-firm cooperation results in standardization of products, improved quality, and increased information so consumers have better choices. It is worth observing that there generally tend to be fewer exemptions in countries which have recently adopted competition law (mainly developing and transition market economies) as compared with more industrialized nations. In India, the Competition Act 2002, under section 54 specifies the Central Government’s power to exempt; the Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification——-

a) Any class of enterprise if such exemptions are necessary in the interest of security of the State or public interest;
b) Any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
c) Any enterprise which performs a sovereign function on behalf of the Central Government or a State Government;
Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions. In addition, section 3 sub-clause 5 indicates that; 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) The Copyright Act, 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 Indication of Goods (Registration and Protection) Act, 1999 (48 of 1999);
   e) The Designs Act, 2000 (16 of 2000);
   f) The Semiconductor 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.

In essence, the approach being adopted by India is similar to that of various other countries. However, the determination of exemptions rests with the Central Government. The provisions relating to intellectual property rights appears to imply that the restrictions from application of the competition law provisions may be removed if the conditions imposed by firms tend to be unreasonable. However, this would presumably have to be determined through judicial interpretation as to what constitutes to be reasonable or unreasonable. The Competition Act itself does not define this. Also, at this point of time, the interface between the competition Act and other laws and regulations, especially those relating to specific sectors such as telecommunication, energy and other services have yet to be clearly delineated.
Extra-territorial application and enforcement of Indian Competition Law

The modern competition law in the form of the Competition Act, 2002, The Central Government has also established the Competition Commission of India to carry out the objectives of the Act. The Monopolies & Restrictive Trade Practices Act, enacted in 1969, dealt with some competition issues. As stated earlier the MRTP Act was too narrow in its sweep to deal with competition issues especially in the era of liberalization and globalization. The MRTP Commission had taken up complaints against anticompetitive practices but was handicapped on account of certain limitations in the law. These limitations have been adequately covered in the new law. If we look at the provisions of Section 32 of the Competition Act, 2002 we find that it makes provision with regard to extraterritorial jurisdiction of Indian Competition Authority. The Proviso of Section 18 states the Competition Commission may enter into any Memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provisions of this Act. A treaty is different from Understanding. Thus the mandate of the Competition Commission extends beyond the boundaries of India. In case any agreement that has been entered outside India and is anti-competitive in terms of sec. 3 of the Act or any party to such an agreement is outside India; or any enterprise abusing the dominant position is outside India; or a combination has taken place outside India; or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, if such agreement, combination or abuse of dominant position has or are likely to have an adverse effect on competition in the

141 The Commission has the power to inquire acts taking place outside but India but having an effect on competition in India.
142 See; the Proviso of Section 18 of the Competition Act, 2002 which says.............. Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.
143 A ‘memorandum of understanding’ (MOU or MoU) is a document describing a bilateral or multilateral agreement between parties. It expresses a convergence of will between the parties, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement. It is a more formal alternative to a gentlemen’s agreement. For clarification see; http://en.wikipedia.org/wiki/Memorandum_of_understanding retrieved on 18-02-2010.
144 A ‘treaty’ is an agreement under international law entered into by actors in international law, namely sovereign states and international organizations. For further clarification see; http://en.wikipedia.org/wiki/Treaty (last accessed on 18-02-2010).
Indian market, the CCI shall have the power to inquire into such agreement or dominant position or combination if have or are likely to have an appreciable adverse effect on competition in the relevant market in India. Only mentioning Extra-territorial jurisdiction in Indian Competition Law is not sufficient unless such extra-territorial jurisdiction is applied and enforced by way of International co-operation and it forces Indian Competition Authority to enter into Bilateral and Multilateral Agreement to seek the objectives laid down in the Preamble of The Competition Act, 2002. The Competition Act, 2002 is a growing baby and Bilateral, Multilateral Agreements, Treaties and Memorandum of Understandings are blood and flesh for Indian Competition Commission. By looking at the language of Section 32 of the Competition Act, 2002 it may be concluded that in India also the ‘Effects Doctrine’ may be applied as it has been recognized under Section 32. It would be pertinent to say at this juncture that the Commission has not notified any special regulation for the enforcement of Section 32 of the Act and very recently in May, 2009 has notified the Competition Commission of India (General) Regulations 2009, 2 of 2009, so the process for the enforcement of extraterritorial jurisdiction shall be according to this regulation and the Code of Civil Procedure, 1908 wherever applicable.

The Competition Law of today and of Yesterday

There is a general impression and a perception that the Competition Act 2002 is either a replica or revised version of the MRTP Act 1969 which was erroneous and misplaced. A thorough analysis and comparison of the Competition Act and MRTP Act reveals that the Competition Act 2002 is different from the MRTP Act in many ways, in terms of aims, philosophy structure, duties approach and application process and powers of the Act. The Competition Act 2002 has been recognized as a well conceived, modern law by the OECD and WTO and both have advocated that the most pressing requirement is to quickly make the Act fully operational. The Competition Law is different from the MRTP Act in that it focuses on the firm’s structure, not size. The MRTP Act lists 14 offences. The Competition

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145 The Effects Doctrine is applicable only when the action taken outside the Country has ‘direct, substantial, and reasonably foreseeable’ effects within the Country. Whether this Doctrine is against the spirit of International Law? In International Law there is no standard to determine the ‘direct, substantial, and reasonably foreseeable’ effects within the Country’. Therefore, this Doctrine is not against the spirit of International Law.

146 Discussed in detail in chapter VI.
Law will recognize only four such offences. The MRTP Act's role was only advisory. The proposed competition commission can initiate *suo motu* proceedings and levy penalties. The Competition Law does not consider the firm's dominance *per se* detrimental to competition. The MRTP Act frowned upon dominance and laid down an arithmetical test. The Competition Law frowns only upon abuse of dominance. It seeks to regulate agreements that control production, supply, markets, technical developments or investment in provision of services. All such agreements are considered anti-competitive and penalty can be levied. The recent experience with cement cartels is an example of price rigging under agreements to share markets. Sources of production by way of geographical allocation of market will be considered anti-competitive. The Competition Law prohibits agreements arrived at between enterprises that directly result in bid rigging or collusive tendering. The Act defines bid rigging as agreements between enterprises or persons engaged in identical or similar manufacturing, trading or provision of service that has the effect of eliminating or reducing competition for bids, or adversely affecting/manipulating bidding. Apart from these guidelines, other restrictive trade practices will fall under the rule of reason test before the Competition Commission of India (CCI).

Registration of agreements was mandatory under the MRTP Act, but the Competition Law has no such requirement. A combination is sought to be regulated beyond a threshold limit. The Government appointed the MRTP Commission's Chairman. A Collegium consisting of the Chief Justice, the Finance and other Cabinet Ministers, the Cabinet Secretary and the RBI Governor, will select the CCI chairman. An important difference lies in the fact that the Competition Law leaves unfair trade practices to consumer forum and not to the CCI. The MRTP Act had definition of unfair trade practices u/S 36A that lists out various modes and possibilities of Unfair Trade Practice. The Competition Law will take care of cartelization that imposes unjustified cost on the consumers. The Competition Law dispenses with the requirement of pre-merger notifications. There will be a separate Bench of the CCI styled as the Merger Commission to deal with mergers. This part of the Law requires disposal of the case within 90 days. If there is no order, it will be presumed the merger has been approved. There is also possibility of power sharing conflict with SEBI, another body dealing with takeover bids of substantial shareholding of any listed company in India. The MRTP Act
was based on reformative theory, while the Competition Act 2002 is backed by reformative cum deterrence theory. The “cease and desist” order is based on reformative philosophy which in present time is increasingly found to be insufficient to persuade delinquent enterprise to discontinue or not to re-engage in monopolistic, restrictive or unfair trade behavior. Hence, a need to impose penalty on those found to be contravening the law has been felt imperative by the law makers. Moreover, The Competition Law also seeks to regulate predatory pricing though it is not clear how the Commission will determine pricing below the cost. There is bound to be some overlap between the functions of the High Court and the CCI when it comes to cases involving mergers, acquisitions and amalgamations. The Competition Act also expects the CCI to promote competition through advocacy. This is in line with the thinking of the OECD. The OECD had pointed out that in every member-country where significant reform efforts have been undertaken, the competition agencies have been active participants in the reform process. Advocacy can include persuasion behind the scenes and publicity outside. This part of the Act appears to suggest that the CCI should interact through the media to promote competition

Philosophy

The MRTP Act was based on the reformative theory. While the Competition Act is backed by reformative cum deterrence theory. The “cease and desist “order is based on reformative philosophy which in present time is increasingly found to be insufficient to persuade delinquent enterprise to discontinue or not reengage in monopolistic, restrictive or unfair trade behavior. Hence a need to impose penalty on those found to be contravening the law has been felt imperative by the law makers. In the filed of Competition Law, potential offenders conduct a cost benefit analysis in order to see whether it is worth while taking risk of being caught and punished. Thus, an effective penalty is one which takes into account the financial gains perpetrated by the offence as well as the probability of the detection. Moreover, prudence suggests that fines must be high enough to deter, but not so high as to bankrupt the violator. It is in this backdrop that the CCI, besides handing down a cease and desist direction, has been empowered to impose penalties which are linked with the turnover
of the delinquent enterprises\textsuperscript{147}. For recovery of a penalty, the person upon whom the penalty has been imposed shall be deemed to be an “assesses” under the Income Tax Act 1961. Moreover, no deduction to the extent of penalty paid shall be allowed under the Income Tax Act being a penalty towards violation of law. Further, under the MRTP Act, only the restrictive trade covenant can be declared “void”\textsuperscript{148}. While Competition Act makes the whole trade agreement void if it is found to be anti-competitive. Additionally, CCI is armed with residuary power \textsuperscript{149} as a remedy to curb the anti-competitive agreement or abuse of dominance, whereas such residuary power does not existed under the MRTP Act.

\subsection*{Scope and powers}

The scope and ambit of several concepts under the Competition Act 2002 has been amplified in as much as the term “goods” includes “debentures”, the scope of “services” has been widened so as to include education, storage, treatment, advertise etc, in its scope. The Act can now discipline the Government Department s performing non-sovereign functions and the law can tame unreasonable restraints imposed by a holder of intellectual property. The definitions of tie-in arrangement, exclusive supply or distribution agreement, refusal to deal and resale price maintenance, have been made inclusive. Thus the coverage and scope of Competition Act 2002 is wider that under the MRTP Act. As far as powers are concern, in addition to the power to pass cease and desist Order and imposing of penalty on the delinquent party, the CCI is empowered to direct division of an enterprise or the Group enjoying dominant position and also to effect the division. Such power is with the Central Government under the MRTP Act. The CCI is empowered to approve, approve with modifications or block the Combination. Under the MRTP Act, after 1991, mergers are not regulated. Even prior to 1991, before embarking upon expansion plans by undertakings registered under the MRTP Act, there was a requirement and such powers were exercised by the Central Government through executive action.

\textsuperscript{147} In case of cartel, for example, the Commission may impose upon participating enterprise, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of continuances of such agreement which is higher.

\textsuperscript{148} Section 37(1) (b) of the MRTP Act.

\textsuperscript{149} Section 27 (g) empowers the CCI to pass such other orders or issue such directions as it may deem fit.
Focus

The MRTP Act initially focused on ‘size’ and emphasis later shifted exclusively on ‘behavior of undertaking” i.e. prohibiting monopolistic, restrictive and unfair trade practices. The Competition Act 2002 focuses primarily on “effect” i.e. it frowns upon if there is appreciable adverse effect on competition as a result of anticompetitive agreement or combination or exploitative conducts or exclusionary practices in case of dominance of enterprise or group. The focus on effect is obviously logical and rational and in this sense there is convergence with global trend.

Structure and Duties

The MRTP is a single –tier sole agency mandated to prohibit anti-competitive trade practices in the country while the Competition Act envisages two –tier structure, i.e. CCI and the Competition Appellate Tribunal (CAT). An appeal against an order passed by the MRTP act lies in the Supreme Court while an order passed by the CCI can be appealed in the CAT and direction of CAT can be appealed in the Supreme Court. The MRTP Commission consists of a chairman who is or has been or is qualified to be judge of the Supreme Court or of a High Court and is to be appointed by the Central Government. The CCI is a body corporate and shall consist of Chairperson who has special knowledge of and professional experience of not less than 15 years in the specified disciplines. Thus, the Chairperson of the CCI need not be a judge. The Chairperson and members of the CCI are to be appointed by the Central Government but on the recommendations of the selection committee to be chaired by the Chief Justice of India or his nominee. Likewise, CAT shall be headed by a chairperson who is or has been a Chief Justice of a High Court or a Judge of the Supreme Court and the selection and appointment process shall be same as that of the CCI. The budget and manpower are key to efficient performance of both MRTP Commission and the CCI. While the MRTP Commission is wholly dependent on the Government for its budget as well as for manpower but the CCI is comparatively autonomous in terms of funding as the Competition Act of 2002 provides for establishment of “Competition Fund” to defray its expenses to perform its functions. The CCI is more autonomous in respect of manpower in as much as it has been empowered to appoint a
Secretary and such other officers and employees as it considers necessary to perform its duties efficiently. As far as Duties are concern, MRTP Act which was still operating was closed down completely and CCI has taken the charge after six years of the enactment of the Act. The MRTP Commission duty was to investigate and enquire into monopolistic, restrictive and unfair trade practices. It can pass ‘cease and desist’ order and other directions in case of restrictive trade practice and unfair trade practice but in case of monopolistic trade practices, the MRTP Commission is required to report its findings to the Central Government which is to pass such Orders as it may think fit to remedy or prevent any mischief which results from such monopolistic trade practice. As far as Competition Act 2002, the CCI is mandated to (i) prohibit anti-competitive agreements, (ii) to prohibit abuse of dominance, (iii) regulate certain Combinations, (iv) render advice to Central /State Governments and the Statutory Authorities and (v) undertake competition Advocacy. Whereas as, the duties of the Competition Appellate Tribunal (CAT) are (i) to hear and dispose of appeals against any order/ direction of the CCI, (ii) to hear appeal arising out of an Order passed by the Tax Recovery Commissioner or Tax Recovery officer in terms of chapter XVIID and the Second Schedule of the Income Tax Act 1961, (iii) to adjudicate on claim for compensation that may arise from the (a) finding of the Commission, (b) its own Orders and (c) arising out of violation of directions of the CCI or the CAT. Thus the duties under the Competition Act 2002 is more intensive and extensive.

As far as the powers of the Director General is concerned, under the MRTP Act, the Director General does not have civil court powers while carrying out the investigation and it is in this backdrop, the investigation and investigation report is titled as “preliminary investigation report”. Thus, in collecting information/ evidence, the Director General is not backed by Civil Court powers. under the Competition Act, the Director General is armed with Civil Court powers and these are expected to ensure (i) that the findings are supported by pungent evidence and (ii) that the CCI is expected to take much less time in concluding an enquiry. In the event that there is likelihood of records being destroyed or tempered or mutilated, the Director General has power to invoke Section 240 and 240 A of the Companies Act. The Competition Act 2002 provides that Director General can go ahead

\[150^{\text{Details in Chapter V.}}\]
with the concurrence of the Chief Metropolitan Magistrate, Delhi and further records of group, affiliate or associate enterprises can also be searched with the permission of the CCI instead of the Central Government.

**Other Assistance for CCI**

The CCI has been empowered to engage experts and professionals, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist in the discharge of its functions. It may now call upon experts from specified disciplines or from any other fields as it may deem necessary to assist the Commission in the conduct of any inquiry. Such explicit provisions do not exist under the MRTP Act. Moreover, the CCI can make a reference to a Statutory Authority including sector-specific regulator and solicit its advice on an issue falling in its domain and have the benefit of its expertise before taking a view on a matter before it. Such explicit provisions do not find place in the MRTP Act. It is relevant to note that, the MRTP Act is obsessed with deeming provisions as under section 33(1) of the Act, there are 14 deemed restrictive trade practices and every monopolistic trade practice is deemed to be prejudicial to public interest except when it is expressly authorized by any law or when it is permitted by the Central Government to be carried on. In view of deeming provisions, the enquiry is instituted in the first instance and charged party is required to defend itself. The resultant effect has been that in few enquiries, the MRTP Commission could slap ‘cease and desist’ Orders as compared to total number of enquiries instituted. The Competition Act 2002 leans on “rule of reason” which means it is case to case basis and in the first instance it is for prosecutor to prove the adverse effect. There are only four categories of agreement amongst competitors such as fixing price, limiting production, allocating markets of rigging of bids when there is a presumption of adverse effect and rest of the restrictive covenants are not presumed to be anti-competitive until proved so. Similarly, an act is abusive only when the enterprise or the group is dominant. Further, the dominance is not merely linked with the market share enjoyed by an enterprise but host of factors\(^{151}\).

\(^{151}\) Section 19(4) of the Competition Act 2002 lists out various factors which Commission, while inquiring whether an enterprise enjoys a dominant position or not, has to give due regard.
Reach

The Competition Act 2002 is applicable to all sectors of the economy including Department of Government (Central as well as State) and there are no exclusions or exemptions unlike the MRTP Act which has limited jurisdiction in respect of banking and Insurance sector. The arms of the MRTP Act do not extend to Department of the Government. The CCI has been explicitly empowered to exercise jurisdiction in respect of overseas acts having appreciable adverse effect on Competition in India. However, the Competition Act 2002 does not take care of the unfair trade practices and for that Government is considering establishing the National Consumer Protection Authority, so that commercial buyers who are victims of unfair trade practices can have redress therefrom. Further the MRTP Act didn’t have the extra territorial jurisdiction. Which was the great setback to the MRTP Act. MRTP ACT, 1969, so legislature could not foresee about those acts taking place outside India but having an effect on competition in India, thus sec-32 of Competition Act, 2002 has included this provision.

- MRTP ACT, 1969 is silent about the sums realized by the way of penalties but Competition Act sec-47 points out that this sum will be credited to the Consolidated Fund of India.
- A new chapter (Ch-vii) has been inculcated in CA which deals with advisory jurisdiction of competition commission. Competition advocacy\textsuperscript{152} says that the central government while formulating a policy on competition can seek opinion of Competition commission but such opinion is not binding.
- In order to avoid corruption or misappropriation of money of competition fund sec-52 and sec-53 are included which directs the commission to maintain paper accounts, other relevant records and to prepare an annual report giving a true and full account of its activities during the previous year and copies of the same will be forwarded to central government.
- Though there has not been any change regarding the particulars of offence but MRTP ACT, 1969 has laid stress on imprisonment as punishment rather than fine.

\textsuperscript{152} See Sec:49 of the Act
on the other hand Competition Act, 2002 had introduced huge fine as penalty and had avoided imprisonment. E.g. Competition Act gives one year imprisonment when there is contravention of orders of commission and failure to pay the penalty (sec-42) and in all other offences accused has to pay fine.

- Also the amount of fine in Competition Act is much more than in MRTP ACT, 1969. E.g. For the offences in relation to furnishing of information Competition Act imposes fine of Rs. 10 lakhs (sec-45) whereas for the same offence MRTP ACT, 1969 imposes a fine of Rs. 500

Essentials of Competition Law

There are specifically three issues concerning all competition laws world over which form the essentials of competition law. The essentials of competition law could be discussed as follows:

(i) Anti –competitive agreements that have the object or effect of preventing, restricting or distorting competition is prohibited under section 3 of the Competition Act, 2002.
(ii) Abuse behavior by a monopolist or dominant firm with significant market power that could be harmful to consumer welfare, is prohibited under Section 4 of the Competition Act, 2002.
(iii) Mergers / Combinations that would reduce rivalry between firms in the market, again with detrimental consequences for consumer welfare is regulated under section 5 and 6 of the Competition Act 2002.
(iv) Competition advocacy, the mandate given to the Commission under the Act includes a competition advocacy role. Section 49 of the Act gives us more inputs about the advocacy role of the Commission, which shall be discussed by the researcher in chapter no. V.
The above mentioned objectives / elements of the Competition Act will be discussed by the researcher in detail as follows.
Chapter IV

Part - A Competition Law and Anti-competitive Agreement

Part- B Competition Law and Abuse of Dominant Position

Part- C Competition Law and Combination and Regulation
Part -A Competition Law and Anti-competitive Agreement

In this part the researcher intends to discuss the various dimensions of the Competition Act, 2002. As the name itself suggests Anti-Competitive Agreements are those agreements that restricts competition. The researcher intends to discuss the issues raised regarding the anti-competitive agreements in the wake of continuous changing economic scenario with globalization and liberalization. Further, the researcher makes an attempt to analyse amendments made to the Act to deal effectively with the Anti Competitive Practices adopted by the Competitors in the Market.

