Chapter V

Competition regulatory Authority of India: Competition Commission of India: CCI and Competition Advocacy

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Chapter V

Competition Regulatory Authority of India: Competition Commission of India (CCI)

In this chapter the researcher intends to analyze the Competition Regulatory Authority of India. India is one of the largest democratic economies of the world which has two competition legislation but unfortunately none has the ability to regulate the market failure as of now. The existing law (repealed) – MRTP Act is deficient in many respects and the new legislation – Competition Act 2002 (as amended in September in 2007, again amended in 2009), though a modern legislation having all the salient ingredients of competition enactment, is yet to be given effect to by the Government of India. The researcher tries to analysis the urgent need / implementation of the law and also discuss the Composition, powers and Functions of the CCI and Competition Appellate Tribunal which was the result of the 2007 Amendment. Further the researcher tries to analyze the see –saw relationship between sector regulators and the Competition authority of India i.e. CCI.

Introduction

In the recent times, the Indian economy has seen reform and restructuring initiatives in diverse facets and dimensions since mid 1980s. In the context of the globalization, the emergence of multinational corporations, interdependence of economies, and role of private enterprise in economic development, the global financial crisis is emerging as a watershed in the “regulatory and reform” thinking. India took up economic reforms in earnest in the early 1990s and in the second phase of the reforms, it enacted a new competition law to replace the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969, which had become obsolete in certain aspects. The Competition Act of 2002 came on the statute book. It is in the economic terms a more sophisticated law and covers the three standard limbs of Competition law — namely anti-competitive agreements, abuse of dominance and merger regulation. The new competition law i.e. Competition Act 2002, after taking into consideration the recommendations of the Raghavan Committee and deliberations of the standing Committee on finance, provided for the establishment of Competition Commission of India (CCI). The Commission is the sole Competition enforcement agency. It has also

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272 Discussed in detail in Chapter III
been assigned to take a proactive stand to promote Competition. The Competition (Amendment) Act, 2007 provided for the establishment of Appellate Tribunal for adjudicating claim for the Compensation and for hearing appeal against the direction of decision made or order passed by the Commission. It is worth to observe that the Commission established under the earlier legislation i.e. MRTP Act, which was enacted primarily to curb monopolies and concentration of economic power, had only limited powers. The MRTPC was empowered to submit its recommendatory opinions to the Central Government on Monopolistic Trade Practices and Unfair Trade Practices (UTP) matters. It is only empowered to investigate and enquire into Restrictive Trade Practices (RTP). Inquires into the RTPs and UTPs remained the two most important areas of activities of the Commission. Between the two, UTP gained the momentum because the impact of the orders benefited the aggrieved consumer significantly. Award of compensation as an interlocutory application to an UTP enquiry further enhanced the credibility of the MRTPC in the eyes of the consumers and the society. But with the coming up of the consumers courts, post 1986, at all places, the jurisdictions of the MRTPC and Consumer Courts got overlapping and resulted in ushering in of ‘forum shopping’ and multiplicity of litigations on some issues between the parties. Important RTPs, involving big ticket enterprises, very rarely got concluded at the commission’s level and invariably travelled up to the Supreme Court in appeal. Supreme Court, more often than not, found infirmities in the order of the commission and set aside most of the Orders of the Commission. Besides forgoing, came the further amendments to the MRTP Act in 1991 in the wake of economic liberalization and consequently Chapter III of the Act was deleted. With this deletion the Commission lost its feeble power of recommendation into Merger and Acquisition activities in India. Post-1991 scenarios forced the Government of India to ponder over the issues relating to as to whether or not to continue with the MRTP Act and the Commission established under it. There were two clear options available with the Government. One

273 Hindustan Lever Ltd vs Director General (Investigation and Registration) and another (2001) 2 SCC 474.
either it thoroughly amends the existing MRTP Act to match the changed economic scenario of India as well as of the other jurisdiction or the other was to repeal the law and enact a new piece of legislation which would contain features of the latest international best practices ‘concepts’\textsuperscript{275}. The kind of amendments that could make sense was felt to be identical to writing a new legislation – as such a high-powered committee was set up in 1999 to assess all aspects of the situations. The Committee headed by SVS Raghavan found that MRTP Act to be falling short of squarely addressing competition and anti-competitive practices. It found that the MRTP Commission’s powers under the Act were quite restrictive and it was ill equipped. The Committee emphatically stated that; the MRTP Act, in comparison with Competition Laws of many countries, is inadequate for fostering competition in the market and trade and for reducing, if not eliminating, anti-competitive practices in the country’s domestic and international trade”\textsuperscript{276}. Based on this analysis, the Raghavan Committee found it expedient to have a new competition law. It will be useful to understand the underlying principles that led to the new enactment. As a result of the report submitted by the committee’s recommendations, the Competition Act of 2002 came into being in January 2003. The preamble of the Competition Act provides for establishment of the Competition Commission of India (CCI). The CCI was established on 14th October 2003. The Chairman and a Member were appointed by the Central Government.

Raghavan Committee Report

It is to be noted that, while competition cases are tried by courts in many countries, the Raghavan Committee did not found it suitable for India, given the inexperience of the Judiciary in dealing with free market problems. According to the Committee, a specialized agency is preferable\textsuperscript{277}. The report go on saying that, in many developed countries and economies in transition, the judiciary therein may be inexperienced in dealing with free market problems. The problems relating to free and fair trade and relating to restrictive and other prohibited trade practices like abuse of dominance, require certain level of specialized

\textsuperscript{275} The concepts like “Competition”, Cartel, collusion, bid rigging, predatory pricing, etc were not recognized by the MRTP Act.

\textsuperscript{276} Page 60 of the Report.