Introduction

Anti Competitive agreements under the new Competition Act 2002 are in the nature of restrictive Trade Practices under the erstwhile MRTP Act, 1969. Further, Sachar Committee in 1978 recommended that the collective agreements relating to the trade practice of collective discrimination, boycott, collective bidding, resale price maintenance and residuary collective agreements in this regard should be prohibited. Anti-Competitive agreements are prohibited under section 3(1) of the Competition Act and are held to be void under section 3(2) of the Act. As the name itself suggests, anti competitive agreements are those agreements that restricts competition. The Act defines an agreement to include any arrangement, understanding or concerted action entered between parties. The agreement need not be in writing or formal or intended to be enforceable in law. Thus, an informal agreement to fix prices will hit by the provisions of Competition Law. The section 2(b) of the Competition Act 2002 defines the word “agreement” as under:

“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.

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154 Sec 2(b) of the Act
This means in order to fall under this definition, a concerted action on the part of enterprises or persons is a pre-requisite. It may also include casual, verbal, unwritten arrangements. An agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause to appreciable effect on competition within India is defined to be an Anti-Competitive Agreement. The Act prohibits such an agreement, such that it shall be a void agreement. It is noteworthy that the prohibition contained in section 3 is not absolute and permits joint venture agreements in case certain parameters are met. The Section 3 of the Act deals with the economic regulation of the market power intended to constrain an enterprise from exercising it, to promote and sustain competition in markets. It is designed to prevent, along with conspiracies and monopolies against consuming public, such unfair practices against smaller competitors, and also such other practices, that unfairly disadvantage competitors or injure consumers as tying arrangements, exclusive supply or distribution agreements, refusal to deal. It therefore, provides for prohibition of entering into agreement in respect of goods or services which causes or is likely to cause an appreciable effect on competition within India and such agreement is void. Anti-Competitive Agreements could be both horizontal and vertical. Sec 3(3) deals with ‘horizontal’ agreements. It also defines activities which could be taken as meaning to cause or likely to cause an appreciable adverse effect. Section 3(4) deals with ‘vertical’ agreements. Exceptions are contained in sec 3(5).

**Anti Competitive Agreement- Appreciable adverse effect**

The adverse effect of the agreement on competition within India must be significant. It refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sort of agreements in varying time and circumstances. The word s ‘adverse effect on competition’ embraces acts, contracts, agreements or combinations which operate to the prejudice of the public interests by

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155 Goods have been defined to mean goods as defined under Sale of Goods Act and includes products manufactured, processed or mined, debentures, stocks and shares after their allotment and goods imported in India (Section 2(1)).
156 Section 3(2) of the Act read with Section 10 of the Indian Contract Act, 1872.
157 Sec3(2)
unduly restricting competition or unduly obstructing due course of trade. Public interest is the first consideration. It does not necessarily mean only of the industry\textsuperscript{158}. It is not the nature of factum of trade restraint but its being prejudicial to the public interest which sought to be targeted. The restraint of trade is tolerable, if it is reasonable as to the public and the parties and limited to what is reasonably necessary. Otherwise, it becomes appreciably adverse. All agreements having adverse effect on competition are not forbidden. There can scarcely be any agreement or contract among businessmen that does not directly or indirectly affect and possibly restrain commerce. In India, the basic test for an agreement to be anti-competitive is whether or not it causes or is likely to cause an appreciable adverse effect on competition within India. In order to determine the adverse effects on competition, both the harmful and beneficial effects are to be considered.

**Anti competitive Agreement – Competition within India**

The concept of trade is not limited to traditional exchange of goods and services across the countries but it is a wider concept covering all cross borderer economic activity including establishment. The Agreements are considered illegal only if they result in unreasonable restrictions on Competition. The Adverse effect on competition in India should be the result of anti-competitive agreement. The entire concept of appreciable adverse effect on competition is made subjective that may vary from case to case. It is noteworthy, that the term ‘appreciable adverse effect on competition”, used in section 3(1) has not been defined in the Act. However, the Act prescribes certain factors\textsuperscript{159} to be taken into consideration by the Competition Commission while determining whether an agreement has an appreciable adverse effect on competition under section 3. Thus in assessing whether an agreement has an appreciable adverse effect on competition, both harmful and beneficial effects are to be considered. Furthermore, for that matter visible effect of the agreement or cartelization is to be seen. If it is in India, then the competition in India is affected. It is irrespective of where the agreement or the understanding has been arrived at. This is known as “effects doctrine”. The Supreme Court expounded the doctrine

\textsuperscript{158} See Haridas Exports vs. All India Float Glass Manufacturers Association [2002] 111 Comp .Cas .617 (SC) ]

\textsuperscript{159} See section 19 (3) of the Act.
in Haridas Exports vs. All India Float Glass Manufacturers Association\textsuperscript{160}. ‘ even if an agreement is executed outside India or the parties to this agreement are not in India… if any restrictive trade practice is a consequence of such an outside agreement carried out in India, then the MRTP Commission has jurisdiction’ . Thus if the adverse effect in competition comes to be felt in India, the Commission will have jurisdiction\textsuperscript{161}.

The Ragavan Committee Report on Competition Law observed as follows, on extra-territorial reach of the law; \textit{---Some anti competitive practices may have extra-territorial origin or extra-territorial impact. For instance, some mergers and acquisitions may have significant effects beyond the boarders of the country in which merging parties are based or have production facilities. In such matters, the concept of “relevant market” for competition law purposes will come into play.}

The applicability of the domestic competition law to arrangements entered into outside a country’s borders so long as such conduct has significant effects in the country, is important to the control of anti-competitive practices. However, it needs to be noted that extra-territorial application of national laws entails some potential for conflicts between jurisdictions. International co-operation and, in particular, agreements incorporating principles of ‘positive comity’ can be useful in minimizing the actual extent of such conflicts between countries participating in such arrangements. A caveat which has jurisdiction is that, if a country wants to have extra-territorial reach of its competition law, it should allow other countries to have extra-territorial reach of their competition laws in its soil.’

The committee recommended the retention of the “extra-territorial reach” provision. If power is not given to the Commission to have jurisdiction, then it will mean that persons outside India can continue to indulge in such practices whose adverse effect is felt in India with impunity. Therefore Supreme Court opined that, “competition law is a mechanism to counter cross border economic terrorism”. Even though such agreement may enter into outside the territorial jurisdiction of the Commission but it results in appreciably effecting adverse competition within India, the Commission has the jurisdiction to pass appropriate

\textsuperscript{160} \textit{ibid}
\textsuperscript{161} 
\textit{Jugaldas Damodar Mody Co.,Inre [1983] 3 Comp.LJ 221 (MRTPC)
orders. To that extent the Act has extra-territorial operation. The Act lists the following factors to be taken into consideration for adjudicatory purposes to determine whether an agreement or a practice has an appreciable adverse effect on competition namely;

a) Creation of barriers to the 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\textsuperscript{162}.

Interestingly, the Anti Competitive Agreements could be both Horizontal and Vertical Agreement. Sub Section (3) of section 3 sets out agreements which are presumed to have appreciable adverse effect on Competition. Horizontal agreements are agreements between two or more enterprises that are at the same stage of production chain and, in the same market. The aspect that they are at the same market implies the fact that the parties to the agreement must be both producers or retailers or wholesalers. The degree of cooperation may vary from carrying out research and development to establishing a new company through the means of a joint venture. These agreements can have pro-competitive benefit like it may highly beneficial to the competitive structure of the market and also leads to the synergy of operations by pooling of resources for the ultimate benefits of the consumers. However there can be situation wherein the agreement is meant only for maximizing the profits for the parties involved at the expenses of the consumers. The parties concerned can fix prices or output, to share markets and if the cooperation enables the parties to maintain gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products. The operation of the horizontal agreements can be varied ranging from cartels to parallelism. Usually, it is the horizontal agreements that cause the greatest concern to competition authority. The use of the expression s “agreements, practices and decision” ensures that undertakings may not

\textsuperscript{162} Section 19(3)
resolve to collude and co-ordinate their anti-competitive behavior. It is noteworthy that prohibition contained above section 3(1) and 3(2) is not absolute and it can be dis-applied to a joint venture agreement, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. This clearly means that, even if there is an appreciable adverse effect on competition, a joint venture agreement shall not foul of the provisions of the Act if the parties to the joint venture are able to show that there have been efficiency gains due to the joint venture. The burden of proof to show that the joint venture agreement has resulted in efficiency gains is on the joint venture partners. The Act prohibits Horizontal Agreements^{163}, having appreciable adverse effect on Competition. These are agreements, including Cartels and other;

a) Agreements to fix prices
b) Agreement to limit production, supply, markets, technical development investments or provisions of service;
c) Agreement to geographically allocate markets or source of production or provision of services—by allocation of geographical areas, type of goods/services or number of consumers;
d) Bid rigging and collusive bidding.

These above agreements or concerted acts of decisions of the trade association are presumed to have appreciable adverse effect on competition, which is similar to the per se rule. The Sec 3 (3) identifies above agreements or practices which are per se, and, therefore, presumed to be, anti-competitive. The section presume s certain kinds of agreement between enterprises, decisions by associations of enterprise, concerted practices of association of enterprises have an appreciable adverse effect on competition. Such agreements are per se void. There is no scope of investigation or enquiry. Section 3(1) prohibits any agreement which causes or likely to cause an appreciable adverse effect on competition. Yet certain kinds of agreement as set out in section 3(3) will so often prove so harmful to competition and so rarely proved justified that the competition laws do not require proof that an agreement of that kind is, in fact, anti-competitive in the particular

^{163} Section 3(3) (a) to (d)
The justification and standard for the creation of per se rules is stated in Northern Pacific Railway Co. vs. United States\textsuperscript{165}, “There are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore, illegal without elaborate enquiry as to the precise harm they have caused or the business excuse for their use”. The per se rule reflect a long-standing judgment that every horizontal price–fixing arrangement among competitors poses some threat to the free market even if the participants do not themselves have the power to control market prices.

The Rules for determining effect on Competition

Most laws make a distinction between the horizontal and vertical agreements. India bears no difference to the general rule followed by legislation s world over and therefore categorized such agreements, with horizontal agreements being viewed more seriously than vertical ones. The agreements referred to in section 3(3) of the Competition Act are horizontal agreements and those referred to in section 3(4) are vertical agreements. There are two rules available to determine the effect on competition and they are as follows:

Rule of reason

Under the rule of reason, the effect on competition is found on the facts of the case, the market, and the existing competition, the actual or probable limiting of competition in the relevant market, etc. what determines the issue is, on the facts, the actual or probable restraint on competition. The rule of reason in examining the legality of restraints on trade. The World Bank / OECD Glossary states that the rule of reason is [a] legal approach ---- where an attempt is made to evaluate the pro-competition features of the restrictive business practice against its anti-competitive effects in order to decide whether or not the practices should be prohibited\textsuperscript{166}.

\textsuperscript{164} See State Oil Co vs. Khan 522 US 3 (1997), Northwest Wholesale Stationers Inc vs. Pacific Stationery and printing Co.472US284]
\textsuperscript{165} 356US1 (1958)
\textsuperscript{166} World Bank /OECD; Glossary of Industrial Organization Economics and Competition Law.
The Per Se Rule

Under the per se rule, the acts or practices specified by the Act as deemed or presumed to have an appreciable adverse effect on competition are by themselves prohibited. It is unnecessary to considered, under the per se rule, if they limit or restrict competition. This is on the basis of established experience of their nature to produce anti-competitive effect. Therefore, it is no longer necessary to prove the anti-competitive nature of per se violations.

The Rules under the Indian Competition Act

To ascertain the effect on competition of an agreement stated as being anti-competitive, the first step is to determine the market where the competition is complained of as having been adversely affected. The market that has to be taken into consideration for this purpose is called the ‘relevant market’. Section 3 has not directly defined what an anti-competitive agreement is, but has only provided that an agreement which causes or is likely to cause an appreciable effect on competition within India is prohibited and has declared that such an agreement is void. Therefore it is necessary to ascertain in each case whether an agreement does have that effect. The Indian competition Act has been ambivalent about the application of these rules. The breaches under the section 3(3) by cartels or such groups, through anti-competitive agreements or practices that have the effects set out in section 3(3) (a) to (d) have been declared as those that shall be presumed to have an appreciable adverse effect on competition and it cannot be criticized. In the case of agreements set out in section 3(4) (a) to (e), viz, tie-in agreement, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance, they shall be in contravention of section 3(1), if they cause or likely to cause an appreciable adverse effect on competition in India, meaning thereby that they will be examined under the rule of reason. The position regarding anti-competitive agreements that do not fall under section 3(3) or section 3(4), but fall under section 3(1) is not expressly stated and, therefore, it should be understood that such cases will have to be considered only under the rule of reason. What needs to be criticized is the reversal of the position regarding the treatment of the agreements falling under section 3(4) (a) to (e) with regard to tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale
price maintenance. Under the MRTP Act, after the amendment in 1984, of section 33(1) of that Act, any agreement falling within one or more of the categories set out section 33(1) (a) to (l)\textsuperscript{167} was ‘deemed for the purposes of the Act, to be an agreement relating to restrictive trade practices…..’ the practices that may be covered by section 33(1) (a) to (l), as a consequence, became per se restrictive trade practices. Those agreements stipulating the per se restrictive practices were required to be registered under that Act and were the starting point of investigation into restrictive practices. Even though these trade practice were per se restrictive trade practices, section 38 of the MRTP Act provided certain ‘gateway’ through which any of such practices could be shown as not prejudicial to the public interest. Tie- in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance, covered by section 3(4) (a) to (e) of the Competition Act, 2002 are covered by section 33(1) of the MRTP Act, under which they are per se restrictive trade practices. Further, section 39 of the MRTP Act is a specific provision declaring void the establishment of a minimum price to be charged on the resale

\textsuperscript{167} Section 33 (a)to (l), speaks about the register able agreements relating to restrictive trade practices

m) Any agreements which restricts , or likely to restricts , by any methods the persons or classes of persons to whom goods are sold or from whom goods are brought;

n) Any agreement requiring a purchaser of goods , as a condition of such purchaser , to purchaser some other goods;

o) 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 persons;

p) 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;

q) Any agreement to grant or allow concessions or benefits, including allowances , discount, rebates or credit in connection with or by reason of, dealing;

r) Any agreement to sell goods, on condition that the prices to be charged on 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 ;

s) Any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;

t) Any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;

u) Any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;

v) Any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;

w) any agreement not hereinbefore referred to in this section which the Central Government may specify for the time being as being one relating to a restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf;

x) Any agreement to enforce the carrying out of such agreement as is referred to in this sub-section.
of the goods in India, thus regulating resale price maintenance. In a land mark decision of
the Supreme Court of India, in *Tata Engineering and Locomotive Co. Ltd vs. Registered of
Restrictive Trade Practices Agreement*\(^{168}\), where among other principles, the rule of reason was
illustrated. It was a case under the MRTP Act and the decision rested on the interpretation
of section 2(o)\(^{169}\) of that Act, defining ‘restrictive trade practices’. The question before the
Supreme Court of India, on appeal from the decision of the MRTP Commission (‘the
Commission’), was whether the agreement between Telco and its dealers allocating
territories to its dealers within which only the dealers could sell bus and truck chassis
referred to as the vehicles produced by the company, constitute a ‘restrictive trade
practices’. The Supreme Court held that when supply was shown as being far below
demand and when the dealers were not in a position to sell below permissible prices, the
charge of territorial restrictions restraining competition had no merit. The Court also stated
that the territorial restriction ensured equitable distribution of the commercial vehicles in
all parts of the country, where Telco had appointed dealers, and that if, without that
restriction, Telco dealers were free to sell anywhere, the commercial vehicles would find
their way to big cities and upcountry locations and small backward states would be
depri ved of the supply. It decided that the territorial restriction imposed by Telco did not
fall under section 2(o). As stated earlier, with the amendment of section 33(1) of the MRTP
Act in 1984, after this judgment, allocation of an area for the disposal of goods became a
per se a restrictive trade practice, under section 33(1) (a) of that Act. A vertical restraint of
trade is not per se illegal unless it includes some agreement on price or price levels. Per se
rules are appropriate only for conduct that is manifestly anti-competitive. The distinction
between the two is that concerted action to set price is illegal per se and concerted action on
non-price restrictions is judged under the “rule of reason’. Vertical restraints are subjected
to “rule of reason” approach, which reflects the fact that such restraints are not always
harmful and may, actually, be beneficial in particular market structure circumstances.
Non-price vertical restraints are rarely opposed. Furthermore, in case of vertical agreement,
it is required to be proved, rather than presumed, that it causes or is likely to cause adverse

\(^{168}\) (1977) 47 Comp Cas 520 Supreme Court
\(^{169}\) Section 2(o) under, MRTP Act, defines ‘Restrictive trade practices’.
effect on competition. The agreement being harmful is not enough. Its said adverse effect on the market has to be judged. For that matter, an investigation has to be made, whether the respondents possess significant market power. Market power means as the power to force a purchaser to do something that he would not do in a competitive market. It is ordinarily inferred from the sellers possession of predominate share of the market. In general, the ‘rule of reason’ is required for establishing that an agreement is illegal. It may also be possible that the agreement, on investigation, turns out not to be anti- but pro – competitive. The rule of reason demands a proper inquiry whether the challenged agreement is one that promotes, or the one that suppress the competition. Every trade agreement restraints bind persons or places or prices. The question is whether a restraint is such as may suppress or even destroy competition. To determine that question, three matters are to be considered;

- First, what facts are peculiar to the business to which the restraint is applied;
- Secondly, what was the condition before and after the restraint is imposed;
- Thirdly, what is the nature of the restraint and what is its actual or probable effect.

These factors are taken into account only for determining the actual or probable effect of the trade practices clause of the agreement. The rule of reason does not support a defense based on the assumption that competition itself is unreasonable.

Anti- Competitive Agreement and Cartelisation

Over the recent past, there has been an increased focus and grave concern on the pernicious activities of cartels. Consumers all over the world desire the market to be competitive driven in order that they get goods and services of their choice at reasonable competitive prices. But their desire for competition based environment is likely to be thwarted, if firms selling goods and rendering services collude, cartelize and in some cases monopolize the market. The cartels are the most insidious form of anti-competitive behavior, being difficult to detect and investigate due to the secretive nature. The

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170 National Society of Professional Engineers vs. United states 435 US 679
171 Mahindra and Mahindra Ltd vs Union of India AIR 1959 SC 798)
presumption is that horizontal agreements and cartel lead to unreasonable restrictions of competition and may, therefore, be presumed to have an appreciable adverse effect on competition. The Cartelisation is entering into an agreement or arrangement or understanding between enterprises and instituting measures to control competition. The Act defines “cartel” in section 2(c) of the Competition Act 2002, as follows;

“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”.

The definition is very wide and inclusive, covering both trade and competition. It is a formal association of manufacturers or suppliers to maintain prices at high level, and control production, prices, marketing arrangements etc., and thereby limiting competition and imposing restraints on trade. It, thus, imposes unreasonable restraint on free trade and distorts competition. This being an economic field, greater latitude has to be given to the word “cartel” to include all sorts of combinations, which are anti-competitive172. The Supreme Court defines it “Cartel, therefore, is an association of producers who by agreement among themselves attempt to control production, sale and price of the product to obtain a monopoly in any particular industry or commodity”. The emphasis is on association of producers and the agreement between them. It may be any combination, the object of which is to limit or control trade or production, distribution, sale or price of the goods or services. Quoting identical rates or prices even when the cost of production varied is a presumption in favour of a cartel173.

**Objectives of the Cartels**

The underlying purpose of a Cartel is to replace individual and completely free competition by a collective organization intended to regulate and rationalize production and to influence prices with a view to their stabilization. It shield participants from

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172 Alkali Manufacturers Association of India vs. Sinochem International Chemicals Co. Ltd [1999] 98 Comp. Cas. 333 (MRTPC)

173 Bengal Tools Ltd, In re [1988] 63 Comp. Cas 468 (MRTPC) and also see Excel Industry Ltd. In re [1988] 63 Comp. Cas 531 (MRTPC)
competition allowing them to charge higher prices and removing the pressure on them to improve the products they sell or find more efficient ways in which to produce them. It is the customers (companies and consumers) who foot the bill in terms of paying higher prices for lower quality and narrower choice. This not only makes consumers and business suffer but also adversely affects the competitiveness of the economy as a whole. Since the very foundation of such agreements is to restrict freedom of trade, these are considered to be unambiguously bad and the most egregious violation of competition law. The Supreme Court of US in a case stated that cartels are ‘the Supreme evils of antitrust”.

The cartel agreements may be open or secret and are directed towards price, production and market control. The devices adopted are;

- Market quota or division of territories;
- Sale outlets of like products of member firms. the sale outlet distribute the entire demand among member firms in agreed proportions;
- Members that exceed agreed production rates are penalized and the funds are paid into a common pool. From the pool bonuses are paid to those firms who had been unable to produce their full quota.

The Cartels are of different types internationally. The first type of cartel are called hard core cartels and are essentially made up of private producers who co operate to control prices or allocate shares in world market. Another type of cartels are private export cartels wherein non state related producers from one country take steps to fix prices or engage in market allocation in export markets, but not in their domestic market. Essentially cartels are agreements to limit output with the object of increasing prices and profits. This is usually carried out in practice by means of price fixing, allocation of production or sharing geographic markets or product markets. Cartels restrict competition, wherein resources are misallocated and consumer welfare is reduced.

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Cartels under Indian Law

The Cartels are agreements between enterprises (including association of enterprises) not to compete on price, products including goods and services or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to customers and to the economy. Therefore a cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement

1. to fix prices,
2. to limit production and supply,
3. to allocate market share or sales quotas, or
4. to engage in collusive bidding or bid rigging in one or more markets

After removing competition and creating the conditions of monopoly, the cartel of businessmen prevents the market forces from operating smoothly and to benefit the consumers. It tries to increase the profits by raising prices of the goods or by cutting their output to create conditions of scarcity for raising prices thereof. The monopoly created by the cartel is as such not conducive to progress. It retards growth and impedes the improvement of the levels of living of the people. While the formation of the cartel amounts to an anti-competitive trade practices, which is in disputably against the public interest, the existence of a cartel is seldom proved by direct evidence. Generally no express agreement showing its existence by setting up a chain of events leading to a common understanding or plan. The underlying issue is what, at the minimum, constitutes that ‘meeting of the minds’ which must be directly or circumstantially established to prove that there is a restrictive effect on competition. The practice of cartelization includes in the element of a conspiracy to create a monopoly and thus to eliminate competition. While observing thus, the MRTPC held in Alkali Manufacturers Association of India vs. America Natural Soda Ash Corporation175. In September 1996, American Natural Soda Corporation (ANSAC) comprising of six American producers of soda ash attempted to ship a consignment of soda ash at cartelize price in India. Based on the ANSAC membership agreement, the MRTP Commission held it as a prima facie cartel and granted interim injunction in exercise of its

175 [1998] 92 Comp .Cas 206 (MRTPC)
powers in terms of section 14 of the MRTP Act\textsuperscript{176}. However, the MRTP Commission's stay order was set aside by the Supreme Court on two grounds: a cartel has not been defined properly under the MRTP Act, and it also doesn’t contain extra-territorial jurisdiction. These two lacunae, among others, have been taken care of under the new competition law. Historically, India has had a very poor record of enforcement against hard –core cartels. Cartels have been alleged in various sectors, including the cement\textsuperscript{177}, steel, tyre and trucking industries\textsuperscript{178}. However, although the CCI’s predecessor ---- the Monopolies and Restrictive Trade Practices Commission (MRTPC) – has had the legal authority to take action against cartels for nearly 30 to 31 years, it has exercised that authority in relatively few instances. In addition, the MRTPC has made little attempt to investigate in India international cartels that have been uncovered elsewhere and which are likely to have had an impact on the Indian consumer; e.g. the Vitamins cartel, exposed as a global conspiracy in the 1990s by the US and EU authorities, and which has resulted in follow –on private damages actions in the UK courts, was not taken forward by the MRTPC, despite a complaint by an Indian pressure group. One of the main reasons if not the main reason for the MRTPC’s reluctance to engage in “cartel –busting” to date is that it does not enjoy the power to impose effective sanctions to back-up its decisions in addition to the fact that the MRTPC can impose “cease and desist” Orders on the companies under investigation. Accordingly, a business can freely indulge in cartel activity until it is summoned before the MRTPC; it is not penalized for behavior up to that point, regardless of how long the cartel has been in existence. The current Indian law does not, therefore, act as an effective deterrent --particularly given the prospects of the MRTPC taking action at all are relatively low. However, it has change with the coming into force of the Competition Act which substantially enhances the CCI’s powers in respect of cartel s. in contrast to the MRTPA , the new legislation clearly defines cartels ; it also sets out the presumption that such agreements cause appreciable adverse effects on competition, shifting the burden of proof onto the defendant. Consistent with the

\textsuperscript{176} Section 14 of the MRTP Act speaks about, the Orders where party concerned does not carry on business in India.
\textsuperscript{177} Trucking cartel case, of 1984 involved members of the Bharatpur truck Operators Union, Faridabad, which collude to fix freight rates individually.
\textsuperscript{178} The Cement cartel case, involving 40 manufactures of cement, initiated in 1990 and fixing of prices of cement through the cement Manufacturers Association (CMA) was proved in 2007 before the MRTPC. However, the MRTPC could only pass a ‘cease and desist “order.
position in many other mature competition regimes, the Competition Act also grants the CCI extra-territorial jurisdiction to cover agreements which have been entered into outside India if the agreement has an effect on the Indian markets (s). In addition, the CCI has been given extensive powers (in -line with competition authorities elsewhere) with which to punish cartel activity. It can still issue “cease and desist” Orders. However, much more importantly, the CCI also has the power to impose severe fines-under the Competition Act, fines can amount to a maximum of 10 per cent of average turnover for the last three years for each party to an anti-competitive agreement. Moreover, in respect of cartels, fines can amount to whichever is the higher of here times the profits or 10 percent of turnover for each year the practice continued. Since cartels are regarded as the most destructive form of violation of competition law, each country treats it with strict or per se liability. However, the scope of liability differs in each jurisdiction and India following the Global trend. Finally, perhaps most significantly, the new Indian competition regime includes a leniency programme which sets out in detail the conditions required to be satisfied for cartel members seeking full or partial immunity from sanctions. Leniency programmes are now globally recognized as a pragmatic and effective tools for cartel detection. Thus detection and punishment of cartels will be an enforcement priority for the CCI. Although provisions for a reduction in penalties has been made in the Competition Act, the detail of how the regime will operate is set out in the CCI implementing regulation s (currently in draft form). The power and function of the CCI with regard to cartels detection and investigation shall be discussed by the researcher in detail in the Chapter V. It needs to be noted that hardcore cartels cannot be successfully investigated and prosecuted without exchange of confidential information. Since Cartels have serious adverse effects on developing countries' economies, the competition laws of the developing and developed countries need to be amended. In other words, the laws need to be amended in favour of exchange of confidential information. Thus the approaches to deal with cartel s have evolved over time and particularly in the last decade. The law should not be static but be dynamic in line with the changing needs of the society. Some of the Latin American countries have used some or most of the tools to crake cartels successfully. The developing countries need to take a

179 The investigating authorities uses various methods to crack down cartels like, Framing and implementing
lesson from them and use the investigation tools including leniency/amnesty schemes and fight cartels.

**Anti–competitive Agreement ---- Agreement s fixing prices;**

The Agreement which directly or indirectly determines the purchase or sale price is prohibited under section 3(3) (a). Price fixing is a per se prohibition. It may be direct or indirect. It may relate to prices or pricing methods. It is used in the sense that it is “administered price' which does not vary with market conditions, as competitive prices do. It is fixed or administered by a cartel or a concert or a trade association. Thus, when the prices are controlled by formulae, agreements, or price leadership, the parties are assured of stabilization from the onslaught of price-cutting and open price warfare. When certain traders combine together or have a concert to fix the prices of a commodity they deal in or to raise prices of the commodity together, i.e., at or about the same time, they voluntarily as a group give up the competition between each other in the matter of pricing. The competition is abjured and in its place a price mechanism determined by the combination or concert is brought into operation. The price is no longer fixed by free forces of supply and demand but by the fait of combination or a concert. The consumer’s reaction are completely ignored or not taken into account. Any agreement to fix or maintain prices violates, irrespective of whether the prices in themselves are reasonable or unreasonable. Therefore, the combination to fix prices is anti-competitive in effect. Price–fixing conspiracy may consist of any mutual agreement, or arrangement or understanding between two or more competitors to sell at a uniform price, or to raise, lower, or stabilize price or discounts. It may also mean that the competitors follow each other’s price polices, discuss prices, obtain information about each other’s prices, exchange information about prices; all these done because of an agreement or arrangement or understanding.
Anti-Competitive Agreement---Agreement to limit and control production and investment

Agreement for price-fixing may be extended to agreements on outputs and market shares assigned to each of the participants. Without price fixing, there could be agreement for controlling output or for market sharing, with the same anti-competitive effect. Output is to be restricted to below optimum consumer welfare levels and the price correspondingly maintained above competition level. Both types of agreements are prohibited, vide section 3(3) (b) and section 3(3) (c). The Section 3(3) (b) prohibits agreements which limit or control production, supply, markets, technical development, investment or provision of services. The object of the agreement for controlling production and investment is to raise prices, restricting the supply of the product very much short of demand. In order to constitute an agreement an agreement falling within anti-competitive provision, not only should there be an agreement for sale or purchase between suppliers or between purchasers, but also imposition of certain restriction which should have the effect of limiting production, supply, markets, technical development etc. even a boycott, if it is effected through collective agreement between suppliers or between purchasers, will be covered.

Agreement for limiting or controlling production is Anti-competitive. It is so for two reasons. By controlling production, the supply is kept low as compared to demand and thereby creating artificial scarcity. Secondly, the agreement in effect restricts competition between the parties themselves so that the efficient ones among them could not go ahead with further production and elbow out the less efficient. The central idea of competition is that the efficient enterprises which is able to supply goods at prices acceptable to consumers will increase while the less efficient will reduce their production and if necessary will go out of it. Any agreement interfering with this process in anti-competitive, as in such a situation less efficient enterprises are propped up by the artificial support to continue in production even though the forces of demand and market price do not justify the continuance.

Anti Competitive Agreement---Agreement on market allocation and sharing

Agreements are presumed to be anti-competitive under section 3 (3) (c), which 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 service, or
• number of customers in the market, or
• any other similar way

An agreement which results in a territorial division of the market or a division of the product market among them is anti-competitive. Section 3(1) is infringed if two enterprises or association of enterprises agree to keep out of each other's territories or establish quotas.

Sharing the market involves the assignment to particular enterprises of particular customers or markets for the products or services in question. It may also be done on the basis of quantity allocations rather than on territories or customers. Such arrangements have effect of eliminating competition in respect of each other's customers or markets. It is restrictive to particular line of product or particular type of product.

**Anti-Competitive Agreement--- Bid rigging and collusive bidding**

Agreements which directly or indirectly result in bid rigging or collective bidding are presumed to be anti-competitive. The expression “bid rigging” has been defined in the explanation to mean any agreement, between enterprises or persons 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 of bidding. Agreement to conspire to eliminate competition in obtaining contracts is illegal. Bid-Rigging is an agreement which has the adverse effect on competition. Collusive is a secret agreement for illegal purposes or a conspiracy. It is a deceitful agreement for some evil purposes. Bid rigging and collusive bidding are fraudulent, aimed at manipulating the market and competition. As stated earlier, beside horizontal agreement there can be anti-competitive agreement between producers and suppliers or between producers and distributors, and such agreements are termed as vertical agreements. The prohibition as provided in section 3(1) also applies to vertical agreements between non-competing enterprises operating at the different levels. The concept refers to certain types of

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business practices that relate to the resale of products by manufactures or suppliers. They are embodied in agreements between operators on a line of business situated at different stages of the value-added chain. Such agreements are also anti-competitive, if they cause or are likely to cause an appreciable adverse effect on competition. The Act frowns upon vertical agreements, which are;

1. Tie in arrangement;
2. Exclusive supply agreement;
3. Exclusive distributive agreement;
4. Refusal to deal;
5. Resale price maintenance;

These agreements are considered illegal only if they result in affecting competition adversely to an appreciable degree. In other words, the restraint is to be evaluated under the Rule of reason. The vertical agreements are between non-competing undertakings operating at different levels and, therefore not prima facie anti-competitive as the horizontal agreements which are made between the competitors. These are mainly distribution agreements between a manufacturer (or producer) and the distributor (retailer), which may require distributor to observe some restraints, such as:

- To purchase a second product distinct from the main product which is a condition of purchase (tie-in agreement)

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181 Section 3(4) (a) to (c)
182 Section 3(4) defines Vertical Agreement, Explanation for the purpose of this sub section—

a) “tie-in arrangement” includes any agreement requiring a purchaser of goods, as a condition of such purchaser, 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 likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are brought;

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.
➢ To purchase a specific brand of product exclusively from manufacturer and not from others (exclusive supply agreement):
➢ To sell product in a territory exclusively assigned to distributor (exclusive distribution agreement):
➢ To resell the product at the fixed minimum price (resale price maintenance).

When a supplier deals in technically complex products, he may desire that consumers purchasing them receive a minimum pre-sale service and are fully informed about the products qualities and capabilities and, therefore, the retailers are specialized. If the products are luxury and branded items, he may restrict supply to retailers selling from a high quality location to ensure the aura of exclusivity and prestige of the product in the mind of the consumers. He may, therefore, restrict supply to retailers who agree to comply with the obligation as to service and sales promotion. Such agreements contribute to the improvement of production and distribution and promote technical and economic progress, which is reflected in the reduction in prices or the constant supply to the consumers. Such agreements, however, are considered anti-competitive if one or more of the firms have market power. In such a situation, the agreement, in any case, likely to attract provisions of the law relating to abuse of dominance. Further, if the restraints are such that enhances competition, they are not, and if they foreclose the market, reduce rivalry and facilitates collusion they are, void. To determine, the rule of reason is applied. Thus, vertical agreements have both negative and positive effects. If the negative effect outweighs the positive, the agreement is declared void. The negative effects are—

➢ Foreclosure of the other suppliers or other buyers by raising barriers to entry;
➢ Reduction of inter-brand competition between companies operating on market, including facilitation of collusion amongst suppliers or buyers.
➢ Reduction of intra-brand competition between distributors of the same brand.

The main objection to the exclusive contracts is their probable adverse effect on the market of foreclosing it to other competitors. That objection does not hold good if the agreements could be justified by showing that the economic advantages to the consumers outweighs the anti-competitive effects, for example, benefit of the security of supply, providing
information about the use of highly technical products, providing additional services etc. The market impact of vertical restrictions is complex because of their potential for simultaneous reduction of intra-brand competition (rivalry between sellers of the same brand) and stimulation of intra-brand competition (rivalry with the sellers of other brands). The vertical agreements are treated more leniently than horizontal. They are not per se void; the ‘rule of reason” applies, to be judged on case to case basis. The Researcher attempts to discuss the Vertical agreements mentioned above in detail;

(a) Tie-in agreements: it is a form of vertical arrangement, in which there is a covenant between enterprises that are at different stages of the production chain, say, among a distributor /supplier and a buyer/purchaser. Simply stated, it includes any agreement required a purchaser of goods (tying good), as a condition of such purchase, to purchase some other goods (tied good). They have been defined in Explanation (a) to sub-section (4) of section 3 of the Competition Act, 2002. The effect of the arrangement is that a manufacturer or supplier of goods makes the buyer of goods to buy some goods or services, which he does not want, along with the goods he wants for use or for resale.

They are to be found where the tying product is either more popular or is in short supply and the tied product is slow-moving and less in demand. Thus, by such an arrangement the manufacturer or supplier can increase and expand the share of the tied product in the market. Such practice may also be restored to when a manufacturer or supplier of a popular and established product introduces a new product in the market and wants its sale to be pushed up and in which case he ties up the new product with the established product. Therefore, as a consequence if the new product is not bought in a specified quantity, the buyer’s order for the popular product is likely to be refused. Further, while deciding on the most probable outcome of tying agreements, Supreme Court stated in the case of Director-General of Investigation and Registration vs Hindustan Lever Limited184 that:

184 MANU/MR/0005/1987 ; (19890 66 Company Cases 51
Tying agreements serve hardly any purpose beyond the suppression of competition ……. By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyer’s independent judgment as to the “tied” product’s merits and insulates it from the competitive stresses of the open market. Intrinsic superiority of the ‘tied’ product, if there be any, would convince freely choosing buyers to select it over others, anyway. The effect of the tying device on competition sellers attempting to rival the “tied” product is indeed drastic as it enables the sellers adopting the tying arrangement to enjoy market control while other existing and potential sellers are foreclosed from offering their goods to a free competitive judgment through being effectively excluded from fair market dealing.

The reasonableness rule stipulates that the tie–ups should be treated with caution, as it might be the case that such agreements were enhancing competition rather than curbing it. Sometimes, it may be the case that some tying clause are for the betterment of the quality of the good produced or services rendered and thus, were promoting healthy competition and to the benefit of the consumers. Accordingly the Supreme Court of India in Mahindra and Mahindra vs Union of India\textsuperscript{185}, the Commission categorically stated that every restraint in commercial activities is not to be regarded as impermissible under the law and has to be tested on the touchstone of reasonableness. Thus, this case adopted the rule of reason ‘as evolved and applied by many foreign jurisdictions.

(b) Exclusive Supply and Distribution Agreements: Exclusive supply arrangements 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. Whereas distribution agreements 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. They have been defined under the Explanation (b) and (c) to sub-section (4) of section 3 of the Competition Act 2002. Such agreements originate principally to cater to the manufacturer’s need to promote his branded product at all stages of distribution, down to the consumer. As a result of which, the competitors are prevented access to the market and the dealers are denied freedom to handle competing products. In

\textsuperscript{185} MANU/SC/0391/1979, AIR 1979 SC 798. Refer supra note 29.
this process, the consumer is also restricted in his choice among the number of competing products. In landmark verdict of Telco vs RRTA, the Supreme Court observed that exclusive dealership in this case did not impede competition rather promoted it because they led to specialization and improvement in after-sales services, and by specialization in each make of vehicle and providing the best possible service, the competition between the various makes was enhanced. Wherein the exclusive arrangement was found to be essential for the survival of the respondent firm and competition, it was held that there is no affect on competition and therefore, it is not violative of law. When dealers are required not to deal directly or indirectly in sale of similar goods, it is then held to be restrictive in case of exclusive dealing. In Tata Engineering and Locomotive Co. vs Registrar of restrictive Trade Practices, the Supreme Court did not find the distribution of areas between the company's distributors as being restrictive. To sum it up, whenever there is a categorical condition in the agreement, that the purchaser shall not buy from any other party the specified products for sale or the terms of the agreement are shown to be on a principal to–principal basis, then they are held to be restrictive and reducing competition in the market.

(C) Refusal to deal: The section 3 sub-section (4) of the Competition Act defines it as including any agreement which restricts or likely to restrict by any method the persons or classes of persons top whom goods are sold or from whom goods are bought. Mere non-supply of goods to a dealer does not amount to refusal to deal, unless it is the outcome of non-adherence to some restrictive covenant, e.g. tie-ups sales, area restriction etc. what is required to b seen is the effect of such practice on competition and whether it results in or is likely to result in foreclosing market s to competitors. The US Supreme Court in case of Aspen Skiing Co vs Aspen Highlands Skiing Corp, that refusal to deal can be abused when access is denied after having been granted in the past. Further, a player in a dominant position can impose restriction s or a player who is the provider of the technological

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186 SC/0254/1977; (1977) 2 SCC 55
development in the service concerned. In RRTA vs Bata India Ltd\textsuperscript{188} engaged in the manufacturer of leather and rubber canvas footwear, entered into agreements with small-scale manufactures for purchase of footwear to be sold by it under its own brand. The agreements prohibited these manufactures from purchasing raw material and components from parties other than those approved by Bata. It also required them to use the moulds sold/supplied by Bata exclusively for manufacturing for Bata's requirement. The Commission held that these conditions imposed by Bata is restrictive trade practices and prejudicial to public interest.