\textsuperscript{277} See page 57 of the report
knowledge in economics, trade and relevant law for adjudication. Even if the judiciary has the reputation and exposure to commerce and market-related matters, the competition law administration will be better handled, if a specialized agency is set–up for the purpose. With due respect to the judiciary around the world and in particular in India, it needs to be understood that, in the area of specialization, competition law would be better administered and consumer welfare better sub served, if placed in the hands of a specialized agency. Therefore the Ragavan Committee recommended that the administration and enforcement of competition law in India should be under a specialized court/Tribunal. The Committee emphasized that, a body should be independent and autonomous. Its investigative, prosecutorial, and administrative functions need to be separate and its proceedings should be transparent and rule–bound. The competition authority’s reach should be extra-territorial and it should have powers to punish the guilty and levy fines. Further the committee felt that there is a low awareness of competition issues among the stake holders and the Governments (Central and States) in India, so, it laid great emphasis on a Competition Advocacy. And thus, “Competition Commission of India’ was proposed. The Competition Commission of India (CCI) will hear competition cases and also play the role of competition advocate.

Accordingly the Competition Act, 2002, provides for the establishment of the Competition Commission of India. Section 7 of the Act deals with establishment of “Competition Commission of India”. It provides that with effect from such date as the Central Government may, by notification, appoint there shall be established a Commission called the ‘Competition Commission of India” sec. 7(1). The Competition Act 2002 provides for the establishment of CCI to prevent those malpractices that adversely affect competition. Additionally, it was enacted to promote and sustain competition in markets as well as to protect the interests of consumers. The Competition Commission is the sole authority to receive complaints against the infringement of Competition Law from individuals, business firms, entities, Central or State Governments. Thus, it was enacted to ensure free and fair trade amongst participants in Indian markets and such other matters connected therewith. It

See section 7(1) 

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provides for both substantive and procedural provisions of Law. The Competition Commission of India shall have the following two basic functions;

a. Administration and enforcement of Competition Law and Competition Policy to foster economic efficiency and consumer welfare.

b. Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open flexible and adaptable.

The Commission is a body corporate having perpetual succession and common seal with power to acquire hold and dispose of property both movable and immovable and to contract and shall sue and be sued. Its head office shall be at such places as the Central Government may decide from time to time. The Commission is to consists of Chairperson and not less than two members and not more than six members. Thus Competition Commission has come in the place of MRTP Commission; MRTP Act was established and constituted under section 5 of the MRTP Act 1969. Further the Competition Commission of India may be compared with SEBI, IRDA and TRAI as a regulating agency. Under sub-section 2 of section 7, CCI has been established as a body corporate. A body corporate is a person in the eye of law, it is not a natural person but a legal or an artificial person may be created or established by forming ,for example ‘company” under the Companies Act , 1956 or it may be created or established by an Act of legislation in which case it is known as statutory company. CCI is a statutory corporation having its existence under an Act of parliament namely the Competition Act 2002.

279 Section 7
280 The Headquarters of the CCI may be located in Delhi with permanent Benches at Delhi, Calcutta, Mumbai and Chennai with further to be decided by the Central Government from time to time.
281 Section 10 stipulates that chairperson and every other member shall hold office as such for a term of five years but shall not hold office after the attainment of age of 65 years.
282 Section 8(2) stipulates that the Chairperson and every member shall be a person of ability, integrity and standing and who has special knowledge of and such professional experience of not less than 15 years in international trade, economics, business, commerce, law , finance, accountancy, management, industry, public affairs or competition matters including law and policy.
283 The section of CCI is compared with section 3 of SEBI Act 1992, section 3 of Insurance Regulatory and Development Authority Act 1999, and also with the relevant provisions of the Telecom Regulatory Authority of India Act, 2000.
Composition of the Commission

The Competition Commission shall consist of a Chairperson and not less than two and not more than ten other members to be appointed by the Central Government. The Chairperson and the members are appointed by the Central Government from the panel of names recommended by the selection committee consisting of:

- The Chief Justice of India or his nominee (chairperson of the committee);
- Secretaries in the Ministries of Corporate Affairs and Law and Justice;
- Two experts of repute having special knowledge of and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affair or competition matters including competition law and policy in international trade, economics, business, commerce, law, finance, industry;
- RBI Governor

The Chairperson and every other member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment. The Act provides that the salaries of the staff and other expenses shall be met by the Competition Fund. The Central Government is empowered to remove the chairperson and any member of the commission on certain specific grounds and the procedure as specified in the Act. The ‘Persons’ appointed shall be whole time Members. The Act prohibits Chairperson and the members to accept employment in or connect with the management or administration of any enterprise which has been party to the proceedings before the Commission, within two years of demitting the office. The Chairperson and the members of

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284 See Section 10 of the Act
285 Section 11 and section 53K deals with the removal of Chairman or any member of the Commission. He can be removed if he
a) Is, or at any time has been, adjudged insolvent; or
b) Has engaged at any time, during his term of office, in any paid employment; or

c) Has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

d) Has acquired such financial or other interest as is likely to affect prejudicially his functions as a member; or

e) Has so abused his position as to render his continuance in office prejudicial to the public interest; or

f) Has become physically or mentally incapable of acting as member.

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the commission have been given protection of the service in as much as their salary, allowance and other terms and conditions of the service will be varied to their disadvantage after their appointment. The Chairperson and the other staff of the Commission are deemed to be public servants within the meaning of section 21 of the Indian Penal Code. No suit or proceedings shall lie against Central government, Commission or the officers/staff of the commission for anything done in good faith or intended to be done under this Act or the rules or regulations framed there under. The Chairperson has general power of superintendence, direction and control over the administrative matters of the Commission. The Competition Commission will also have suo moto powers for initiating action against any perceived infringement. The Commission shall be assisted by a Director General (DG) appointed by the central government.

**Appointment of Director General and other officials**

The Central Government appoints the Director General (DG) for assisting CCI in conducting enquiry into contravention of any of the provisions of the Act or to perform other functions as provided by or under the Act.\(^{286}\) The Additional, Joint, Deputy and Assistant Director General or such other advisers,\(^ {287} \) consultant and officers so appointed shall exercise his powers and discharge his functions, subject to the general control, supervision and direction of the Director General. The DG shall, when directed by the Commission assist the Commission in investigation into any contravention of the provisions of the Act. The Commission shall hold the meetings for the purpose of discharging the functions and all the questions which come up for before the commission shall be decided by the majority of the members present and voting. The quorum for the meetings shall three members. The Raghavan Committee had recommended that the Commission should be independent from political and budgetary controls of the Government and that independent functioning of the members needs to be ensured by having an appropriate provision for their removal, only with the concurrence of the Supreme Court. It is worth to note here that, the

\(^{286}\) See section 16(1)

\(^{287}\) The director General and Additional ,Joint, Deputy and Assistant Directors General or such other advisers , consultant and officers, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation and knowledge of accountancy, management, business, public administration, international trade, law or economies and such other qualifications as may be prescribed.
The constitutional validity of the establishment of the Competition Commission came to be challenged in the case of *Brahm Dutt vs. Union of India*\(^{288}\). The constitutional validity of the Competition Commission was mainly challenged on the ground that Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or the Judge of the Supreme court or of the High Court, to be nominated by the Chief Justice of India or by a Committee preside over by the Chief Justice of India. In other words, the contention is that the Chairmen of the commission had to be a person connect with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary. The contention was based upon the principle of separation of powers on the lines of the case of *Sampath Kumar vs. Union of India*\(^{289}\). The contention to uphold the composition of the Competition Commission was that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and members of the judiciary who can, of course, adjudicate upon matters in dispute cannot supply such expertise. It is further contended that so long as the power of judicial review of the High Court and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the constitution. It was also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers. The Apex court refrained from giving a judgment as there were the affidavits filed by the union of India stating that there has been proposed some amendments to the effect so as to enable the Chairman and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee.

\(^{288}\) *AIR 2005 SC 730; (2005) 2 SCC 431.*  
\(^{289}\) *Sampath Kumar vs. Union of India*\(^{289}\), *1SCC 124.*
Hence the court stated that one should look at the amendments as and when notified and then address the issue of constitutionality. In this backdrop, The Government passed a Competition (Amendment) Bill 2006 in the light of the above judicial dicta of the Supreme Court. The mentioned bill was passed by both the Houses and the necessary changes were made under the Competition Act 2002 vide the Competition (Amendment) Act 2007. The various changes were made to make Competition Act so as to make CCI fully operational on a sustainable basis. The Competition (Amendment) Act, 2007 provides for the establishment of Competition Appellate Tribunal (COMPAT) for adjudicating claim for competition and for hearing appeal against the direction of decision made or order passed by the Commission. The Commission has the investigative and decision –making power. In order to enable it to exercise that power effectively, the Act empowers the Commission to penalize who obstructs the investigation, contravenes orders, destroys or falsifies documents, supplies misleading information. In context of the needs of economic development of India, the Competition Commission is entrusted with the following duties;

- Eliminate practices having adverse effect on competition;
- Promote and sustain competition;
- Protect the interests of the consumers; and;
- Ensure freedom of trade carried by other participants in markets, in India.

**Powers and the Functions of the Competition Commission of India**

The Commission has duty to eliminate the practices having adverse effect on competition, to promote and sustain competition in the market, to protect the consumer interests and to ensure freedom of trade carried on by other participants in the market in India. For the purpose of discharging its duties or performing its functions, the Commission may enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.\(^\text{290}\)

\(^{290}\) See section 53A of the Act
\(^{291}\) Section 18
Observations of High Level Committee on Competition Regulatory Authorities;

Although significant steps have been taken to increase competition in various sectors of the economy, a number of important things need to be done that are essential for a competition policy. There is the need for a Competition Law Tribunal (Competition commission of India) that will act as a watch–dog for the introduction and maintenance of the Competition policy. It will promote the introduction of the required changes in the policy environment and once this is done, it will perform a proactive advocacy function for competition. Competition law should deal with anti–competitive practices, particularly Caterlisation, price–fixing and other abuses of the market power and should regulate mergers. It is important to ensure that such legislation does not itself become anti-competitive and this is a real danger. For this, it is necessary to ensure that the law is precise and discretion is kept at a minimum. It may be stated here that Act has been enacted to carry out the objectives of the Article 38 and 39 of the Constitution of India. Further, the Act prescribes that the commission in discharge of its functions shall be guided by the principles of natural justice and the concerned parties can appear before the commission in person or shall though authorized Chartered Accountants, Company Secretaries, Costs Accountants or Legal Practitioners. It is relevant to note here that, the Draft regulation s of the Commission being issued in terms of the Act attempt to provide the detailed procedure that the commission intends to follow while implementing various provisions of the Act. It has so far drafted seven regulations. The Draft Regulation s provide for the procedure to be adopted by the CCI in exercise of its function s and powers. The procedure shown reflects a transparent process consistent with the principles of natural justice as enshrined in the law. It is noteworthy, that at present the Commission is currently engaged in reviewing the present version of the draft regulations with a view to finalize and issue the same. The CCI have the powers not only to formulate own rules and regulations to govern the procedures and conduct of its business and administration, but also have the powers to frame 'Regulations 'which could supplement the provision s of competition law. Since some of these regulations which will supplement the economic conditions, the CCI could from time to time review and amend these regulations. This would have the added

benefit of ensuring consistency and would minimize the risk of uneven application of law that emerge as a result of following a case by case basis of examination. Most importantly, these regulations would put trade and industry at advance notice on how the competition commission was likely to look at certain aspects of their conduct and behavior, i.e. what is acceptable and what is not acceptable. All policy directions by the Government should be binding on the Competition Commission.