(d) Resale price maintenance: Explanation (e) to Sub-section 94) of the Section 3 of the Act defines resale price maintenance. it 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 maintained is in some countries treated under the "per –se" rule, e.g. in the US because it could be the sign of a cartel\textsuperscript{189}. Further, Section 3(5) of the Competition Act explicitly exempts the applicability of section 3 to -

- Agreements containing reasonable conditions to protect any of his rights; and
- Rights of a person to restrain any infringement of his rights.

Prohibition as provided in section 3 does not apply to the agreements relating to the following statutory rights;

i. The Copyright Act, 1957;
ii. The Patents Act 1970;
iii. The Trade Marks Act, 1999;
iv. The Geographical Indications of Goods (Registration and Protection) Act 1999
v. The Design Act, 2000;

\textsuperscript{188} RTP Enquiry No. 3/1974.
\textsuperscript{189} Ramappa. T. "Competition Law in India: Policy, Issues and Developments ", New-Delhi, Oxford University Press; 2006
All the rights are statutorily available and are popularly known as intellectual property rights. These rights are monopolistic. The owner has all the rights to exploit them and also the right to prevent others from doing so. There is no violation of the Competition law if the owner of the articles (patented or otherwise) seeks to dispose them directly to the consumer or fixes the price by which his agents transfer the title from him directly to such consumer. The law relating to intellectual property gives the right holder to exclude others from the use of his monopoly right, absolutely or on terms. The right has to be confined within the relevant law. The existence of intellectual property creates markets, because they provide the object of trade. Earlier, the MRTP Act excluded any IPR issues, assuming that these are natural monopolies granted by law, and hence not challengeable. The Raghavan Committee Report on Competition Law in reference to Intellectual Property Rights observes as follows:

“All forms of intellectual property have the potential to raise competition policy/law problems. Intellectual property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, intellectual property needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is need to curb and prevent anti-competition behavior that may surface in the exercise of the intellectual property.

There is, in some cases, a dichotomy between intellectual property rights and competition policy/law. The former endangers competition while the latter endangers intellectual rights. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practices or conduct is visible to the detriment of the consumer interest or public interest, it ought to be assailed under the competition policy/law’

Thus, the section 3(5), therefore exempts agreements relating to intellectual property rights under the laws as specified therein from the applicability of section 3(1) and (2). Only

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190 United States vs. General Electrical Company et al 272 US 476
191 see Raghavan Committee Report on Competition Law, Paragraphs 5.1.7 and 5.1.8.

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reasonable and legal conditions under those laws are not within the prohibition. The agreement concerning intellectual property rights are subjected to competition Law to the extent restraints provided or conditions imposed are not necessary for the protection of those rights. The obligations in a license for the exploitation of an intellectual property right are not “restrictions’ within the meaning of competition Act. If the agreement confers right to exploit the patented invention on payment of royalties on the conditions which do not go beyond the scope of the patent, the question of applicability of the prohibition under the competition Act does not arise; but arises if the grant is accompanied by the terms which go beyond. For example, “a copyright may no more be used than a patent to deter competition between rivals in the exfoliation of their licenses”. To determine the scope, it is necessary to define the specific subject—matter of the right and its exhaustion. Any term which is outside the subject matter and the exhaustion of the right, is subject to competition rule. The following concepts have, therefore, to be kept in view if the demands of the competition law are to be reconciled with the protection of intellectual property rights;

- There is dichotomy between the existence of intellectual property rights and their exercise; the competition law is concerned with the latter;
- The protection of the ‘specific subject matter’ of the right is justified even if it adversely affects the competition;
- Once the right as specified in the subject—matter exhausted, i.e., when the holder of the right has consented to selling the protected product, the agreement will lose protection and be subject to competition law.

**Agreement s those are not anti-competitive: Exports of Goods**

The agreement would not be anti-competitive if it relates exclusively to the production, supply, distribution or control of goods or provision of services for export from India. The activity of export is exempted, because it does not affect the domestic market. For example, price fixing with respect to goods and services sold domestically is subject to control under the competition law, but price fixing with respect to export is permitted. An

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192 See Ravenseft Properties Ltd's Application (1977) 1 All ER 47.
193 See section 3(5) (g) of the competition Act of 2002.
agreement is anti-competitive if it has “adverse effect on competition within India”\textsuperscript{194}. The focus is on domestic effects of anti-competitive conduct. The reach of the Indian law is not limited to conduct and transaction that occur within the boundaries of India but also to those which affect competition within India regardless where such conduct or transaction occurs or the nationality of the persons involved. The purpose of the Indian law is to protect consumers, competition and commerce in India. It does not extend to protect the foreign markets from anti-competitive effect and regulate the competitive competitions of the other countries. If the Indian market is affected whether it is the export or the domestic market, the anti-competitive conduct falls within the prohibition.

**Conclusion**

Competition law should be to protect competition—not competitors. Under the Indian competition law, the term ‘agreement’ is given a wide definition. This is because the parties often choose not to formalize the agreement, in fact sometimes they go to great lengths to hide the agreement or any trace of it, especially in case of cartels. The Competition Act of 2002 has made an attempt to deal with anti competitive practices, but it has failed to define certain provisions which it has used in the Act, like market definition, relevant market etc. The Act terribly need to address this lacuna at the earliest. Further, the Competition regulatory Authority must be well equipped with the provisions to deal with these kinds of practices.

\textsuperscript{194} See section 3(1) of the competition Act of 2002.
Part: B Regulation of Abuse of Domaince

Abuse of Dominant Position is an internal part of the mandate of modern competition authorities. For a developing countries dealing with competition authorities who are starting Competition Law enforcement as is the case in India, it is advisable “abuse of dominance” on a priority. Here in this chapter we shall analysis what is Abuse of Dominant Position and how effective is the treatment of Abuse of Dominance under the Indian Competition Act.

Introduction

The Indian Competition Law, the Competition Act of 2002, like other modern competition laws covers agreements, abuse of dominant position and mergers. The Act prohibits Anti-competitive Agreements and abuse of dominance and regulates combinations. It also mandates competition advocacy, involving awareness building and mandates the Commission to provide advice on laws, rules, regulations and policy. Existence of dominant position is not frowned upon. Its abuse is, analysis of abuse of dominance, under the Act, involves; determining status of enterprises as dominant and examining conduct of dominant enterprise as abusive. The Indian law envisages that dominance is defined based on an array of factors; both structural and behavioral. The types of conduct, when indulged in by a dominant enterprise or group enjoying dominant position in the relevant market, are also specified in the Act. Even though ‘appreciable adverse effect on Competition” in Indian markets is the touchstone, the law does not specify any requirement for proof of appreciable adverse effect on competition in the case of such conduct by any dominant enterprise or dominant group in the relevant market. The Law of Competition in India seeks to ensure fair competition by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India. The words ‘adverse effect on competition” embrace acts or behavior of an enterprise enjoying dominant position in the market, agreement (horizontal and vertical) between , and combinations (acquisition and mergers) of, enterprises, which operate to the prejudice of public interests by unduly restricting competition or obstructing due course of trade. The Dominant position has been defined to
mean a position of strength, enjoyed by an enterprise, in 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 relevant market in its favour”

Dominance in law implies that a firm has a high degree of immunity from the normal disciplining forces of rival’s competitive reactions and consumer behavior. On the other hand, dominance as an economic concept is associated with the notion of market power. Although the term dominance is a legal concept but its assessment is ultimately heavily influenced by economic considerations. The Competition Act does not forbid an enterprises or a group from becoming big. Bigness is essential to industrial efficiency and innovation. But where it stifles competition, law intervenes. The law, therefore, does not prohibit dominance. It prohibits its abuse. A monopoly is not objectionable merely because of the size of the enterprise, its capital and power of production or merely because of the power to restrain competition, if not exerted.

**Concept of Dominance and Abuse**

The ultimate concern of the competition law is about market power and its abuse. Market power is used to mean the ability of enterprises to raise price above the level that would prevail under the competitive conditions. Under the Competition Act of India, section 4 deals with Abuse of Dominance or dominant position by an enterprise or a group. It prohibits the use of market controlling position to prevent individual enterprises or a group from driving out competing businesses from the market as well as from dictating prices. The concept of abuse of dominant position of market power refers to anti-competitive business practices in which dominant firm may engage in order to maintain or increase its position in the market.

195 Explanation (a) of section 4
Dominant position

The Dominance defined in the section relates to the position of economic strength on a properly defined relevant market which allows the dominant enterprise to behave independently of its consumers. An enterprise is prohibited from abusing its dominant position\textsuperscript{196}. The provision first supposes that the enterprise enjoys a dominant position in the market, and then prohibits that enterprise from abusing it. “Dominant position” and “Abuse of Dominant position”, are the two requirements. Dominance itself is not prohibited. What is prohibited is its “abuse”. When an enterprise\textsuperscript{197} or group of enterprise\textsuperscript{198}, directly or indirectly, imposes unfair or discriminatory (a) condition in purchase or sale of goods or service; or (b) price in purchase or sale (including predatory price) of goods or service, amounts to abuse of its dominant position in the market.

The definition appears to be somewhat ambiguous capable of different interpretation, but this ambiguity has a justification, as observed in Ragavan’s Committee Report in paragraph 4.4-5, ‘having regard to the fact that even a firm with a low market share of just 20 percent with the remaining 80 per cent diffusedly held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60 percent market share with 40 per cent held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape or result in unnecessary litigation. Hence in a dynamic changing economic environment, a static arithmetic figure to define ‘dominance’ will be an “aberration” [departure from what is normal or accepted or regarded as right]. The definition, therefore, is broad enough to enable the authorities to

\textsuperscript{196} Section 4(1)
\textsuperscript{197} According to the Section 2(h) of the Act “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 units 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, defense and space.
\textsuperscript{198} Section 4(2), inserted by the Competition (Amendment) Act of 2007.
have freedom to fix errant undertakings and encourage competitive market practices even if there is larger player around. Abuse of dominance is key for the competition law. The definition first defines domination as the enterprise position of strength in the relevant market and then sets out criteria to determine that position in terms of the enterprise power of operating independently of market forces or affecting competitors and consumers or the relevant market in its favour. A dominant position refers to a situation of economic strength, which gives the enterprise power to obstruct the maintenance of an effective competition in the market concerned and enables it to conduct itself in a way that it is independent from its competitors and consumers. Competitive forces in the relevant market either having no effect on the operation of the enterprise, or being directed in its favour, suggest domination of that enterprise. Either situation indicates the position of strength in the relevant market. Thus a dominant position in a market controlling position, capable of driving competing business from the market and also of dictating price. It is a power of controlling prices or unreasonably restricting competition. The material consideration in determining whether dominance exists is not that prices are raised and that competition is actually excluded, but that power exists to raise prices or to exclude competition when it is desired to do so. Dominance has been defined in terms of: first, the enterprise ability to operate independently of competitive pressure; and secondly; its ability to appreciable affect the relevant market, competitors and consumers. Substantial impact on it, rather than in terms of the market share, is the criterion. Domination in common parlance means market power. Market power is the power to force a purchaser to do something that he would not do in competitive market, and courts have ordinarily inferred the existence of such power from the sellers possession of a predominate share of the market. Predominant share of the market is, however, no longer the criterion to determine dominance. For establishing dominant position and its abuse it is necessary to:

- Define the relevant market, as the dominance does not exist in the abstract but in relation to a market in which the undertaking competes, and after having so done,

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Assess market strength in order to see whether the undertaking possesses a certain level of market power and finally,

Consider whether the conduct of the undertaking amounts to an abuse of dominant position.

A finding of dominance involves a two-stage process—

a) Defining relevant market and

b) Assessing the various factors giving rise to dominance.

The key element of the section is to identify conduct that amounts to an “abuse”. In case involving abuse of dominant basic distinction can be made between—

a) exclusionary abuses, i.e. Unlawful attempts to exclude rival firms, refusal to deal, selective price cutting. Etc, and

b) exploitative abuses i.e. direct exploitation of consumers e.g. Through excessive prices, imposing unfair condition s, limiting production markets or technical development etc.

The Concept of Abuse

In general, actions that are considered anti-competitive and illegal in the context of agreement are also illegal, if undertaken by a dominant firm. Section 4 specifically prohibits an abuse of dominant position by enterprises but does not afford a definition of what constitutes an abuse of dominant position. It is not an offence for a firm to be in a dominant position but when firm is in a dominant position it has a special responsibility not to conduct itself in manner which would harm the competitive process or competition in

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201 See section 19 of the Competition Act
202 Exclusionary abuses results in long term harm to the dominant enterprise’s customers or trading partners by foreclosing the market to actual or potential competitors.
203 Exploitative abuses occurs where a dominant enterprise attempts to exploit the opportunities provided by its market power to harm its consumers directly, e.g. through excessive prices or imposing unfair trading conditions, etc.
204 Section 28 of the Act gives power to the Competition Commission to order the division of such a dominant enterprise such that the enterprise does not abuse its dominant position. This is a highly intrusive remedy which should be used by their Competition Commission only in very rare circumstances.
market. European Court of Justice (ECJ) in Hoffmann-La Roche\textsuperscript{205} stated that the concept of abuse is an objective one which means that certain behavior of a dominant enterprise can be abusive even where the enterprise did not have an intention to abuse its dominant position. Section 4 lists certain practices which if carried out by a dominant enterprise, would be considered as an abuse of its dominant position. Such practices include imposing unfair or discriminatory conditions or prices for purchase or sale of goods or services, limiting or restricting production of goods or services, technical or scientific development, refusal to access essential facilities, tie-ins arrangements\textsuperscript{206} etc. Abuse of a dominant position, therefore, means a conduct which cannot legitimately be carried out by the dominant enterprise or group in the dominant market as also in the non-dominant market. Section 4 only prohibits the conduct which exploits a dominant position but not an enterprise or group holding a dominant position.

**Assessing the relevant market**

In order to establish the abuse of dominant or dominance, it is first necessary to establish the dominance itself. Ever since the enforcement of section 2 of the Sherman Act in the US economic analysis is playing an important role. This led to the development of certain key concepts in competition economics namely, markets definition. Dominance or market power exists only in relation to a relevant market, for to point out dominance one must say upon what market an undertaking is dominant. It is, therefore necessary to determine first what dominant position is. The relevant market is defined in the Indian Law with reference to the competitive constraints that exist between products and regions. Relevant market is based on “relevant product market” and “relevant geographical market”. Relevant market

\textsuperscript{205} Case 85/76, Hoffmann-La Roche vs Commission [1979] ECR 461 at Para 91; “The concept of abuse is an objective concept relating to the behavior of the undertaking in a dominant position which is so as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transaction of commercial operators, has the effect of hindering the maintenance of degree of competition still existing in the market or the growth of that competition “

\textsuperscript{206} Section 4 (2) (d) of the Act has been lifted verbatim from Article 82 of the EC treaty, at http://eur-lex.europa.eu/LexUriServ. Article 82 of the Treaty of the EC enumerates the following as being abuse of dominant position; unfair prices or conditions, limiting production, markets or technical development, applying dissimilar conditions to equivalent transaction, and making contracts subject to supplementary obligations having no connection with the subject of the contracts.
is “the market that may be determined by the commission with reference to the relevant product market or the relevant product market or with reference to both the markets.”

According to the World Bank/OECD Glossary, ‘If markets are defined too narrowly in either product or geographic terms, meaningful competition may be excluded from the analysis. On the other hand, if the product and geographic market are too broadly defined the degree of competition may be overstated. Too broad or too narrow market definitions lead to understanding or overstating market share and concentration measure.’ Relevant product market is defined in terms of substitutability of products. It means “a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by the reason of the characteristics of the product are services, their price and intended use.” In other words, the relevant product market can be taken as the smallest set of products which are close substitutes. Along with this, section 19(7) of the Act enumerates the factors that are to be considered while determining the relevant product market namely (a) physical characteristics or end-use of goods; (b) price of goods or services; (c) consumers preferences; (d) exclusion of in-house production; (e) existence of specialized producers; and (f) classification of industrial products. The first three factors would aid in assessing the interchangeability of products or services. Determination of substitutability of products can be either by way of demand side or supply side substitutability or potential competition. Demand side substitutability involves shift of demand to competing product on a small but significant non-transitory change in price. Supply side substitutability involves shift of production promoted by a small but significant non-transitory increase in the price, within a reasonable time period to meet demand. The hypothetical monopolistic test, evolved in US is currently used widely in market definition in many jurisdictions. The “hypothetical monopolist test’ is also known as “small but significant non transitory increase in price” (SSNIP) test. In simplest terms, the SSNIP test is based on hypothesis that if we assume there is a hypothetical monopolist over an

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207 See section 2(r) of the Act
209 See section 2(t)
210 The phrase SSNIP, also known as Hypothetical Monopolistic Test was first deployed by the Department of Justice and the Federal Trade Commission under US Competition law while analyzing horizontal mergers. SSNIP originates from the 1982 U.S Merger Guidelines
area, would consumer substitution be enough to discourage the hypothetical monopolist from raising the price by 5-20 percent without losing sufficient sales to render the price increase unprofitable. If the price increase would be profitable, the product market is defined properly. If the price increase would be unprofitable for the hypothetical monopolist because the monopolist would lose too many sales to products not included within the preliminary defined market. Geographic aspect of the market, apart from the product, is also important. Geographic market is the geographic area in which the conditions of competition are sufficiently homogenous for the effect of the economic power of the undertaking concerned to be able to be evaluated. The dictionary meaning of ‘homogenous’ is; formed of parts that all are of the same type. This refers to uniformity of composition that can be distinguished from the conditions of competition such as terms of supply, or the mix of the services offered or demanded in the neighboring areas. Only that part of the geographic territory where uniformity of the composition is present should be considered the geographic market. Conversely, when conditions prevailing in the neighboring areas are different, the markets are different. The objective is that the exact sphere of competition, both in terms of a physical market and a specific product or services is to be identified towards ascertaining a dominant position. In other words, Geographic dimensions involve identification of the geographic area within which the competition takes place. Relevant geographic market could be local, national, international or occasionally even global depending upon the facts in each case. In India, relevant geographical market has been defined in the Competition Act[211] as a ‘market comprising the area in which the conditions of competition for supply of goods or provision of services of demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighboring areas’. Along with this, the factors that are to be considered while determining the relevant geographic market have been enumerated in section 19(6) of the Act, namely (a) regulatory trade barriers; (b) local specification requirement; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) languages; (g) consumers preferences and (h) need for regular source or regular suppliers or rapid after-sales services. It may be noted that all these factors excepting the last one will negate uniformity of

[211] Section 2(s) of the Competition Act of 2002.
composition and would help in narrowing down the geographic territory to the actual geographic market that is to be considered. The most recently legislated law of the central eastern European countries are based on the relevant articles of the “Treaty of Rome” and are most interventionist in design, in that they appear to rely exclusively on market shares to establish dominance. The US laws, does not use the term ‘abuse of dominance’, nevertheless it attempts to deal with similar issues with its prohibition on ‘monopolization’ and attempts to monopolise, while continuing to recognize that monopoly as such is not illegal provided it is acquired through superior skill, foresight and industry.

**Micro soft case**

The European Commission\(^{212}\) held that Microsoft had abused its dominant position in the market for desktop operating systems by freezing out rivals in adjacent markets such as media player and server software. The group was ordered to produce a version of windows without Microsoft own media player and to make available technical information that would allow rivals to develop server software that functioned smoothly with windows-driven computers. The European Court ruled that Microsoft had violated European anti-trust law by exploiting its near dominance in operating systems to shut out competitors like Real Networks and Sun micro systems. According to the judgment, Microsoft cannot regulate the market by imposing its products and services on people. It can no longer prevent the market from functioning properly and that computer users and therefore entitled to benefit from choice, more innovative products and more competitive prices.

**Factors to be taken into account while defining Market**

Mere dominance in the market is not abusive unless it is exerted when the enterprise is able to do so. The concept of abuse of a dominant position of market power refers to anti-competitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market. Competition Act 2002 does not specify any single proxy variable for determining dominant position in the relevant market. Dominance is linked with the host of factors like market share of the enterprise; size and resources of enterprise;

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\(^{212}\) In the year 2004
Size and importance of competitors; commercial advantage of enterprise over competitors; vertical integration; dependence of consumers; dominant position as a result of a statute; entry barriers; countervailing buying power; market structure and size of market; social obligations and costs; contribution to economic development; and any other factor that the Commission may consider relevant for the enquiry. Market share is traditionally the single most used proxy for determining dominance. It has the advantage of being a very clear and understandable criterion. However, market share as a proxy may not be a reliable norm. In fact, to fix any across-the-board applicable benchmark is difficult. A number of factors like the market share of competitors in the market, countervailing power, the power of consumers, barrier to entry, etc. are normally taken into account in most competition jurisdiction now. Apart from the above elements, various other factors taken into account to assess dominance. An enterprise owning products which are not interchangeable with other products on the market is likely to be in a dominant position. The reference to the market share of the enterprise for specific products is also a determinant element.

Enterprise of similar size may differ in terms of their resources. An enterprise with deep pockets has higher say in power and can. Therefore, afford to abuse the market power. Control over financial resource facilitates financial leveraging. Control of inputs, involving vertical integration, adds to market power and dominant position. Portfolio power could be covered under this. Portfolio power refers to the market power due to the possession of a portfolio of leading brands. This provides greater flexibility in structuring prices, greater potential for tying, as also benefit from economies of scale and scope, both in sales and marketing. Vertical integrated markets tend to create and/or strengthen market power and dominant position and enables exclusionary behaviour by way of foreclosure of input market or denial of market access. Size and importance of competitors is an important consideration. Dominance would depend, to a great extent, on the market share of the competitors—whether the market shares of the competitors is small or large, whether the competitors are too many in number with small shares in the market, etc. the market share of the near rivals should be looked at.
In *Hoffmann-la Roche & Co.AG vs. Commission of the European Communities*, the court held in determining dominance position of an enterprise the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition are relevant factors. The percent of the market owned or controlled necessary to constitute a dominant position is not static. Rather, it is dependent upon a number of factors including the relevant market and the percentage of market share relative to other competitors. The European Court of Justice has found a dominant position in cases ranging from ninety percent market shares, to only a forty to forty-five percent market share. In addition the Commission has issued a report indicating that market shares of twenty to forty percent cannot be ruled out as being dominant. Furthermore, it has also been suggested that even if the market share is lower, a dominant position may be inferred if there are high barriers to entry that guard the market shares.

The position of Indian Law is somewhat different. Dominance has been defined in terms of:

- The position of strength enjoyed by an undertaking which enables it operate independently of the competitive pressure and also to affect by its actions the relevant market, competitors and consumers, and,
- The substantial impact on the market including creating barriers to the new entrants.

It has not specified the market shares which the enterprise must hold in order to be considered in a dominant position, because, as observed by the Raghavan's Committee Report, ‘a firm with a high market share may conduct business ethically if there is a strong and effective rival in the relevant market and likewise, a firm with a small market share may abuse its market power, if its competitors diffusely hold the remaining market share”.

Defining dominance rigidly in terms of arithmetical test would have been an aberration. It has been kept deliberately vague to enable the authorities to fix the errant and thus to keep competitive market practices even if there is a large player around. Dominance is looked

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213 [1979] 3 CMLR211
214 See competition Law of India by Abir Roy and Jayanth Kumar, chapter 4 page 110, published by Eastern Law House Private Ltd.
at both from the structural perspective and from the behavioral perspective. The Indian Act uses a mix of both. While the structural perspective looks at the factors like market share, behavioral approach looks at the ability of the enterprise to raise price above normal levels and the ability of the enterprise (or group) to act independently of consumers and competitors, in the relevant market. Even though structural criteria are easier and more practical, modern laws are veering more and more towards behavioral criteria or rather a mix of both. It has also been found that reliance on ‘behavioral” approach is theoretically more exact and is also more suited to developing country circumstances.\textsuperscript{215}

**Concept of Collective Dominance**

The recent\textsuperscript{216} amendment to the Competition Act, 2002 introduced the concept of group dominance. Abuse of dominant position by an enterprise or a group of enterprises stand prohibited under the Act to mean; ‘two or more enterprises which, directly or indirectly, are in a position to,;

i. Exercise 26 percent, or more of the voting rights in the other enterprise; or

ii. Appoint more than fifty percent of the members of the board of directors in the other enterprise or

iii. Control the management or affairs of the other enterprise’.

The question arises as to whether the concept of dominance by a “group’ of enterprises is the same as the concept of “collective dominance” under EU Competition Law. In the context of the EU Law Collective Dominance implies tacit collusive behavior, where a number of enterprises take strategic decisions keeping in mind the likely behavior of rivals. In Compagnie Maritime Belge\textsuperscript{217} the definition of collective dominance was clearly set out by the court as follows; “a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity”. The


\textsuperscript{216} The competition (Amendment) Act of 2007

\textsuperscript{217} Campagnie Maritime Belge vs.Commission, 2000 4 CMLR
economic links, especially the structural links between the market players is required to establish collective dominance. Compagnie Maritime Belge also clarified that no agreement is required for collective dominance, while other connecting factors like market structure are relevant. Collective dominance requires more rigorous analysis than is normally applicable to single enterprise dominance. In Airtours the court of First Instance (CFI) laid down clear guidelines as regards conditions that should be met for collective dominance, as follows\textsuperscript{218},

- Each members of the oligopoly must know how the others are behaving so that it can follow the same policy on issues such as pricing and supply;
- Members must be deterred from changing their policy through fear of retaliation and
- The oligopoly must be so powerful that it can withstand challenge from other competitors, potential new market entrants and consumers.

Clearly, the concept of ‘group ’dominance in the Indian Act differs substantially from the concept of “collective” dominance under the EU Article 82. While under Competition Act 2002, group consists of enterprises legally linked to each other; the EU concept of collective dominance involves undertakings that are strategically and not legally linked.

**Instruments of Abuse**

The abuse of dominant position is prohibited. An enterprise abuses when it imposes unfair and abusive conditions. These conditions are neither unfair nor abusive when their imposition is a legitimate competition need. Distinguishing predatory behavior from legitimate competition is difficult. The distinction between low prices which result from predatory behavior and low prices which result from legitimate competitive behavior is often very thin and not easily ascertainable. Legitimate competitive behavior may demand lowering of prices to meet a lawful and equally low price of a competitor. The demarcation line between the two behaviors is very difficult to be drawn. However the following acts and behavior are set out as abusive\textsuperscript{219}

\textsuperscript{218} Airtours vs.Commission [2002]ECR II 2585.
\textsuperscript{219} See section 4(2) of the Competition Act of 2002
• Predatory behavior towards competitors;
• Discriminatory price or terms or conditions in supply or purchase of goods or services;
• Limiting production of goods or provision of services;
• Denial of market access;
• Concluding agreements providing for acceptance of supplementary obligations.

The above indicate behavior considered prima facie abusive when an enterprise is in a dominant position. The focus is on the conduct of the market dominating enterprise rather than on its dominance.

**Dominant position – Abuse - Predatory Pricing**

Predatory pricing otherwise known as the destroyer pricing is one of the anti-competitive measure adopted by the companies and it refers to a practice of driving rivals out of the business by selling at a price below the cost of production and thereby creating a barrier to the new potential entrants. Even though the Indian Competition Act incorporates predatory pricing as an abuse of dominance under section 4, the challenge before the enforcement agency is to penalize predatory pricing as it is hard to distinguish between fair, aggressive pricing on one hand and unfair, predatory pricing on the other. The Act specifically includes predatory pricing as an act of abuse of dominance. The Act defines predatory pricing in Explanation (b) of section 4 (2) (e) as ‘the sale of goods or provision of services, at a price which is below 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’. Usually, where the price is below average variable costs, predation is presumed. The purpose of such behavior is to drive competing enterprise out of business so that dominant position in the market could be maintained or strengthened. The principle that governs predatory behavior is the intention to drive out competitor or lessen competition, i.e., an intention of impeding the entry of other economic entities into, or driving them from, the market. In determining whether a conduct is predatory, the question of intent is relevant to

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220 See section 4(2) (a) (ii) of The Competition Act 2002
the offence of monopolization\textsuperscript{221}. The Raghavan Committee observes on predatory pricing as follows\textsuperscript{222}:

"Predatory pricing is defined as the situation where a firm with market power prices below cost as to drive competitors out of the market and, in this way, acquire and maintain a position of dominance …… in reality, predation is only established after the fact, i.e., once the rival has left the market and the predator has acquired monopoly position in the market. However, any law to prevent is meaningful, only if it takes effect before the fact, i.e. before the competitor has left the market."

The sale at a price below cost is not per se predatory. It has to be motivated with the said intention. The behavior would be predatory and anti-competitive, if it could be established that the dominant enterprise has engaged with a specific intent to monopolise and there is a dangerous probability of achieving monopoly power. In absence of a plausible motive to engage in predatory pricing, predatory charge cannot be sustained\textsuperscript{223}. Identification of predatory pricing is an important issue. The basic concept of predatory pricing is the price below cost. Therefore, there is relation between costs and prices. Accordingly, a price below the marginal cost is inductive of predatory pricing. Therefore another alternative is that to use Average Variable Cost as a substitute. The courts have taken the opinion that prices charged below variable costs by means of which a dominant undertaking seeks to eliminate its competitors must be regarded to be anti-competitive. The US Supreme Court in \textit{Utah Pie vs. Continental Banking Co}\textsuperscript{224}, considered price below the full cost is predatory. Moreover it has also been decided that prices below average total costs i.e., fixed costs plus variable costs but above average variable costs must be regarded abusive if they are determined as a part of plan for elimination of a competitor. Such prices can drive from the market undertakings, which are as efficient as the dominant undertaking but which because of their smaller financial resources are incapable to withstand the competition. In

\textsuperscript{221} See Aspen Skiing Co. vs Aspen Highlands Skiing Corp. 472 US 585
\textsuperscript{222} See paragraph 4.5-1 of the Raghavan Committee Report.
\textsuperscript{223} Matsushita Elec. Industrial Co vs. Zenith Radio 475 US 574
\textsuperscript{224} 386 US 685 (1967)
AZKO Chemie vs. Commission\textsuperscript{225}, the European Court of Justice sanctioned two different methods of analysis for determining whether an undertaking has practiced predatory pricing. First, prices below average variable cost (total variable costs divided by the number of units produced) must always be considered abusive. In such case, there is no conceivable economic purpose other than the elimination of a competitor. Since each item produced and sold entails a loss to the undertaking. Secondly, prices below average total costs (total cost divided by number of units produced) but above average variable costs are only to be considered abusive if an intention to eliminate competition can be shown\textsuperscript{226}.

The Raghavan’s Report on Competition Law observes, rejecting the proposal about identifying the predatory pricing under the ‘per se illegal category’;___

“\textit{After} considerable discussions, it was agreed that having regard to the practical difficulties involved and interpretation, \textit{it is better to treat predatory pricing as an abuse, only if it is unambiguously established and indulged in by a dominant undertaking}.”

Therefore, it has first to be proved that the enterprise enjoys a dominant position in the relevant market and then its intent to monopolise. Neither the fact of dominance nor the intent alone is sufficient. Both must be proved. Their co-existence is necessary. What is, therefore, required to be proved for the successful predations are; the existence of dominant position, intention to destroy the rival and compel to leave, and, the possibility of recoupment of the loss after the competitor has left.

\textbf{Predatory pricing and Competition Act of 2002}

Predatory pricing is an exclusionary practice\textsuperscript{227}. Although the enforcement provisions of the Act have not yet been notified. It can be expected that CCI when interpreting section 4 of the Act will look into the allegation of the PP not only when it has actually produced the pursued exclusionary effect, such as the elimination of competition or creation of an entry barrier, but also when such a conduct is ‘likely ‘ to attain these goals. A similar approach is

\textsuperscript{225} (1993) 5 CMLR 215.
\textsuperscript{227} 'Exclusionary Practice ' has been defined by Judge Wyszynski in United States vs United Shoe Machinery Corp,110 F Supp 295, “to mean a practice that deters potential rivals from entering the monopolist s market, or existing rivals from increasing their output in response to the monopolist s price increase.
followed in the European Community where the European court of Justice has held that it must be possible to penalize predatory pricing whenever there is risk that competitors will be eliminated since the aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors. The Competition Commission of India has adopted the Average Variable Cost (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 enterprises sets in sale price below its AVC, it has engaged in a predatory pricing practices contrary to section 4. However, prices falling between the ATC and AVC are also subjected to inquiry, but in such case specific intent would have to be shown. Prices set above the ATC are unlikely to be challenged. 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 provision s of section 4, it may pass any of the orders specified under section 27 of the Act and may further under section 28 of the

228 Average variable cost is defined as the ‘total variable cost divided by total output during the period of alleged predation’. The CCI states that the ‘cost’ in Explanation (b) to section 4 of the Act shall mean average variable cost unless the commission decide otherwise.

229 Section 27 deals with the orders by commission after inquiry into agreement or abuse of dominant position. Where after the inquiry the commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4 , as the case may be, it may pass all or any of the following orders namely;___

a) Direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement or abuse of dominant position, to discontinue such abuse of dominant position, as the case may be;
b) Impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turn over for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse;

provided that in case any agreement referred to in section 3 has been entered into by any cartel, the commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel fro the last preceding three financial years, whichever is higher”,
c) [omitted by the competition (Amendment) Act of 2007]
d) Direct that the agreement shall stand modified to the extent and in the manner as may be specified in the order by the commission;
e) 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;
f) [omitted by competition (Amendment) Act 2007]
g) Pass such other (order or issue such directions) as it may deem fit,
Act direct the division of an enterprise enjoying a dominant position to ensure that such an enterprise does not abuse its dominant position. Interestingly, Predatory behavior is not merely confined to pricing. Other means can be considered predatory, such as acquisition with a view to the suspension of activities of competitors, excessive pricing, or the refusal to supply material essential for the production activities of a customer who is in a position to engage in competitive activities.

**Abuse on pricing : Discriminatory prices**

The predatory behavior is not limited to predatory pricing; price discrimination is also such behavior. Discriminatory pricing in supply or purchase of goods or services is regarded is prohibited by Law. Though it is closely related to, but different from predatory pricing. Both are intended to injure competitors; in one it is of the favoured purchaser, while in the other, of the dominant enterprises itself. Injury to the competitors alone is not as important as the likely to the competition. Predatory behavior is not limited to predatory pricing; price discrimination is also such behavior. Predatory pricing involves not just below cost pricing but also price discrimination. Below–cost pricing is predatory when aimed to destroy direct competitors of the undertaking. The aim of the discriminatory price is also the same, destruction of the competitors also of those of the favoured purchasers. A selective discriminatory pricing policy by a dominant firm designed purely to damage the business of, or deter market entry by, its competitors, whilst maintain higher prices for the bulk of its customers, is both exploitative of these other customers and destructive of competition. The imposition of different prices for the same product in different areas without any justification is also considered anti-competitive. Differentials are not discriminatory or unfair which are based on savings in selling costs from differing methods of distribution, or when the transaction s are bona fide and not in restraint of trade or where they are made in good faith to meet an equally low price of a competitor. The Law,

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231 See FTC vs Bush Inc 363 US 536
therefore, does not forbid price competition. It, however, provides that sellers may not sell
goods to different purchasers at different prices, if the result may be to injure competition in
either the seller's or the buyer's market unless such discriminations are justified. It is on the
seller to show that, his price was actually a good-faith response to that competing low
price. The standard of good faith response is the standard of a prudent businessman
responding fairly to what he reasonably believes is a situation of competitive necessity.232
Discounts and rebates are a normal incident of commercial world and not a characteristic
of market power. However, discounting polices of the dominant firms are under certain
circumstances severely constrained. A discount ceases to be normal and becomes abusive
when it is intended to tie customers to which it is granted and place competitors in an
unfavorable competitive position. Differential or discriminatory bonus or discount based
on quantity is similarly abusive practice inasmuch as discounts would reduce the
opportunities of the smaller dealers in being able to compete with the bigger ones and this
would have the effect of preventing distorting or reducing competition between them.233
Thus, the prohibition of the price discrimination tends to protect small firms against the
discounting polices of their larger and more efficient rivals.

**Dominant position –Abuse –Limiting or restricting production**

Limiting or restricting production of goods or provisions of services or market therefore, technical or scientific development relating to goods or services to the prejudice of customers, is abuse. Limiting or restricting market for goods or services is anti-competitive, when a supplier in a dominant position insulates particular market on from another and thereby engages in a different pricing according to the level that each market can bear.

**Practices resulting in denial of market access**

The practice which results in denial of market access is abusive in nature. A course of conduct adopted by a dominant undertaking with a view to excluding a competitor from a market by means of other than legitimate competition on the merits is an infringement.

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232 Falls City Industries Inc vs Vanco Beverage Inc. 460 US 428
233 See Shashikala Glass Works (P) Ltd. In re [1993] 3 Comp LJ 385 (MRTPC) and Director General vs Rajshree Cement [1995] 83 Comp Cas 712 (MRTPC)
The injury to the competition will be aggravated where the stated purpose of the action is indirectly to prevent the entry into the market of a potential competitor to the dominant producer. Refusal to deal and Refusal to supply are the practices which results in denial of market practices. Dominant undertaking thereby creates artificial barriers denying access to, or resulting in a competitor leaving market. An undertaking has freedom to choose customers, the circumstances and conditions to deal with. It has right to deal with or refuse to supply its products in its business interest. But right is not absolute. It is held to be violative of law if it impedes competition.

**Essential facility Doctrine**

The Monopolist cannot use its market power to prevent or impede competition in the relevant market. A monopolist has the duty to provide competitors with reasonable access to “essential facilities’, facilities under the monopolists control and without which one cannot effectively compete in a given market. “ Essential” means vitally important; absolutely necessary. This is one of the recent extensions that have come in view of the judicial pronouncements as regards it being an instrument of abuse of dominant position. The doctrine postulates a situation where in a dominant firm owns or controls a facility, which is an essential facility to which one of its competitors would like to gain access to it so that it can sell its goods or provide its services. The refusal to grant such essential facilities to its competitors would tantamount to abuse of dominant position. The origin of the doctrine of essential facilities was formed in US where the Supreme Court probably first use this doctrine in United States vs Terminal Railroad Association\(^2\)\(^3\). This was a case of section 1 violation where joint venture was formed by several railroad companies to buy and run rail terminals. The joint venture denied the non-members the ability to use the terminals. The Court held the practice to be anti-competitive as the non-members could not effectively compete without the access to the essential facilities and it was held that the same analogy would be applicable to unilateral activity undertaken by dominant firm.

\(^2\)\(^3\) United States vs Terminal Railroad Association 361 US 116 (1959)
Dominant position – Tying and bundling agreements

Forcing obligations which have no relation to the subject matter of a contract are illegal and anti-competitive. Tying agreements involves an agreement wherein there exists a dominant firm who agrees to sell a desirable product or service which is the tying product only on the pre-condition that buyer shall purchase a less desirable second product or service, i.e. the tied product irrespective of the fact that whether the buyer wants the second product or not. Bundling refers to the situation where a package of two or more products is offered. The law therefore forbids “tying” arrangements in a contract. Tying agreements violates, when the seller enjoys a dominant position in the market for the “tying” product and a substantial volume of trade in the “tied” product is restrained. In Director General Vs Gascom Gases\textsuperscript{235}, it was held that the condition that the distributor dealing with similar items other than the products of the company will be seriously viewed and in such cases the distributorship will be terminated without notice is regarded as anti-competitive practice. But tying of the two products would not be violative if they are so integrated that they could be taken components of a single product or service. It would be permitted if there is a link between the two because of their nature or customary usage, as a reading of section 4(2) (d) of the Competition Act suggests when it refers to ‘supplementary obligations which, by their nature or according to commercial usage, has no connection with the subject of such contracts”. There could be business justification for tying action, such as, a commitment to quality service, a need to control inventory costs, a desire to prevent the competitor from free riding on capital investment of the undertaking, or safety, healthy or quality reasons.

Acts in Bonafide Competition Exempted

The Explanation to section 4(2) (a) exempts such unfair or discriminatory trading conditions or unfair or discriminatory prices or predatory pricing referred to in section 4(2) (a) (i) and (ii), setting out those practices as an abuse of dominant position, from being considered as an abuse of a dominant position, when there are adopted to meet competition. The basis for this contention is that when enterprises are engaged in bonafide

\textsuperscript{235} [1995] 84 Comp Cas 615 [MRTPC]
competition and readjusting their trading strategies to meet the terms of offers of competitors in a market as it evolves, there is no ‘abuse’ by any of the enterprises. They are only responding to the market situation. for example, if prices fall in the market, for reasons not the action of an enterprise, a reduction in the price by that enterprise to match its prices or the new prices cannot be termed unfair pricing or predatory pricing. Actually, this explanation is a defense that may be urged by one charged with having abused a dominant position under section 4(2) (a). It should be noted that it is not available in the case of allegations of practices set out in section 4(2) (b) to (e).