**Merger Commission**

The Mergers, Amalgamation etc were given a treatment under the competition perspective and the recommendations would be kept in view in suggesting an agency for having surveillance over them. For those cases of mergers, amalgamation etc, which need to be examined on the touchstone of competition, before the event takes place, the Act designed the Merger Commission, which will be a part of the Competition Commission of India, but which will be a separate Bench to handle pre-merger scrutiny cases. This is to ensure that there is no avoidable delay in dealing with such scrutiny, as delays can prevent bodies corporate from being competitive globally. An appropriate rider in the merger provision should be that, if the Merger Commission does not finally decide against a merger within stipulated period of say ninety days, it would be deemed that approval has been accorded. The Merger commission, at least two members will be detailed to deal with cases of merger, amalgamation s, acquisition and takeovers. It is to be noted that aims and objects of the Indian competition law afford guidelines to the Commission when it examines the effect of an agreement, combination or dominant position, i.e. whether it has an influence, direct or indirect, actual or potential, on the pattern of trade within India. Trade may appear to increase, but that increase is not an end itself as the object of this Act is to create a system of undistorted competition to protect the interest of consumers. Initial spurt in the trade as a consequence of the agreement is not important if it leads to development differently from the way in which it would have done without such agreement. If it is capable of constituting a threat to the freedom of trade within India in a manner which might harm the attainment of the aforesaid objects, it is to be declared void. That threat may be direct or indirect, actual or potential.
Procedure for enquiry into Anti-competitive Agreements by the Competition Commission of India

The CCI upon receipt of reference or its own knowledge or information received under section 19 with regard to anti-competitive agreement has to come to a prima facie opinion that a case exits and once it comes to such conclusion, it shall direct the Director General (DG) to make an investigation. If the CCI does not find a prima facie case, it will close the case, pass an appropriate Order and forward the Orders to the concerned persons. The Director General is required to submit a report on his finding to the CCI within the time as may be specified by the Order of the Commission.

Orders that CCI can pass:

After CCI comes to the conclusion that there is an anti-competitive agreement, which has caused or is likely to cause appreciable adverse effect on competition within India, it may pass all or any of the following orders:

- Direct the parties to the said agreements to discontinue the said agreement and not to re-entered such agreements;
- Impose penalty which shall not be more that 10 percent of the average turn over of the last three preceding financial years upon each of the parties to the said agreements;
- If the anti-competitive agreement has been entered by a cartel, the CCI may impose upon each member of the cartel a penalty of up to three percent of its profit for each year of continuance of such agreement or ten per cent of its turn over for each year of continuance of such agreement, whichever is higher;
- Direct modification of the agreements;
- Direct compliance of its orders /directions including payment of costs;
- The CCI can also pass orders /directions and impose penalties upon a group or its members if, during investigations, it finds that:

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293 See Section 26
294 Proviso to section 27(b)
295 See section 27(d)
a) The enterprise which has contravened the provisions of the Act is a part of a Group and

b) Other members of the group are also responsible for or contributed to such contravention.

Further, the CCI has jurisdiction and is empowered to pass ex-parte interim Orders temporarily restraining a party from carrying out an act until conclusion of an investigation or until further orders. In case of cartel;

- Impose penalty on each member of cartel up to three times of its profit for each year of the continuance of agreement or ten percent of its turnover for each year of continuance of such agreement, whichever is higher;
- Modify the agreement;
- Pass any order/ direction which deems fit;
- Order division of the enterprise enjoying dominant position.

Failure to comply with the aforesaid penalty shall be punishable with further risks as it may lead to imprisonment for a term which may extend to three years or with fine which may extend to rupees 25 crores or with both, as the Chief Metropolitan Magistrate (CMM), Delhi may deem fit296. Whenever companies contravene Orders of the Commission, the person who is in charge of and is responsible to the company shall be deemed to guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Every Orders/decisions/directions passed by the Commission may be appealed by the party aggrieved by such Orders/decisions before the Competition Appellate Tribunal (COMPAT) within 60 days of such orders. Further, the parties aggrieved by the decision or Orders of the COMPAT may file an appeal to the Supreme Court within 60 days from the date of the communication of the decision or Order of the COMPAT to them.

296 See Section 42 of the Act
Procedure for inquiry into Abuse of Dominance by the Competition Commission of India

The Commission must arrive at a prima facie opinion that a case of abuse of dominance exists. Once it comes to such conclusion, it shall direct the Director General DG to investigate into the matter. If the Commission does not find a prima facie case, it will close the case, pass an appropriate order and forward the orders to the concerned persons. DG is required to submit a report on his findings to the Commission within the time as may be specified by the order of the Commission.

Orders that Commission can pass

After the competition of the investigation, if Commission comes to the conclusion that there is an anti-competitive agreement, which has caused or is likely to cause appreciable adverse effect on competition within India, it may pass all or any of the following Orders;

a) Direct the parties to continue the abuse of dominance;

b) Direct compliance of its orders /directions including payment of costs;

c) Direct for the division of an enterprise abusing the dominant position to ensure that it does not abuse its dominance;

d) Pass such other order or issue such other direction as the Commission deems fit.

The Order directing the division of an enterprise may provide for all or any of the following matters;

i. The transfer or vesting of property, rights, liabilities or obligations;

ii. The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

iii. The creation, allotment, surrender or cancellation of any shares, stocks or securities;

DG does not have any suo-moto powers as is the case with OFT and it can not initiate any inquiry on its own.

See section 28 of the Act
iv. The formation or winding up of an enterprise or the amendment of memorandum of association or article of association or any other instruments regulating the business of any enterprise;

v. The extent to which, and the circumstances in which, provision of the Order affecting an enterprise may be altered by the enterprise and the registration there.

It is worth to note that, the Commission is vested with the power to pass ex parte interim Order \(^{299}\) temporarily restraining a party from carrying out any act until conclusion of an investigation or until further Orders. Further, that any enterprise abusing the dominant position is outside India, the Commission is empowered to: a) inquire into such abuse of dominance; and pass such orders as it may deem fit in accordance with the provision of the Act \(^{300}\). The Act further provides for imposing significant penalties or imprisonment up to a period of three years or both in case parties who have not preferred appeals against the orders of the Commission within the stipulated period of 60 days have defaulted in complying with the Orders of the Commission. Contravening Orders of Appellate Tribunal would also invite huge pecuniary penalties or imprisonment up to three years or both. It is worth mentioning that, Consumers all over the Country could benefit from a landmark investigation by the Competition regulator, which found that the Delhi’s power distribution companies are overcharging 90% of their customers. The Investigation by the CCI found that most of the electric meters put by the BSES and NDPL \(^{301}\) are fast running, the CCI has served notices on the dotcoms. The distcoms do not allow their customers to install meters of their choices, thereby abusing their dominant market position, the CCI investigation revealed. While only two distcoms operating in the capital have come under the regulators lens, the finding of investigation will have a nationwide impact in the way electricity companies service consumers. The Anil Ambani Group firm BSES has challenged the CCI’s report, which says its customers are deprived of the liberty to use electricity meters of their choice. The allegations regarding not allowing consumers the option to install their own meters are not correct, as the same is provided under law. BSES has published this on

\(^{299}\) See section 33 of the Act
\(^{300}\) See section 32 of the Act.
\(^{301}\) The NDPL is owned by the TATA Group of Companies
its website, distributed lakh of pamphlets, issued newspaper ads and “choose your own meters “is a widely published campaign by BSES. It was alleged by BSES that meters brought and installed by the BSES met the relevant BIS standards and guidelines of the Central Electricity Authority. The CCI investigated the case based on a complaint filed in September 2009. The regulator has issued a show-cause notices to the distcoms after examining the report of its Director General (Investigation) which found evidence against them for misusing their dominant position and entering into anti-competitive agreements. The investigation has a much wider implication as the power distribution mechanism is largely Monopolistic across the states.

**Procedure for Investigation of Combination by the Competition Commission of India**

On coming to a prima facie opinion that the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market, the commission shall issue a show cause notice to parties to the combination calling upon them to show within 30 days of receipt as to why investigation of such combination should not be conducted. After the receipt of the response from the parties, the commission may call for a report from the DG within the time as may be specified.

**Orders that CCI can pass in respect of Combinations**

The commission is empowered to pass the following orders after the due process:

a) Approve the combination where no appreciable adverse effect on competition in the relevant market in India;

b) Direct that combination shall not take effect where the Commission is opinion that there is or is likely to have appreciable adverse effect on competition;

c) Propose modification in the combination where the commission is of the appreciable adverse effect cause or likely to be caused by the combination can be eliminated by the modification.

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302 In Delhi over 2.3 million users receive power supply from BSES, while NDPL supplies power to about 1 million users. Based on the replies of the disco’s, the CCI will decide the course of action to be initiated against them.
Two scenario s have been envisaged in the Act in case of the modification proposal:

(a) The parties may accept and carry out the modification within the specified time. If they fail to carry out the modification to the combination with in the specified time, such combination shall be deemed to have appreciable adverse effect on competition;

(b) The parties to the combination may within 30 days of the modification proposal submit an amendment to the modification proposal, whereupon:

i) If the Commission agrees with the amendment to the modification proposal, shall approve the combination;

ii) If it does not agree with the amendment, the Commission will give further 30 days to the parties to accept the modification. If they fail to accept the modification, the combination shall be deemed to have adverse effect on competition and shall not be given effect.

Once the Commission has passed an order a combination to be void, the acquisition, acquiring of the control or merger or amalgamation shall be dealt by the authorities as if such acquisition, acquiring control or merger or amalgamation had not taken place. It is worth to refer here that the Commission is vested with the power to pass ex parte interim order temporarily restraining a party from carrying out an act or until the conclusion of the investigation.

**Issues relating to the Implementations of the Act**

Being a significant change in law, the regulations and guidelines with administrative law principles of due process shall be critical in the initial phase of the implementation of the Act. Some challenges include:

a) Forms of Notification as proposed by the commission in its draft regulations may prima facie appear seeking too much of information from parties. Some of such information may not be relevant for the purpose of ascertain anti-competitive harm in relevant market post-combination.

b) Seeking more information may cause additional cost to parties and would be more so in cases involving cross-boarder transactions.
c) Multi-jurisdiction notifications with variation in waiting periods, filing fees, procedural formalities and above all lack of domain knowledge in newer jurisdiction would cause additional difficulties for the parties.

d) Confidentiality of information shall be adhered to by the Commission and the COMPAT unless otherwise consented to by enterprises in writing for disclosure of such information.