**Remedies for Abuse of Dominance under Indian Competition Law**

Section 19(1) of the Competition Act 2002 provides that the Commission may either on its own motion or on the receipt of a complaint, accompanies by such fee as may be determined by regulations, from any person, consumer or their association or trade association or the reference made by the Central Government or a statutory authority, inquire into any alleged contravention of the provisions contained in section 3(1) or 4(1). The powers of the Commission while enquiring into the case of abuse of dominant position and the factors are to be taken into consideration, as set out in section 19(4) to (7) of the Act. Under section 27 of the Act, where after the inquiry the commission finds that any

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**Section 4 (b) limits or restricts,---**

- a) Production of goods or provision of services or market therefore; or
- b) Technical or scientific development relating to goods or services to prejudice of consumers; or
- c) Indulges in practice or practices resulting in denial of market access [in any manner]
- 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;

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**Section 19(4) says the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely**

- a) Market share of the enterprise;
- b) Size and resources of the enterprise;
- c) Size and importance of the competitors;
- d) Economic power of the enterprise including commercial advantage over competitors;
- e) Vertical integration of the enterprises or sale or services network of such enterprises;
- f) Dependence of consumers on the enterprise;
- g) 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;
- h) Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of the entry, marketing entry barriers, technical entry barriers, economics of scale, high cost of substitutable goods or service for consumers;
agreement referred to in section 3 or action of an enterprise in a dominant position, is in
contravention of section 3 or section 4, as the case may be, it shall pass all or any of the
following orders, namely;

a) Direct any enterprise or association of enterprises or person or association of
persons, as the case may be, involved in such agreement, or abuse of dominant
position to discontinue and not to re-enter such agreement or discontinue such
abuse of dominant position, as the case may be;

b) Impose such penalty, as it may deem fit which shall be not more than ten per cent
of the average of the turnover for the last three preceding financial years, upon each
of such person or enterprises which are parties to such agreements or abuse.²³⁸

c) [omitted by Competition (Amendment) Act, 2007]

²³⁸ The Competition (Amendment) Act of 2007 “provides that in case any agreement referred to in section 3 has been entered into by cartel, the Commission shall impose upon in that 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 the average of the turnover of the cartel for the last preceding three financial years, whichever is higher”.

i) Countervailing buying power;

j) Market structure and size of market

k) Social obligations and social costs;

l) 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;

m) Any other factors which the commission may considered relevant for the inquiry.

5) For determining whether a market constitutes a “relevant market” for the purposes of this Act, the
Commission shall have due regard to the “relevant geographic market” and “relevant product market “.

6) The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of
the following factors, namely;—

(a) Regulatory trade barriers;

(b) Local specification requirements;

(c) National procurement policies;

(d) Adequate distribution facilities;

(e) Transport costs;

(f) Language;

(g) Consumers preference;

(h) Need for secure or regular suppliers or rapid after-sales services;

7) The Commission shall, while determining the “relevant product market”, have due regard to all or any of the
following factors, namely;—

(a) Physical characteristic 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.
d) Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

e) Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of the costs, if any:

f) Omitted by Competition (Amendment) Act, 2007

g) Pass such other as it may deem fit.

Furthermore, the Commission is empowered to grant interim relief in the form of temporary injunction. In almost all the jurisdictions, injunction, compensation and division of the enterprise are the common remedies available to the plaintiff in case of abuse of dominant position by the defendant.

**Conclusion**

The abuse of dominant position is another way of interfering with competition in the market place. In simple terms it refers to the conduct of the enterprise that enjoys a dominant position, as defined in the Act. In substance, dominant position means the position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market. Such an enterprise will be in a position to disregard market forces and unilaterally impose trading conditions, fix prices, etc. the abuse may result in the restriction of competition, or the elimination of effective competition. Some of the various forms of abuse are: price fixing, imposing discriminatory pricing, predatory pricing, limiting supply of goods or services, denial of market access, etc.

Abuse of dominant position is an integral part of the mandate of modern competition authorities. For developing country competition authorities who are starting Competition Law enforcement, as in the case of India, it is advisable to deal with “abuse of dominance” on a priority. The question is relevant in the context of India where the Competition Commission of India has not yet started enforcement action yet. Abuse of Dominance cases should be taken up by competition authorities only after they have had experience in other areas of enforcement viz. anti-competitive agreement and mergers. However, new competition authorities which invariably are in developing countries where infrastructure development is a priority. Abuse of dominance remains a thrust area in view of the close
link between essential facilities and infrastructure facilities. Infrastructure facilities tend to qualify as essential facilities for the application of competition Law in view of the lumpy investment involved and the long gestation lag in creating infrastructure. Besides, Dominance is to be determined by the Commission based on a number of factors which are either structural or behavioral in nature. The Act provides an exclusive list of abuses. It also takes cognizance of abuse by a “group “having dominant position in the relevant market. However, the relevant provision in the India law is distinct from the concept of “collective dominance “in EU law. The Indian law provides for effective remedies for abuse of dominant position, including the power for the Commission to order “division s of enterprise” abusing dominant position.
Part C : Competition Law and Combination

The third element of modern law is merger/ combination. The Law of competition in India seeks to ensure fair competition by prohibiting trade practices which cause appreciable effect on competition in markets within India. Here in this chapter the researcher makes an attempt to discuss about the term Combination, the legal framework of competition law to deal effectively with the aspect of mergers /Combination and their effect on competition. The international mergers, having its impact on the Indian market and economy. The provisions contained in the Act to deal effectively with the anti competitive mergers and the role of Competition regulatory Authorities.

Introduction

An entrepreneur may grow its business either by internal expansion or by external expansion. In the case of internal expansion, a firm grows gradually over time in the normal course of the business, through acquisition of new assets, replacement of the technologically obsolete equipments and the establishment of new lines of products. But in external expansion, a firm acquires a running business and grows overnight through corporate combinations. These combinations are in the form of mergers, acquisitions, amalgamations and takeovers and have now become important features of corporate restructuring. They have been playing an important role in the external growth of a number of leading companies the world over. They have become popular because of the enhanced competition, breaking of trade barriers, free flow of capital across countries and globalization of businesses. In the wake of economic reforms, Indian industries have also started restructuring their operations around their core business activities through acquisition and takeovers because of their increasing exposure to competition both domestically and internationally. The Competition law is a modern piece of economic legislation. Worldwide competition laws have three contours, as discussed in the earlier chapters, i.e. Anti-competitive agreements, Abuse of dominance and regulation of Mergers and Acquisitions. Indian law has all the essential ingredients of anti-competitive practices provisions. Anti-competitive agreements and abuse of dominance are intended to be prohibited by orders of the commission, whereas, combination (merger) are to be regulated
by orders. This distinction in law indicates the intention of the legislators. Competition ensures economic growth, more economic opportunities for business to compete with their overseas counterparts and consumer’s welfare ultimately. Many a times an anti-competitive combinations harm markets and subvert the interest of the consumers. In amicable and consensual mergers the parties have unanimity of interests and any competition authority would really have not much to do but to allow such proposals. In India the combination is anti competitive if it creates a dominant enterprise that subsequently abuses its dominance. Concentration of economic power occurs inter alia, through takeovers and mergers. A Merger involves two separate undertaking merging entirely into a new entity. A Merger, broadly speaking, a transaction that brings about a change in control of different business entities enabling one business entity effectively to control a significant part of the assets or decision – making process of another. In business world joining of ownership may take many different forms, and may be either amicable and consensual or unwelcome and hostile. In India mergers are regulated under the Companies Act and also under the SEBI Act. With the enactment of the Competition Act 2002, mergers also come within the ambit of this legislation. The Combination is an umbrella term used in the Competition Act 2002, which includes every kind of mergers, amalgamations and acquisitions\textsuperscript{239} under its ambit. The Competition Act has laid emphasis on regulating these combinations in order to prevent any anti-competitive practices. The Section 5 of the Act defines combination of enterprises as formed through acquisition, merger or amalgamation. The Combination s has been defined to mean:

(a) The Acquisition of control ,shares voting rights or assets of one or more enterprises\textsuperscript{240} by one or more persons\textsuperscript{241}; or

\textsuperscript{239} Section 2(a) acquisition means ,directly or indirectly , acquiring or agreeing to acquire :
(i) Shares , voting rights or assets of an enterprise; or
(ii) Control over management or control over assets of any enterprise.

\textsuperscript{240} Section 2(h) – enterprise means a person or a department of the Government engaged in the business activity of production, distribution, acquisition or control of articles or goods or provisions of services of any kind or in investment or in the business of acquiring, holding, underwriting or dealing with the 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 enterprises is located or at a different place or 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
(b) Acquiring the control by a person over an enterprise where such person has control over another enterprise engaged production, distribution or trading of similar or identical or substitutable good or provision of similar or identical or substitutable service; or

(c) Merger or amalgamation between or amongst the enterprises provided that the resultant entity/ies breach the stipulated thresholds

The test of the legality of merger is based on the size of assets and turnover, and not the market share and is not derived from the provision of dominance as defined in explanation (a) of section 4 but is phrased in the terms of measures of the actual or potential effect on the competition. Further, Section 6 deals with regulation of combinations. It contains a prohibition against a combination which causes or is likely to cause an appreciable adverse effect on combinations. In a merger, the legal effect of which is that the merging company will lose its corporate status as a company and will be owned by the company with which it has merged, the merging company autonomy is lost in its entirely to the merged company. The control of an enterprise can be acquired through the modes such as purchase of securities, assets or contract, the loss of autonomy of the other company need not be total or as perceptible. Yet, the acquiring company would be in a position to decide what the other company should do, even though that enterprise continues to be a separate legal entity. The objective of any competition law is to ensure that persons or enterprises obtaining this autonomy through merger or acquisition do not impair the structure of competition. The

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241 Section 2(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, India or outside India; (vi) any corporation established by or under any Central or State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956; (vii) any body corporate incorporated under any law relating to cooperative societies; (viii) a co-operative society registered under any law relating to co-operative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses.

242 Section 2(x) Trade means any trade, business, industry, profession or occupation relating to production, supply, distribution storage or control of goods and includes any provision of any services.

243 Some merger control regimes for example Kenya require notification of all mergers regardless of size or charter.

244 Explanation a to section 5 – Control includes controlling the affairs or management by

(i) One or more enterprises, either jointly or singly, over another group or enterprise;

(ii) One or more groups, either jointly or singly, over another group or enterprise.
Act uses a composite expression ‘combination’ to cover these modes, viz. merger, acquisition of shares, assets, acquiring control of an enterprise. In India, the legislative provisions governing mergers of companies are contained in section 390 to section 396A of the Companies Act 1956. Section 5 of the Competition Act deals with the aspect of combination and merger is included within the ambit of combination. Particularly, section 5 (c) of the Competition Act describes the mode in which a combination may be brought through a merger. Merger is a business combination. In merger, the identity of one or more is lost and the result is a single enterprise. In take over the identity is not lost. It involves the purchase of all or sufficient amount of shares of another enterprise to enable it to exercise control. Whereas, amalgamation is a blending of two or more existing enterprises into one enterprise, the shareholders of each blending company become substantially the shareholders in a company which is to carry on the blended business. There may be amalgamation either by the transfer of the two or more enterprises to a new company or by the transfer of one or more enterprise to an existing enterprise. Broadly amalgamation is a merger of two or more enterprises. Narrowly, it means, the formation of a new company. If the companies are simply merged with each other, it is simply called merger. Merger or an amalgamation of enterprises is a combination which is forbidden under the law if it causes or likely to cause an appreciable adverse effect on the competition within the relevant market in India.

**Advantages of Merger**

The merger is sought to be beneficial for variety of reasons, most of the mergers are pro-competitive. It is an inexpensive way of entering into a new activity or a new market; it gives the opportunity to use the spare capacity in the acquiring company with the assets of the other company. Where the companies are under the control of the same group, a merger may be seen as a means of affecting economics in making a company just a unit of another company. Further, a merger may also help rationalizing of operations or advance synergies in management; and also provides a means for tax saving in that the losses of the transferor company may be set off against the profits of the remaining company. Another advantage of
the merger would be saving in stamp duty on the sale of large assets by one company to another. Moreover, the following are some advantages of mergers:

- Accelerating a company's growth, particularly when its internal growth is constrained due to paucity of resources. Internal growth requires that a company should develop its operating facilities—manufacturing, research, marketing, etc. But, lack or inadequacy of resources and time needed for internal development may constrain a company's pace of growth. Hence, a company can acquire production facilities as well as other resources from outside through mergers and acquisitions. Specially, for entering in new products/markets, the company may lack technical skills and may require special marketing skills and a wide distribution network to access different segments of markets. The company can acquire existing company or companies with requisite infrastructure and skills and grow quickly.

- Enhancing profitability because a combination of two or more companies may result in more than average profitability due to cost reduction and efficient utilization of resources.

- Diversifying the risks of the company, particularly when it acquires those businesses whose income streams are not correlated. Diversification implies growth through the combination of firms in unrelated businesses. It results in reduction of total risks through substantial reduction of cyclicality of operations. The combination of management and other systems strengthen the capacity of the combined firm to withstand the severity of the unforeseen economic factors which could otherwise endanger the survival of the individual companies.

- A merger may result in financial synergy and benefits for the firm in many ways:

  - By eliminating financial constraints
  - By enhancing debt capacity. This is because a merger of two companies can bring stability of cash flows which in turn reduces the risk of insolvency and enhances the capacity of the new entity to service a larger amount of debt
  - By lowering the financial costs. This is because due to financial stability, the merged firm is able to borrow at a lower rate of interest.
Limiting the severity of competition by increasing the company's market power. A merger can increase the market share of the merged firm. This improves the profitability of the firm due to economies of scale. The bargaining power of the firm vis-à-vis labour, suppliers and buyers is also enhanced. The merged firm can exploit technological breakthroughs against obsolescence and price wars.

Merger Analysis in India

The basic issues raises from the above mentioned are whether Mergers are anti-competitive or pro-competitive? It is imperative to understand the impact of merger on competition in the relevant market. One should remember that competition means better choice and lower prices for the consumers. Merger among small players to give competition to large sized players is always pro-competitive and efficiency enhancing for such marginal players. But a merger between a large and a small player, as happens in the airlines sector in India, does raise competition concerns as it makes an already big player bigger and such merged entity is likely to have a tendency to abuse its dominance for increasing its profits by indulging in any of the anti-competitive practices, such as imposing unfair or discriminatory conditions, limiting or restricting services to the selected few, denying market access to other players or to even enter into other product or services markets through their dominant position in one product or services market. For example, the business class travelers in Kingfisher airlines will be routinely served only kingfisher beers. All these business practices which may be better known in the corporate world as “tricks of trade” are prohibited under the Competition Act, 2002, and are against the spirit of competition, which is the backbone of a free market economy. Furthermore, The provision relating to analysis of merger contained in the MRTP Act were deleted from the Act vide the MRTP (Amendment ) Act 1991 and hence there is nothing in the Act which gave the power s to the MRTP commission to view a merger and analyses whether the same can be anti-competitive before the companies are actually merged. On the other hand the Competition Act 2002, the aspect of pre-notification has been mandatory vide the competition (Amendment) Act 2007 and competition commission is fully empowered to view a proposed merger and block the same if the proposed effect is viewed to be anti-competitive. It is to be noted that, Merger analysis
differs from the analysis of anti-competitive agreements or abuse of dominance in an important ways; in the case of mergers, the authority is trying to look into future performance or behavior rather than into existing or past behavior. The exercise is similar to that for determining the relevant market in case of abuse of dominant position, with however, one point of difference according to some authorities. Unlike in the analysis of abuse of dominance, the inquiry relating to the competitive effects of mergers is forward looking and the main concerns is whether the merger will cause the price or rise above the prevailing level, through that level may be above the competitive level. Thus according to these authorities, the cellophane fallacy, which is pertinent in the case of abuse of dominance, is not relevant in merger case\textsuperscript{245}. Also, in the case of mergers, timely completion of the inquiry becomes important so as not to unnecessarily hold up a proposed merger. Many competition laws, therefore, provide for a limit for the completion of a merger inquiry; if not completed in that time, the law may provide that the merger is deemed approved. Competition authorities issues merger guidelines describing the process they will use in analyzing the merger. Under the Companies Act 1956, a scheme of merger, or amalgamation as it is referred to in the Act, is an arrangement between a company and usually, as its members by which the assets and liabilities of one company are transferred to the other company and if the scheme is approved by the prescribed majority of the members of both companies, the court may sanction the scheme of merger. Amalgamation in relation to companies means the merger of one or more companies with another company or merger of two or more companies to form one company. Two companies may join to form a new company. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its identity. In India, under Companies Act, merger between Companies essentially tries to protect the interest of the secured creditors and in the SEBI Act it tries to protect the interest of the investors. Apart from protecting the interest of private parties, the objectives of them is different or mutually exclusive. In the Competition Act, the objectives are much broader. The Act aims at protecting the appreciable adverse effect on trade –related competition in the relevant market in India. So, though the Companies Act and SEBI Act, both are

\textsuperscript{245} See Ramappa T, PP 193.
mutually exclusive, yet aims to protect the interest of private individuals, whereas under Competition Act, the impact of combination directly affects the market and the players in the market including the ‘consumers’. Therefore, we can rightly say that, apart from the fact that all these legislations are mutually exclusive, the companies Act and SEBI Act are the sub-sets of Competition Act in so far as legal scrutiny of mergers are concerned. Interestingly, The Competition Act does not define anti –competitive combination with reference to market share: section 5 thereof defines it as ‘accusation of one or more enterprises by one or more persons or merger or amalgamation of enterprises, with reference to threshold criteria of the value of assets and turnover of the enterprise involved’.

To constitute anti-competitive combination, section 5 of the Act has laid down certain requirements including a threshold requirement based on assets and turnover of the combing enterprises or groups. The regulation of Combinations is governed under section 5 of the Competition Act. The combination results in concentration of economic power through;

i. Section 5 (a) --- Acquisition of an enterprise by another enterprise.

ii. Section 5(b) --- Acquisition of control over an enterprise by a person having control over another enterprise engaged in similar or identical or substitutable goods or services.

iii. Section 5 (c) --- Merger or amalgamation of enterprises.

Section 5 of the Competition Act 2002, says: “the Acquisition of one or more enterprises by one or more persons or mergers or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if;

(a) Any acquisition where:

(A) The parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or being acquired jointly have: either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or 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]

(B) The group, to which the enterprises 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: either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or 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 the enterprise over which control has been acquired along with the enterprise over which the acquired 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

(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.

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

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

(ii) In India or outside India, in aggregate, the assets of the value of more than five hundred millions 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;

(d) 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 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; The M&A's that fall below these thresholds are not considered in the expression combinations and are outside the ambit of the Act.

**When Combinations / Mergers are considered as anti-competitive practices?**

Mergers attract the attentions of the competition policy-makers because they generally have implications for the concentration of, and ability to use market power, which in turn, can impact negatively upon competition. Market power describes the ability of a business entity to act unconstrained by rivals and potential rivals in both price and non-price conduct. A Merger is bad, only if creates a dominant enterprise that subsequently abuses its dominance. To some extent the issue is analogous to that of agreements among enterprises and also overlaps with the issues of dominance. The reason that such a provision exits in most laws is to pre-empt the potential abuse of dominance where it is probable, as
subsequent unbundling can be both difficult and socially costly. Thus, the general principle, in keeping with the overall goal, is that mergers should be challenged only if they reduce or harm competition and adversely affect welfare. It is worth to note that, the Mergers impact upon the concentration and use of the market power lead to;

- A reduction in the number of business entities operating in a market; and
- An increase in the market share controlled by the merged entity.