The Appeals lies before the COMPAT and the Supreme Court within 60 days from the communication of the orders from the CCI and the COMPAT, respectively. Non-compliance of the Commission s or COMPAT Orders if not appealed against shall be subjected to severe pecuniary penalties besides possibilities of civil imprisonment up to three years. Thus, it is clear from the above that in terms of section 27, the Commission can pass all or any of the following Orders;

a) When it comes to the conclusion that enterprises or persons have entered into anti-competitive agreements and/or there has been an abuse of dominance;
   - Direct discontinuance of such agreement and abuse of dominance;
   - Impose penalty to the extent of 10 per cent of the average turnover for the last three preceding three financial years upon such persons or enterprises;

b) Inquire into combinations in the manner and pass such Orders as prescribed under the Act. In respect of the combinations, the Act empowers the Commission to;
   - Approve the combination where there are no competition concerns;
   - Direct the parties not to give effect to the combination where there are competition concerns;
   - Propose amendments to the combinations if commission is of the view that the competition concerns can be eliminated by such amendments.

c) The Commission is empowered and has jurisdiction to pass ex parte interim Orders temporarily restraining parties from carrying on any act, where the commission has initiated an inquiry or is conducting an investigation, during the pendency of such

303 Section 29 and 30

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investigation or inquiry and when commission is satisfied that an act is in contravention with the provisions 3, 4 or 6 of the Act.

d) The Commission has extraterritorial jurisdiction in acts taking place outside India but having effect on competition in India.

The Commission is empowered to rectify any mistake apparent on the face of the Order but cannot, while rectifying the Order, amend the substantive part of the Order.

**Competition Law and Leniency Provisions**

Most competition laws either exempt specific sectors and/or types of economic activity, and/or have provisions for the granting of such exemptions in given situations. It is worth observing that there generally tend to be fewer exemptions in countries which have recently adopted competition laws (mainly developing and transition market economies) as compared with more industrialized nations. In India the Competition Commission of India, while passing orders in respect of cartels, the Commission is vested with the discretion to impose a proportionate/lesser penalty than leviable under the Act upon a producer, seller, distributor, trader or service providers, provided the following conditions are met:

1. Such producer, seller, distributor, trader or service provider included in the cartel had made full and true disclosure in respect of the alleged violations and such disclosure is vital.
2. Such disclosure has been made before receipt of DG’s report on investigation order under section 26 of the Act
3. The party making disclosure continues to co-operate with the Commission till the completion of proceedings before the commission.
4. The party making disclosure has;
   a) Complied with the condition of which the lesser penalty was imposed and
   b) Not given false evidence.

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304 Section 46 of the Act
It is noteworthy that the above leniency may be reversed if during the course of proceedings, the Commission is satisfied that any producer, seller, distributor, trader or service provider included in cartel had;

a) Not complied with the condition on which the lesser penalty was imposed.

b) Given false evidence and;

c) The disclosure made was not vital.

In such an eventuality, such producer, seller, distributor, trader or service provider may be tried for the offence and de-hors the lesser penalty imposed shall be liable to the imposition of penalty to which such person is liable. It is noteworthy the jurisdiction of the Civil Courts to entertain any suit or proceeding in respect of any matter which the commission or the Appellate Tribunal is empowered by or under the Act. The Act specifically bars the Courts and any other authority from granting any injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act\textsuperscript{305}. It is worth to note that the Commission does not have any power to grant any compensation to the affected party\textsuperscript{306}. Moreover, the Director General does not have any suo moto powers to initiate any inquiry as is the case with OFT under the UK Competition law.

**Implementing Whistle Blower Programmes:**

Throughout the world cartels exist and they continue to injure economies. Cartels in the present context are becoming extremely sophisticated. Cartel members who collude and engage in anti-competitive practices are becoming increasingly careful to avoid detection. Apart from the success of leniency and amnesty programs incorporated in several jurisdictions including India it is of utmost significance to notice other key factors that might aid detection thus strengthening enforcement. There is need to highlight of having an effective whistleblower program within the Indian Competition Legislation to enable authorities to widen their reach on cartels and prosecute their actions\textsuperscript{307}. Law enforcers have

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\textsuperscript{305} Section 60 gives overriding effect to the provisions of the Act. Section 61 bars jurisdiction of civil courts where competition Commission if India (CCI) or Competition Appellate Tribunal (CAT) has jurisdiction. MRTP Act provides for similar powers.

\textsuperscript{306} This power is vested in the Competition Appellate Tribunal in terms of section 53-L of the Act.

\textsuperscript{307} The key elements of an effective whistleblower programme should include:
to be conscious that a change in enforcement methods, law and penalties will definitely cover a significant effect on controlling cartel activity.

**Who are whistleblowers?**

Whistleblowers may be informants, current or ex employees of a corporation or any person aware of a conspiracy or an organizational plan which breaches existing laws or regulations. The object of protecting whistleblowers is to encourage them to have a personal investment in the enforcement of laws and in the integrity of their organizations. It is necessary to realize that whistleblowers are an aid in enforcing statutes and in furthering public policy. While rewarding whistleblowers, authorities must also consider the downfalls that such individuals would face for sharing/leaking information regarding cartel activity. Thus apart from monetary compensation adequate socio-economic protections would also have to be guaranteed.

**Protection of Confidential Information**

During the process of investigation, a significant amount of confidential information is passed to the competition authorities, which can cause prejudice to the party giving the information the same is improperly disclosed. Any request for confidentiality of the documents submitted to the commission or the Director General, as the case may be, shall be considered in accordance with the procedure laid down by the Competition Commission of India. The Commission or the Director General may exchange the information with

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(i) **Gathering information**: The main objective is cartel detection; hence it is imperative to collect substantial information for effective prosecution.

(ii) **Suitable Rewards**: Competition authorities must suitably reward whistleblowers for the information shared in order to compensate them from the greater loss they may face.

(iii) **Socio-economic protection**: Mere monetary compensation will not suffice an effective reward scheme; soft factors such as the possible discrimination against the employee, his future job prospects must be safeguarded. In case these provisions are not effectively guaranteed no employee will see the benefit in blowing the whistle.

(iv) **Confidentiality measures**: This remains the most prime factor while developing a whistleblower program to ensure that the whistleblower is adequately protected of his identity so that no possible harm may come his way. The authorities may also need to safeguard the employee from any kind of revenge the employer may decide to resort to in any event any information leaks out to the latter.

(v) **Structured Rewards**: The reward mechanism should rest on the basis on information provided. Highest consideration must be given to quality and nature of evidence given. Whistleblowers need to be compartmentalized on the basis of factual material submitted.

(vi) **Job protection**: Whistleblower’s usually pay the price for the information paid by losing their jobs and a possibility of bleak future employment in the market. Job protection still remains the first priority for individuals making them think twice before disclosing information. Detailed though should be paid to this ground.
other competition authorities with whom the Commission has a Memorandum of Understanding or the agreement for exchange of information. Confidentiality of information disclosed to the Commission is an issue that may also need to be addressed. The mandatory notification required by the Act entails disclosure of significant and confidential commercial information to the Commission. The Commission being a quasi judicial body would have to work from a judicial authority’s perspective, and being a court of record is required to work with transparency, which requires disclosure of all the information filed to the parties concerned and to the public at large. However, the Commission would also have considered the information provided as significant and confidential, which would require due protection so as to ensure successful closure of the combination. The Act does not clarify how confidentiality of the information, data, etc, which may be intellectual property of the enterprise or may be commercially confidential, would be treated once it is disclosed to the Commission. For instance, would all particulars and details be available to the public or certain categories be protected and be kept from the public? This lack of clarity may be a cause for concern for the enterprises at the time of disclosing the information and will have to be addressed by the Commission.

**Extra-territorial application and enforcement of Indian Competition Law**

The Government of India has recently enacted a modern competition law in the form of the Competition Act, 2002 (12 of 2003). The Central Government has established the Competition Commission of India w.e.f. 14.10.2003 to carry out the objectives of the Act. The Monopolies & Restrictive Trade Practices Act, enacted in 1969, dealt with some competition issues. 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.\(^{308}\) 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 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 cooperation 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...

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309 See; the Proviso of Section 18 of the Competition Act, 2002 which says.......

310 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.

311 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 retrieved on 18-02-2010.

312 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
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 Act and the Central Government**

In this world, there cannot be pure competition. There has to be some supervision by the Government, in the public interest. The doctrine of laissez-faire is yielding to welfare state and collectivism and the conflicts between privileges of a few and legitimate demands of the many are more discernible. In its attempt to promote the welfare of the society, the Government interferes to ensure competition in the market at the same time taking care not to interfere in the price and output decision of the private parties. It, therefore, takes measures for the conduct and behavior of enterprises and structure of industry with the objective of promoting efficiency and maximizing welfare. For legal enforceability of those measures competition Law has been enacted. Under the Act, Central Government is empowered with certain powers:

1. The Central Government is empowered, to exempt, by notification, from the application of the Act, or any of its provisions, for a specified period;
   - Any class of enterprises if such exemption is necessary in the interest of security of the state or public interest;
   - Any practices or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country.

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[313] Section 54 of the Competition Act.
• Any enterprises which performs a sovereign function on behalf of the Central Government or a State Government.

2. The Central Government is empowered to issue in writing to the Commission, directions from time to time, on questions of policy other than those relating to technical and administrative matters. The Commission shall be bound by them, but as far as practicable, given an opportunity to express its views, before they are issued. Whether or not a question is one of policy, the decision of the Government is Final.\textsuperscript{314}

3. Supersede the Commission if the Central government is of the opinion;\textsuperscript{315}

• The commission is unable to discharge its functions or performs duties by reason of circumstance beyond its control;
• Commission has persistently made default in complying with any direction given by the Central Government under the Act; or
• Circumstances exist which render it necessary in the public interest to do so.

The CCI needs to be functionally autonomous and financially independent. In order to assure financial independence, CCI may be provided with an initial corpus by way of grant of an appropriate amount to enable it to perform its duties without being subjected to the annual budgetary constraints & uncertainties. The CCI needs to be run professionally so as to attain the highest standards. However, under the mandate of the Amendment Act, CCI is to be an expert body. However there are provisions in the Act, which substantially defeat its independence. Section 50 of the Act provides for grants by the Central Government to CCI. The Act provides that the salaries of the staff and other expenses shall met by the Competition Fund. Such a provision takes away the independence and autonomy of the CCI by including grants by the Central Government as a part of the constitution of the Competition Fund. Thus, CCI has to indirectly depend on the Central Government for meeting its infrastructural and other expenses. Further, CCI is bound to follow any policy directions given by the Central Government. Further, section 56 empowers the Central Government to supersede CCI by issuing a notification and giving reasons for the same.

\textsuperscript{314} Section 55 of the Competition Act.
\textsuperscript{315} Section 56 of the Competition Act.
The executive would appoint CCI being a quasi-judicial body and such power to supersede would severely affect the independent functioning of the Commission. On the other hand, it is said that CCI is a quasi-judicial body and on the other hand, the Act mandates that its decisions are not final.

**Competition Commission of India and Competition Appellate Tribunal (COMPAT)**

The Amendment made to the Act in 2007, casts an obligation upon the Central Government to establish Competition Appellate Tribunal (COMPAT), which shall be a three member quasi-judicial body to

- Hear and dispose of appeals against any direction issued or decision made or the Order passed by the Commission;
- Adjudicate on any claim for compensation that may arise from the findings of the Commission or the Orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or sub-section (2) of section 53Q of this Act, and pass Orders for the recovery of compensation under section 53N of the Act.