Thus, the principle for exercising merger control is that, if a merger is likely to give rise to market power, it is better to prevent this from happening than to control the exercise of market power after the merger has taken place, i.e. prevention is better than cure. Also, the social and economic cost of demerging the firms after the merger is also heavy and thus, not an easy option for the Competition Authorities. Interestingly, the test of size and or the turnover has been laid down as a guide for the presumption about the illegality of the combination under section 6(1) of the Competition Act and also for investigation by Competition Commission of India for exemption under section 6(2) of the Competition Act. Section 6 of the Competition Act prohibits a person or an enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Such a combination is void. A Combination leads to adverse effect only if it creates a dominant enterprise which is likely to abuse its dominance. The generally accepted proposition is that market dominance need not necessarily lead to abuse. But when the companies are too big, they can indulge in abuse and exploit the consumer through market manipulation. Bigness has its own advantages. Firstly it reduces the cost of production and distribution and secondly, it permits a larger expenditure on research. For examples in Pharmaceuticals, huge amount have to be invested. Certain combinations are not void. Provision of section 6 (1) is not applicable to public financial institutions, foreign institution investor, bank or venture

\[246\] Foreign institutional investor is defined under section 115 AD and section 10(23FB) under the Income tax Act, 1961. The section defines “foreign institutional investor” to mean such investor as the Central Government may, by notification in the Official Gazette specify in this behalf. (“Foreign Institutional Investor “ means an institution established or incorporated outside India which proposes to make investment in India in securities; provided that a domestic assets management company or domestic portfolio manager who manages funds raised or collected or
Factor for determining Combinations

After the monetary threshold limits have been crossed by a combination, under section 5(a) or (b) or (c), the next test to be applied is to see whether that combination is one which causes or is likely to cause an appreciable adverse effect on competition within relevant market in India. It is for the party claiming so to establish that the assailed combination does not cause “an appreciable adverse effect on competition within the relevant market in India’. The Section 6 (1) declares as void a combination that causes or likely to cause an appreciable adverse effect on competition within the relevant market in India. The objective of the regulation is the maintenance of competition and preservation of the competitive structure of the relevant market in India. A combination which adversely affects or is likely to affect it is void. Thus, in order to assess whether a combination shall have that effect, it is necessary to determine that---

- the combination has acquired a market power,
- as a result of which the competition is, or likely to be, affected adversely and appreciably within the relevant market.

Most importantly, there should be causal link between the acquiring of the market power and a significant detrimental effect on competition. The first step in examining whether a combination has any adverse effect on competition within the relevant market in India is to

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brought from outside India for investment in India on behalf of a sub-account, shall be deemed to be a Foreign Institutional investor.

Section 10(23FB) clause (b) defines the expression "venture capital fund" to mean such fund:

i) Operating under a trust deed registered under the provisions of the Registration Act, 1908 or operating as a venture capital fund scheme made by the Unit Trust of India established under the Unit Trust of India Act, 1963;

ii) Which has been granted a certificate of registration under the Securities and Exchange Board of India Act, 1992, and regulations made there under;

iii) Which fulfils the conditions as may be specified, with the approval of the Central Government, by the Securities and Exchange Board of India, by notification in the Official Gazette, in this behalf.
define the relevant market\textsuperscript{248}. The relevant market would be the geographic market\textsuperscript{249} or the market for product or service\textsuperscript{250}. The object of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behavior and of preventing them from behaving independently of an effective competitive pressure. It is from this perspective, that the market definition makes it possible, and also to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance. Stating that firms are subject to three main sources of competitive constrained, viz, demand substitutability, supply substitutability and potential competition, it continues: basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of product/services and geographic location of suppliers.

**Inquiry into Combination by Commission**

The issue of whether a combination is likely to cause or has actually caused an appreciable adverse effect on competition within relevant market in India is a question of fact to be determined in each case. This would depend upon a number of factors, the principle ones being the structure of the market, viz, and the suppliers, their shares of the market, their relative strengths, and the actual conditions of competition in the relevant market. Competition authorities generally have the responsibility to intervene when they expect a merger to have an anti-competitive outcome. Although certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anti-competitive that each is illegal per se without inquiry into the harm it has actually caused, other combinations such as mergers, joint ventures and various vertical agreements, hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively and thus, are judged under a rule of reason i.e., an inquiry into market power and market structure designed to assess the combination’s actual effect. Whereas section 23 of the MRTP Act 1969, dealt with “Concentration of Economic Power” which provides for the

\textsuperscript{248} See section 2(r) of the Act.
\textsuperscript{249} See section 2(s) of the Act
\textsuperscript{250} See section 2(t) of the Act.
regulation of Mergers. Under that section what was necessary to be examined, by the Central Government in considering a proposal for merger and also whether the proposed merger would lead to a concentration of economic power. The said section also provided for regulating takeovers of undertakings. Further under section 30A to 30G, was regarding the acquisition of and transfer of shares above the prescribed threshold levels by individuals, bodies corporate that formed a group, or were under the same management. The Central Government s previous approval was necessary for the acquisition or transfer of shares by the entities. Though reference to the Commission and inquiry by the MRTP Commission was a pre-requisite before any Order can be passed by the Central Government, it was not obligatory on the part of the Central Government that the recommendations made by the Commission are accepted. However the entire, chapter contained the above said sections were omitted in 1991, with the result that mergers and Acquisition of shares became subject only to the applicable provisions of the Companies Act, 1956. The Commission, ever since till the repeal does not have statutory powers to investigate into any anti-competitive combination within India. Interestingly, under the New Competition Law, the Act provides that the Commission can initiate inquiry upon its knowledge, on information received or a reference received from the Central Government, State Government or a statutory authority. The filters available in law before the notification of merger can be taken up for investigation and enquiry by CCI. The filters are as follows;

a) If the results breaches the statutory thresholds;
b) Prima facie causation of appreciable adverse effect on competition in the relevant product and geographic market within India. Factors relating to ascertaining appreciable adverse effect on competition has been statutorily provided in the law thereby, minimizing arbitrariness.
c) Local nexus or “de-minimis” thresholds have been provided under the law for overseas transactions having adverse effect in India .cross- border transactions which do not

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251 Section 2(r ), (s ), (t) read with section 19 (5), (6) and (7)
252 Section 20(4)
exceed the statutory “de minimis’ threshold shall be exempted from being inquired into by the Commission.\(^{253}\)

d) Government-aided enterprises are not exempted from being scrutinized thereby ensuring a level-playing field between private and public sector competing enterprises.\(^{254}\)

The key to the offence is the determination of whether a combination has caused or is likely to cause an appreciable adverse effect on competition within India.

**Domestic nexus**

An acquisition or merger or amalgamation would be governed under the third situation, if it constitutes a ‘combination’ by exceeding certain prescribed threshold limits. The limits determine the trigger for reporting the proposed combination to the commission. The amendment 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. 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 India nexus. Incidentally, the original limits continue to apply under the Competition Act to acquisitions of enterprises dealing in similar goods, and to mergers and amalgamations. A corresponding amendment in the limits has not been made for those cases. The rationale for this is not very clear because it would have been better to restrict the applicability to all cases of combinations. These merger regulation provisions, in particular, the mandatory notification requirement and the lack of a ‘domestic nexus’ criterion for foreign mergers have been sore points for the domestic as well as international business communities. It has been argued that the mandatory notification system will require notification of foreign mergers with little or no nexus to India, and add to the cost of doing business as well as strain the resources of the CCI. The amendment Act has sought to address this concern by providing for a domestic nexus test. Accordingly, the thresholds for worldwide turnover or assets have been amended, so that only those

\(^{253}\) Section 5 ---post 2007 amendments to the CA

\(^{254}\) Section 2 (h)read with 2(l)
combinations where at least Rs.500 crore of the combined worldwide assets or at least Rs.1500 crores of combined worldwide turnover of the merging parties is in India, would come under the purview of the Act. However, this amendment has not been well received in business and legal circles.

**Regulation of Combinations in India**

The task of determining the adverse effect of combination as stated above lies with the Competition Commission of India. The competition Law enumerates certain wrongs which are considered to be restraints on free competition in India. A combination leads to adverse effect only if it creates a dominant enterprise which is likely to abuse its dominance. When the companies are big, they can indulge in abuse and exploit the consumers through market manipulation. The law holds such combination void. For exemption, a combination is required to be notified to the Competition commission of India for its approval. As mentioned above, the regulation of Combination in India is provided under section 6 of the Act. Under the Act of 2007, it has been made mandatory for the companies to notify before the Competition Commission of India their scheme of merger. Section 6(2), as amended by Competition (Amendment) Act 2007 read as: ‘subject to the provision contained in sub –section (1), any person or enterprice, 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 acquisition of control referred to in clause (b) of that section;

Section 6 (2A) says that, 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.’ The changes that have been brought vide the amendment is that___
1. Prior intimation to the Commission, of any combination amongst companies, group or persons, has been made mandatory. However, such a intimation of such a combination has to be done if the same triggers the threshold limit as provided under section 5 of the Companies Act.

2. Once the intimation is received by the Commission, it will do all that necessary and give its ruling within a maximum period of 210 days. In fact, the time required would be much less since the limit of 210 days would also take into account a situation where the Commission orders an enquiry. Where no enquiry is found to be necessary, the time taken would be less than half of this limit.

The Competition Commission of India has also promulgated a draft of the Competition Commission (Combination) Regulations which seeks to govern combinations. Further, on the failure on the part of the Commission to pass its order within the prescribed period of 210 after receiving the proposal, combination is deemed to be approved. Though the Act makes an mandatory notification but it does not specify any mannerism of such notification. The proposes notice should be either in Form 1 or Form 2 and the said notice for the combination should be filed with CCI within 30 days of the date of execution of any agreement or other document for acquisition of voting rights or acquisition of control.

It is noteworthy that the Act limits the powers of the Commission to look into the combinations after the expiry of the one year from the date on which such combination has take effect. The proviso to section 20 of the Act provides Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect. As such:

A) Proviso to section 20(1) has to be interpreted in terms of the thresholds provided under section 5(a), (b) and (c). The Act does not provide for retrospective operation, in regard to such combinations which had been entered into prior to the coming into force of the Act.

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255 In other words, an enquiry may be instituted only on the combination comes to the knowledge/information of the Commission within one year of its coming into “combination”
B) Section 20 provides for enquiry into whether the combination “has caused or is likely to cause appreciable averse effect of combination”.

As such, there is an ambiguous situation created by section 20 which may lead to conflicting judicial interpretations in light of the legislative intent and language of section 20 regarding a combination entered into prior to the coming into effect of the Act, which may seem to have caused an appreciable adverse effect on competition. If the Commission does not get to know about the combination within one year, it appears that the Commission would not be able to look into the same\textsuperscript{256}. In this context, it remains to be seen how this provision will be interpreted and implemented by the statutory authorities and Courts of law. This is particularly so because, prima facie, the escape route if accepted would result in setting into motion a perverse incentive in favour of defaulters disclosure/reporting requirement, which threatens to frustrate the law. It should be noted that, Under the Indian Competition Act, section 20(4) of the Act empowers the Competition Commission and sets out the factors to be taken into consideration in determining whether a combination would have effect of, or is likely to have an appreciable adverse effect. The factors contained in this subsection of section 20 contain both positive and negative factors and the last factor specifically states, “whether the benefits of the combination outweigh the adverse impact of the Combination, if any”. This recognizes that a merger can have adverse effects but it could also have positive gains for the economy such as economies of scale and increased efficiency. The Section 20(4) of the Competition Act read as: “for the purpose 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 shall have due regard to all or any of the following factors, namely:

(a) actual and potential level of competition through imports in the market;
(b) Extent of barriers to entry into the market;

\textsuperscript{256} Though the provision has been a statute book for six years, the language of proviso to Section 20(1) does not provide for such retrospective operation of the thresholds levels under section 5. It is settled principle of interpretation of statute that, the provisions which touch a right in existence at the time of passing of statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Further, unless clear and unambiguous intention is indicated by the Legislature by adopted suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected.
Thus, the competitive effect of the merger rests on the understanding of the competitive constraints under which the firm operates and one has to analyze by using various mechanisms whether the merger would result in competitive harm. The ultimate purpose is to determine whether the merger is likely to create or enhance market power or to facilitate its exercise. It is to be noted that while undergoing an appraisal of the merger, only merger sector efficiencies should be considered, i.e. only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anti-competitive effects.

Hence, as a thumb rule, there should be laid down certain parameters for the Competition Commission to decide as to whether the merger is against competition. The factors listed in section 20(4) contain both negative and positive factors and the last factor specifically states ‘whether the benefits of the combination outweigh the adverse impact of the combination, if any’. This recognizes that a merger can have adverse effects, but it could also have
positive gains for the economy such as economies of scale and increased efficiency. There is thus a rule of reason approach in inquiring into a combination. Factors similar to those listed in section 20(4) are considered by competition authorizes in many jurisdictions in appraising a merger.

**Intimation of Combination to Competition Regulatory Authority**

There is a mandatory requirement that CCI should be pre-notified about every kind of combination, which is provided under section 6(2) of the Competition Act 2002. Parties to the proposed merger, acquisition or combination, as the case may be, must determine as to whether the proposed transaction triggers the applicable threshold limits as prescribed under the laws of the countries depending upon the size of the parties or the turnover. In case wherein the applicable threshold limits are triggered, there ought to be filed before the applicable competition authorities the scheme of the proposed combination before the competition commission which would look into the aspect of competitive concerns of the proposed merger taking into account the merger specific efficiencies and once the applicable authorities give the permission, the scheme of the merger/combination is to be carried on.\(^{257}\) Under the aegis of the Competition Act, it was an option left with the Indian Companies to notify to the CCI if the merger triggers the applicable threshold limits to seek for approval. Section 6(2) of the unamended Competition Act used the word "may" instead of "shall". However, there have been necessary changes been carried out under the Competition Act by the Competition (Amendment) Act 2007. Under the Act, it has been made mandatory for the companies to notify before the Competition Commission of India their scheme of merger. Section 6(2) as amended by the Competition (Amendment) Act 2007 says; “subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into 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”:

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\(^{257}\) Ibid page 5
a. approval of the proposed 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 Accusation referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section; and

Further, clause (2A) says --- 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. Thus CCI has promulgated a draft of the Competition Commission Regulations which seeks to govern combinations. Under the Competition (Amendment) Act 2007 which received the Presidential assents towards the end of the 2007 brought significant changes to the Competition Law regime in India. The most noteworthy changes proposed by the Amendment Act was the introduction of a mandatory notification process for persons undertaking combinations above prescribed threshold limits. Further introducing of waiting period of 210 days within which the CCI is required to pass its order with respect to the notice received, failing which, the proposed combination is deemed to be approved. The Regulations provides for certain kinds of combination that are excluded from the ambit of combinations that are likely to have an appreciable impact on competition in India. The test whether a merger is to be permitted or not should be based, on the following:

- The expected impact of the merger on market power and competition in the relevant market.
- Given the size and growth of the market and the presence or absence of entry barriers, an assessment of how the market is expected to evolve.
- Do the markets of the merging entities overlap? There should be the limited cause for concern in case they do not, unless one of the firms has market power.
- Is the market susceptible to collusive behavior?

In view of this, it is extremely important that the law regarding mergers be very carefully framed and the provisions regarding prohibition of mergers be used very sparingly. This is
particularly important at the current stage of India’s corporate development. Relative to the size of major international companies, Indian firms are still small. With the opening of trade and Foreign Direct Investment, Indian firms need to go through a period of consolidation in order to be competitive. Furthermore, Combinations are usually divided into three broad categories; Horizontal merger, vertical and Conglomerate mergers. It should be remembered that whatever may be the kind of merger, whether Horizontal, Vertical, Conglomerate or Joint Venture must be tested by the standard of section 6(1), that is whether it causes or likely to cause an appreciable adverse effect on competition within relevant market in India.

**Combination: Horizontal merger**

Horizontal mergers are between enterprises that are existing or potential competitors, being at the same level in the supply chain, e.g., two manufactures, two distributors, or two retailers of the same product. Horizontal effects occur where a merger takes place between competitors in the same product and geographic markets and at the same level of the production or distribution cycle. As a general proposition horizontal mergers present greater danger to competition than vertical ones, in the same way that horizontal agreements are treated more strictly than vertical agreements; horizontal mergers may be scrutinized both for their ‘unilateral’ effects and for their ‘coordinated effects’, concepts that are not free from difficulty. Competition authorities are most concerned with horizontal mergers since it has the potential of reducing competition where as vertical merger may not have the potential for reducing competition. A merger may lead to a monopoly (in an extreme case) or otherwise create an enterprise with substantial or substantially increased market power. The enterprise can then overcharge or otherwise unilaterally abuse its dominant position or a merger may decrease the number of competing enterprise and make it easier for the remaining enterprises to coordinate their behavior in terms of price, quantity, or quality i.e., a cartel–type arrangement.
Combination: Vertical merger

Vertical merger occurs between firms that operate at different levels of the market; a firm may acquire control of another firm further up or further down the distribution chain; the former is known as ‘backward integration’ and the latter as ‘forward integration’. In other words vertical mergers are those between firms that operate at different but complementary levels in the chain of production or distribution of the same final product. In a vertical merger, pre-transaction, the firms are located at different stages of production or distribution, with one producing an input used by the other. Post-merger, the result is vertical integration and a single firm now performs both stages of production. Vertical mergers can potentially generate substantial efficiencies and should rarely be a cause for concern. However, in some cases, vertical mergers may give rise to competition issues. The vertically integrated merged entity may be able to constrain the ability of rivals to compete by excluding them from the market or by raising their cost; where such actions harm consumer welfare, they are anti-competitive. A vertical merger can result in an increase in market power because of either a unilateral or a co-ordinate effect. The Raghavan Committee’s report explains vertical mergers affecting competition thus: 258 There could, however, be some specific objections to vertical integration, for example;

- **Fear of foreclosure:** It is supposed that, through vertical integration, a firm can create captive distribution channels. This will foreclose the rival firms from the market, represented by the captive distribution network. This may be a problem, if it threatens competition in general.
- **Entry blocking:** monopolies can have the ability to prevent the entry of firms into the market. Sometimes it is claimed that even competitors can come together to prevent a potential entrant. This is sometimes referred to as collective foreclosure. If through integration, firms are able to internalize different levels of production; artificial barriers to entry could be created. This implies that because of the size of the incumbent, a potential entrant’s capital requirement will be high.

258 See competition Law and Practice, by D.P. Mittal, 2nd edition p. 314, published by Taxmann Allied Services (p) Ltd,
Prize squeezes: vertical mergers and integration internalize the process of production and enable a firm to perhaps reduce costs. This will result in reduction in output prices, which is usually interpreted as a prize squeezes. The law should question only those monopolies resulting from vertical mergers (integration) that lead to output restriction rather than preventing vertical integration.

Combination: Conglomerate mergers

Conglomerate mergers are between enterprises which have neither horizontal nor vertical relationship e.g. between enterprises manufacturing or distributing different products. In other word, it is a form of diversification into a totally unrelated field like a merger between a car manufacturer and a textile firm. The structure of competition in the relevant market does not ostensibly change. It gives the additional financial strength to the parties concerned. A considerable increase in the financial strength of the combined enterprise could provide for a wider scope of action and leverage vis-à-vis competitors or potential competitors of both the acquired and the acquiring enterprise and specially if one or both are in a dominant position of the market power, enabling it to restoring to predatory pricing, raising entry barriers, and eliminating potential competition. Though conglomerate mergers do not result in an increase of market power, they are objected on many grounds, such as follows (as pointed out by Raghavan Committee Report):

- They create deep pocket which enables firms to devastate the rivals;
- Lower costs below the marginal cost of the industry;
- Raise barriers to entry;
- Engage in reciprocal dealing to the disadvantage of the rivals;
- Eliminate potential competition.

The objection above mentioned are not of serious nature. The law condemns merger only when they produce anti-competitive effects. Only the last may have that effect, which is really a horizontal rather than the conglomerate aspect of the merger. Elimination of a potential competitor would result in affecting competition adversely as the position of that
competitor “on the edge of the market exerted a beneficial influence on the market’s competitive conditions”.

**Joint Ventures and mergers**

India is witnessing a significant increase of joint ventures, especially in dynamic sectors where innovation costs and, or competitions are on the rise. One such sector is Information Technology. A Joint venture represents a combination of subsets of assets contributed by two (or more) business entities for a specific business purposes and a limited duration. A joint venture is not defined in the Act. There are many ways in which joint ventures could be defined for competition policy purposes. In the Harvard Law Review, Bradley (1982) listed the following conditions that integrate the operations between two or more separate firms in a joint venture:

(a) The enterprise is under joint control of the parent firms, which are not under related control;
(b) Each parent makes a substantial contribution to the joint enterprises;
(c) The enterprise exists as a business entity separate from its parent s; and
(d) The joint venture creates significant new enterprises capability in terms of the new productive capacity, new technology, a new product, or entry into a new market.

In other words, in Joint ventures two or more business join together under a contractual agreement to conduct a specific business enterprise with both parties sharing profits and losses. The venture is for one specific project only, rather than for a continuing business relationship as in a strategic alliance\(^2\)\(^5\)\(^9\). A Joint venture participant continues to exist as separate firms with a joint venture representing a newly created business enterprises. When two companies form a third to engage in a new enterprise, a joint venture is formed. The joint ventures can be organized as Partnership Corporation or any other form of business organization, the participating firms choose to select. The main motive of Joint venture is

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\(^{259}\) Strategic Alliance, -- a partnership with another business in which you combine efforts in a business effort involving anything from getting a better prices for goods by buying in bulk together, to seeking business together, with each of you providing part of the product. The basic idea behind alliance is to minimize risk while maximizing leverage.
to share risks. The Joint ventures are frequently found in traditional sectors such as natural gas, mining, and bidding in on oil contracts and in drilling oil wells, large real estate ventures, in movies, plays and in Television productions. In foreign direct investment, India has a policy requiring the involvement of local partners. This has resulted in the establishment of joint ventures designed to tap local market expertise, thus facilitating foreign direct investment. Joint ventures can have anti and pro-competitive effects. Pro-competitive effects may be seen in activities relating to large scale natural resource exploration, large scale engineering and construction projects and research and development. Anti-competitive effects may arise from easier information exchange and from anti-competitive agreements entered into by the parent entities. Some important anti-competitive effects of joint ventures are:

a) Elimination or reduction of competition between the parents of the joint ventures
b) Reduction of competition from a parent of the joint venture (where a parent would have competed independently but for the joint venture)
c) Anti-competitive market foreclosure because of the vertical relationship between the joint venture and the parents denying potential competitors access to essential inputs.

Joint ventures warrant competition analysis. To hold joint venture unlawful, the same considerations apply as to other combinations. The rule of reason approach is available to the CCI for analyzing the pro-competitive efficiencies and anti-competitive effects of joint venture arrangements. The test is its effect. The test of whether a joint venture might cause an appreciable adverse effect on competition within the relevant market, is not only whether both parent companies would probably have entered the market or whether one would probably have entered alone, but also whether the joint venture eliminate the potential competition of the company that might have stayed at the edge of the market, threatened to enter. The actual adverse effect need not be proved; only reasonable likelihood of that effect is sufficed. Joint ventures stand half way between horizontal agreements and outright mergers. In joint ventures, the operation of the parent firms is partially integrated but not fully. Enterprises may structure joint ventures, which in reality could be mergers or combinations. The procedures and substantive tests applicable to
mergers could and do differ significantly from those applicable to joint ventures not qualifying as mergers. Because of this parents may structure joint ventures in such a way that they do not attract merger regulations. The tendency therefore, will be for the parents to found a joint venture conducive to reaping efficiencies. The usual test in merger control is to examine whether a dominant position is created or strengthened. In the case of a joint venture, the test will be to examine if there is prevention, restriction or distortion of competition. Efficiency is generally pleaded more often in the case of joint ventures rather than in the case of mergers. The CCI would do well to focus more on analysis the economic effects of joint ventures and keep in mind that real efficiency gains are given adequate consideration and weight in the interest of the economic welfare and consumer welfare. It is worth observing that, joint ventures, a scan of statutes of different countries indicates escape valves or loopholes, galore. But, if the establishment of a joint venture leads to efficiencies, to reduce costs through joint production and to reduce marketing costs through joint sale without limiting competition, it is likely to be regarded as a legitimate activity. In that event, the joint venture is not an escape valve. Otherwise it is.

**The Local nexus**

The Competition Act provides for a local nexus, i.e., it makes it mandatory for any combination which is having potential to cause any adverse effect on the Indian market irrespective of the fact that whether the enterprises involved in the combination are non-Indian entities, to be notified to CCI. Therefore, even if the combination is proposed outside India and is completed and approved outside India it has to be notified to the CCI, provided it should be capable of causing any affect on the relevant Indian market. If the quantitative jurisdiction criteria based on the size of the enterprises is fulfilled than notwithstanding whether the principal business of the enterprises is carried outside India, it has to be notified and approved by the CCI. The international combinations may have effect in India if the enterprises involved have subsidiaries in India. For example; A French company acquiring an Brazilian company and if both the companies have their subsidiaries in India having assets above the threshold limit an such a acquisition is expected to have certain adverse effect on the relevant Indian market, than a merger that is between two-non-Indian
companies proposed in a foreign nation and approved by the laws of those nations is mandatory required to be reported to the CCI. The rationale behind the introduction of the local nexus system can be inferred from the Commentary of the UN Model Law on competition: “Merger s, takeovers or other acquisition of control involving transnational corporations should be subjected to some kind of scrutiny in all countries where the corporation operators, since such acquisition of control, irrespective of whether they take place solely within the country or abroad, might have direct or indirect effects on the operations of the other unit of economic activities.”

Many analysts believe that the thresholds for filing mergers are too low. This can be troublesome in the sense that mergers in capital intensive industries such as oil and gas would have inconsequential mergers reviewed. Although a new draft of regulations for the CCI states that a decision must be reached within 30 days of notification (or 60 days depending on the type of form used for notification), the review process can still take up to 210 days. In addition, companies that pass the asset threshold must notify the CCI within 30 days. In the U.S. and European Union, there are no such notification deadlines. Furthermore, the FTC often provides early termination requests that lead to an expedited process for filings that are not suspect. The Competition Act, on the other hand, requires all companies to wait for the CCI’s decision. Another provision in the Competition Act requires an Indian company seeking to acquire a foreign company that has no presence in India, to seek the CCI’s approval. This will have an impact on the current boom in foreign acquisitions by Indian companies. Moreover, foreign companies owning a certain size of assets and not generating sales in India must comply with the notice period requirement as well. This may have an effect on the level of foreign investment in India especially for companies that own manufacturing facilities but do not generate sales in India. The Competition Act also allows for third parties to object to any merger being reviewed by the CCI. In a country that has a civil administration as large as the one in India, there is a significant risk for redundancy and high preparation costs.

260 See paragraph 104, Commentary on UN Model Law on Competition.
Conflicts between competition law and other Indian laws and regulations

The proposed notification of the provision regarding combinations under the Competition Act has the effect of bringing in certain conflict with other Indian laws and regulations, especially the Companies Act, 1956 and the SEBI takeover regulations. The possible areas of conflict between the above mentioned laws are discussed hereunder;

**Competition Act and merger / amalgamation under Companies Act, 1956**

When we use the term “merger”, we are referring to the merging of two companies where one new company will continue to exist. Over a last few decades the mergers have been growing at an ever-increasing pace. Mergers, amalgamation are not limited one particular type of business. The list of past and anticipated mergers covers every size and variety of business_____ mergers are on the increase over the whole marketplace. Because of the wide price fluctuations that are likely to be associated with mergers activity, public policy has been concerned that investors be treated fairly. The aim is prompt and full disclosure of relevant information in the effort to achieve a fair “playing filed” for all participants. Apart from Competition Act, mergers Amalgamations, acquisitions are also governed by Companies Act. The Companies Act uses the expression “arrangement” 261, which would include a merger. The Act does not prescribe what mergers would be approved and what merger would not be approved. The ‘Arrangement’ could be of any kind: a reverse merger, where a financially strong company mergers with a financially weak or actually a sick company; a holding company may merge with its subsidiary; a demerger, which occurs when a unit of a company is hived off to another company, which may be in existence or formed for this purpose; the merging companies need not to have the same or identical business activities. The merger may have tax avoidance as its objective but not tax evasion. Under the Companies Act, 1956, mergers and amalgamations are governed under Chapter VI. Section 391 -394 of the Companies Act deals with mergers and amalgamation. Section 391 of the Companies Act 1956 makes it mandatory for a scheme of arrangement and

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261 According to Section 390 (b) ----- the expression “arrangement” includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or, by both those methods.
Compromise to be approved by the Tribunal\(^{262}\). Section 391(1) says “Where a compromise or arrangement is proposed---

a) between a company and its creditors or any class of them; or

b) between a company and its members or any class of them;

the tribunal may, on the application of the Company or of any creditor or member of the company, or in the case of a company which is being wound-up, of the liquidator, order a meeting of the creditors or class of creditor, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs. Well it should be noted that, no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal by affidavit, or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor’s report on the accounts of the company, or any pendency of investigation proceedings in relation to the company. Thus, it becomes evident from the above mentioned section that a scheme of arrangement and compromise has to be approved from the Tribunal unless the Tribunal approves the scheme cannot take effect.\(^{263}\)

Furthermore, section 394 (1) (a) of the Companies Act 1956 provides that the scheme of arrangement and compromise is done for two purposes:

- For internal reconstruction of any Company and;
- For amalgamation of two or more companies.

Therefore, section 391(1) (a) read with section 394(1) provides that scheme of any kind of merger or amalgamation has to be approved and sanctioned by the Tribunal. The Tribunal has also been given the power to supervise\(^{264}\) and modify such scheme\(^{265}\). If the Tribunal is

\(^{262}\) Substituted for “company Law Board” by the Companies (Second Amendment) Act 2002, earlier the quoted words were substituted for “High Court” by the Companies (Amendment) Act, 1988, w.e.f 31-5-1991 and “High Court” was substituted for Tribunal by the Companies Tribunal (Abolition) Act 1967 w.e.f 1-7-1967.

\(^{263}\) See section 391(2) of the Companies (Amendment) Act 2002.

\(^{264}\) Section 392(1) (a) of the Companies Act, says the Tribunal shall have the power to supervise the carrying out of the compromise or an arrangement.
satisfied that a compromise or an arrangement sanction under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under the Act. the Tribunal shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representation s, if any, made to it by Government, before passing any order under any of these sections. Before the Tribunal sanctions a scheme, the Tribunal must be satisfied that the scheme not only reflects the will of majority of creditors or class of them but it must considered all aspects of the matters so as to arrive at a finding that the scheme is fair, must and reasonable and does not contravene public policy or statutory provision. Further if the Tribunal finds that the scheme of amalgamation is beneficial to the members of both the companies and the affairs of the company which is going to be dissolved and the transferor—company, have not been conducted in any manner prejudicial to the interest of its members or to public interest, Tribunal shall not dwell upon or interfere with the collective wisdom of the shareholders of the companies.

The Companies Act as it stands does not deal with issues of the effect on competition of the merger. A merger of two more companies, whether they are covered by the Competition Act or not, will still have to be approved by the High Court, as required under the Companies Act. The evaluation of the effect of a proposed merger on competition is an additional process that companies falling under the definition of section 5 of the Competition Act will have to go through. Even sections 23 and 24 of the MRTP Act, now omitted, only required that what was necessary to be examined was that the proposed scheme of merger or takeover was not likely to lead to the concentration of economic power to the common detriment, or was not likely to be prejudicial to the public interest in any other manner. The power to approve a merger under section 23 of the MRTP Act

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265 The Tribunal at the time of making order or at any time thereafter give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

266 Administration of the Specified Undertaking of the Unit Trust of India vs Garware polyester Ltd. [2005] 60 SCI 512 (SC)

267 Shankarnarayan Hotel (P) Ltd vs. Official liquidator (1992) 74 COMP CAS 290 (Kar)
rested with the Central Government. Under that Act also, the effect of a merger or takeover on competition did not have to be examined in approving the proposal. The Tribunal of the Competent jurisdiction has to approve a scheme of merger and amalgamation which generally takes period of 4-5 months (120-to150 days approximately). On the other hand the CCI has turnover period of 210 days which can be further extended under certain situation. Therefore, the CCI can legally take a time period of 210 to approve a merger or amalgamation. This poses a practical difficulty in the regime of merger and amalgamation. Firstly the approval period under the Competition Act slows down the merger and amalgamation process and thus creates hurdles for ticket mergers and amalgamations. Secondly, the Companies Act empowers the Tribunal and Competition Act empowers the Competition Commission of India to approve modify and sanction a scheme of merger and amalgamation and modifications made by any one of the regulators (Tribunal and CCI) would lead the decision of the other invaluable. Also if the Tribunal approves or sanctions the scheme and CCI rejects it or vice versa than a difficulty would arise whose decision should be given priority. If the decision of Tribunal is given priority than the decision of CCI would become infructuous and also the other way round. Furthermore, on one hand, the Tribunal has the power to modify the scheme of arrangement and compromise under section 394(2) of the Companies Act 1956, and on the other hand, CCI also has the power to issue modification under section 31(3) of the Competition Act 2002. Therefore, if the modification ordered by the Tribunal are such a nature that they render the compliance of the modifications ordered by the CCI impossible then it would again lead to a problem as the parties to such amalgamations and mergers are bound to follow the modifications ordered by the Tribunal and also by the CCI to ensure the legality of such combination.

The Indian Income Tax Act (ITA), 1961

Merger has not been defined under the ITA but has been covered under the term 'amalgamation' as defined in section 2(1B) of the Act. To encourage restructuring, merger

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Section 31(3) says, “Where the Commission is of the opinion that the combination has or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.”

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and demerger has been given a special treatment in the Income-tax Act since the beginning. The Finance Act, 1999 clarified many issues relating to Business Reorganizations thereby facilitating and making business restructuring tax neutral. As per Finance Minister this has been done to accelerate internal liberalization. Certain provisions applicable to mergers/demergers are as under: Definition of Amalgamation/Merger — Section 2(1B). Amalgamation means merger of either one or more companies with another company or merger of two or more companies to form one company in such a manner that:

1. All the properties and liabilities of the Transferor Company /companies become the properties and liabilities of Transferee Company.
2. Shareholders holding not less than 75% of the value of shares in the transferor company (other than shares which are held by, or by a nominee for, the transferee company or its subsidiaries) become shareholders of the transferee company.

The following provisions would be applicable to merger only if the conditions laid down in section 2(1B) relating to merger are fulfilled:

Taxability in the hands of Transferee Company: Section 47(vi) & section 47 (a) The transfer of shares by the shareholders of the transferor company in lieu of shares of the transferee company on merger is not regarded as transfer and hence gains arising from the same are not chargeable to tax in the hands of the shareholders of the transferee company. [Section 47(vii)]
(b) In case of merger: cost of acquisition of shares of the transferee company, which were acquired in pursuant to merger will be the cost incurred for acquiring the shares of the transferor company. [Section 49(2)]

**Competition Act and SEBI**

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 is the principal law governing acquisitions and takeovers in India. Under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, for ‘listed’ companies, the acquisition by control, shares or voting right or all of them, the
acquisition may be without “control” by buying shares and voting rights etc. The acquisition may be through “market” or off market trade by way of negotiations, deals and understanding. The SEBI (Substantial Acquisition of Shares and Takeovers ) Regulations 1997 was amendment in 2005 do not require any examination of a proposal for acquisition or takeover covered by those regulation for the effect of the proposal on competition in the business of the enterprises involved in the transaction. The objective of the legislation (SEBI) is only to ensure that the acquisition of shares or voting rights in or control of a target company is done on an open manner, equitable to the shareholders and the public investors.

Regulation 10, 11 and 12, the key provisions, impose an obligation on those who may acquire shares , voting rights, control of a target company , in the manner and to the extent set out therein, to make a public announcement to acquire shares in accordance with the regulations. Whereas the Competition Act aims to protect the Consumers in general, which includes along with the investors and shareholders as intended to be protected by SEBI and Companies Act respectively. The provision of the competition Act regarding the time frame of approval will result in extra financial burden on the acquirer. Under the takeover code the acquirer is bound to pay the shareholders their due within 15 days of closure of offer. Regulation 22 (12) of the takeover code\textsuperscript{269} says that; “the acquirer shall, within a period of fifteen days from the date of the closure of offer, completes all procedures relating to the offer including payment of consideration to the shareholders who have accepted the offer and for the purpose open a special account as provided under regulation 29”.

The code under the head of general obligations of the acquirer makes it mandatory for the acquirer to fulfill all the formalities including the payment of consideration to the shareholders within 15 days from the closure of offer. However, the provision also provides for the extension of time to the acquirer under certain conditions. The proviso clearly lays down the condition on which an extension could be granted to the acquirer. SEBI on its satisfaction that the applicants for statutory approvals were diligently pursued by the acquirer and that no neglect or default on the part of the acquirer led to non receipt of

\textsuperscript{269} Regulation 22(12)of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers ) Regulation 1997
required statutory approval may grant him an extension time subject to the fact that the 
aquirer is agreeing to pay interest to the shareholders. Furthermore, the Competition Act 
requires that all the acquisitions shall be notified to CCI as soon as any agreement or any 
other document for the said acquisition is executed270. The Act further provides a 
turnaround time of 210 days to approve or reject application of an acquisition. Thus, 
legally, the Commission is entitled to use the complete 210 days to issue an order. This 
would invariably put the acquirer under the obligation to pay interest to the shareholders if 
both legislation are triggered simultaneously. The situation can be better understood with 
the help of the following illustration. Lets us consider that a Corporation ‘A’ is acquiring 
the Corporation ‘B’. The assets or turnover of the enterprise involved in such acquisition is 
above the threshold limit as mentioned in section 5 of the Competition Act 2002, which 
would make it mandatory to be notified to the CCI for approval. Considering that 
aquisition is done through agreement for acquisition than the CCI has to be notified on 
the day of execution of such agreement. If the entire process of acquisition from public 
announcement to open offer and closure of offer is completed before 210 days, say , in 
about 100 days, then , as per the takeover code, the acquirer is bound to fulfill his 
obligations including payment of considerations to the shareholders within 15 days , i.e. by 
the 115 day. After that he could be given extension by the SEBI Board to fulfill his 
obligation if he agrees to pay the interest to the shareholders. In such a scenario if CCI 
takes the allotted 210 days to pass an order then the acquirer would be obliged to pay 
interest to the shareholders for a period of 95 days. It would lead to significant increase in 
the cost of the acquisition and could be a deterrent factor for the Corporation from 
undertaking such acquisition. The CCI has provided in its draft regulation that it would 
form an opinion whether any combination is anti-competitive or not within 30 days (if the 
otice is filed in longer Form 1) or 60 days (if the notice is filed in shorter Form 2). 
Although it would be a welcome change but it still has its own lacunas. In case of the 210 
days turnover time it is provided that the combination will be deemed to be approved if the 
CCI fails to pass on order within the stipulated 210 days but there is no deemed approval 
where the CCI fails to form a prima facie opinion within 30 or 60 days. Therefore, in 

270 See section 692) (b) of the competition Act 2002
practice, the CCI will take longer as there is no sanction to tie it the time limit. In addition to increasing the above mentioned financial burden, the turn around time period of 210 days and also create a lot of uncertainties. The uncertainties are created because the M&As are left pending for a period of 210 days, this results in a very destabilizing effect on the business of the parties involved. Some of these uncertainties can result in serious implications such as; (a) Change in the price of the Combination due to fluctuations in the market, (b) Delay in the plans of expansion (c) Inability to make strategic and operational decisions; strategic and operational decisions could remain in a “limbo” (d) it could also lower down the market value of both the parties. Further, the draft regulation s provides that the CCI can exempt certain acquisition from its review as not causing or likely to cause an adverse effect on the Indian market. Regulation 11(1) of the takeover code\textsuperscript{271} says;

“\textit{No acquirer who, together with persons acting in concert with him, has acquired in accordance with the provisions of law, 15 per cent or more but less than 75 percent of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, in any financial year ended 31st March, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.”}

The above regulation is exempted by the CCI from its review whereas under the takeover code acquirer is bound to make public disclosure for such acquisition. Thus it can rightly be understood that, in Companies Act and SEBI Act though both are mutually exclusive yet aim to protect the interests of private individuals. Whereas, in the Competition Act, the impact of combinations directly affects the market and the players in the market including the consumers. We may, therefore, safely say that apart from the fact that all these legislations are mutually exclusive, the Companies Act and the SEBI Act are the sub-sets of Competition Act in so far as legal scrutiny of mergers are concerned.

\textsuperscript{271} As per SEBI (Amendment ) 2002 A
Conclusion

Mergers and acquisitions are strategic decisions taken for maximization of a company's growth by enhancing its production and marketing operations. They are being used in a wide array of fields such as information technology, telecommunications, and business process outsourcing as well as in traditional businesses in order to gain strength, expand the customer base, cut competition or enter into a new market or product segment. Merger control is one of the foundation corner on which a healthy economy can develop, while allowing and developing growth and competitiveness in the market by removing the unchecked inorganic growth that could affect the economic strength among a leading players. Merger control should be brought in to force keeping in mind commercial consideration of the parties, the cost involved and the interest of the economy.