The Competition Appellate Tribunal will be guided by principle of natural justice and it can regulate its own procedure. COMPAT can dismiss a petition for default or decide it ex parte and such order of dismissal or ex parte order can be set aside. The proceedings before COMPAT are deemed to be judicial proceedings. If Appellate Tribunal cannot execute its order, it will be sent to Court within whose local jurisdiction the registered office of the company or place of residence of the person is situated. Order of the COMPAT will be executed as a degree of court. COMPAT can directly send the order to a civil court for execution. The order will be executed by that Court as if it is a decree of that Court. The appeal can be filed with COMPAT by Central Government, State Government or enterprises or any person who is aggrieved by decision, direction or order of CCI. Appeal should be filed within 60 days in prescribed form. Delay in filing the appeal can be

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316 Section 53A
317 Section 53 Q says about the contravention of orders of Appellate Tribunal.
condoned by COMPAT if sufficient cause is shown. The COMPAT will endeavor to dispose of the appeal within six months from receipt of appeal. Thus, the time limit of six months is not mandatory. In the event that the orders of Competition Appellate Tribunal are contravened without any reasonable ground punishment of imprisonment up to three years and penalty up to Rs. One crore can be imposed by Chief Metropolitan Magistrate, Delhi. Appeal against the order of COMPAT can be made to Supreme Court which should be filed within 60 days, but Supreme Court can condone the delay.

**Competition Law and Competition Advocacy**

Building strong competition culture is imperative not only to reap the benefits of competition but also to achieve higher level of economic growth. The Act mandates CCI to undertake competition Advocacy, public awareness and training on competition issues. The role of CCI in this respect need be strengthened and adequate resources need to be made available to it. Advocacy is the act of influencing or supporting a particular idea or policy. Public Policy advocacy is geared towards changing particular public policy and involves taking position on specific policy issues. Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanism, mainly through its relationship with other governmental entities by increasing public awareness of the benefits of competition. The Successful implementation of competition policy and law largely depends upon the willingness of the people to accept these and Advocacy plays a vital role in securing the willingness and acceptability of competition policy and law. The Raghavan Committee felt that, the mandate of CCI needs to extend beyond merely enforcing the Competition Law. It needs to participate more broadly in the formulation of the country’s economic policies, which may adversely affect competitive market structure, business conduct and economic performance. The Commission, therefore, needs to assume the role of a competition advocate. There is a direct relationship between competition advocacy and enforcement of competition law. The competition law generally aimed against private restraints on trade, i.e., against anti-competitive acts of private parties. However, there are restraints that may arise from acts of governments acting in their
sovereign capacity or of regulators acting in their statutory capacity. Government departments acting in a commercial capacity are usually covered by the competition law as much as private, unless the competition law exempts such activities from its purview. Where government departments act in their sovereign capacity, these acts usually fall outside the jurisdiction of the competition law. But, the competition authorities could have an advocacy role whereby they could bring to the notice of government the anti-competitive fallout of their policies, and suggest changes to such policies. In some countries, the law specifically mandates or allows the competition authorities to take such advocacy measures, e.g. in India\textsuperscript{318}, United Kingdom, and Australia. Thus, the Raghavan Committee had envisaged the following:-

\textit{The mandate of CCI needs to extend beyond merely enforcing the Competition Law. It needs to participate more broadly in the formulation of the country's economic policies, which may adversely affect competitive market structure, business conduct and economic performance. The Commission, therefore, needs to assume the role of a competition advocate, acting proactively to bring about Government policies that lower barriers to entry, promote de-regulation and trade liberalization and promote competition in the market place. There is a direct relationship between competition advocacy and enforcement of competition law. The aim of competition is to foster conditions that will lead to the direct Intervention of the CCI\textsuperscript{319}.}

Competition advocacy has been an important area of activity of several competition authorities both in terms of creating general awareness about the law amongst the enterprises and thereby promoting self compliance and also in terms of influencing government and regulatory policies in a pro-competition direction. The aim of the Competition Advocacy is to foster conditions that will lead to a more competitive market structure and business behavior without the direct intervention of the competition authority. In recognition of the importance of the various stakeholders, the Act lays emphasis on competition advocacy initiatives of CCI at three levels, namely; the policy makers (Central and State Governments), sectoral regulators and the public at large.

\textsuperscript{318} See section 49 of the Act.
\textsuperscript{319} Report of the High Level Committee on Competition Policy and Law, 2000 Para 6.4.7
In India, competition Advocacy is regarded as one of the element of the Competition Law, perhaps the most important one. The CCI shall take suitable measures, for the promotion of competition advocacy, creating awareness and imparting training about competition issues, and activities that could strengthen the competition culture in the market. The role of the Competition Advocacy depends upon country s legal and economic circumstances. The CCI apart from merely enforcing the competition law needs to participate more broadly in the formulation of the country s economic policies which may adversely affect competitive market structure, business / conduct and economic performance. The CCI therefore assumed the role of competition advocacy, acting proactively to bring about governmental policy that lower barriers to entry, promote de-regulation and trade liberalization and thus, ultimately promote competition in the market. While the competition law targets more towards the commercial activities of public and private players, advocacy targets more towards the policy making powers of the government besides creating awareness. Therefore, it is often said, that law enforcement and competition advocacy complement each other.

The Competition Commission of India has an advisory role to play on a reference made to it by the Central Government for the opinion on possible effect of any policy on competition. The Commission is mandated to proffer its opinion to the Central or State government within 60 days of securing the reference. The opinion however will not be binding upon the Government but will constitute as an important input for the government to finalize its law or policy. Various competition advocacy tools are available and have been effectively utilized by competition authorities in other jurisdictions. Seminars and guidelines, articles and posting them on website are able to carry the message far and wide. An important tool is the ability of many competition authorities to give opinion on proposed legislation and public policy on their own, so that the law makers and policy makers consider the competition dimensions and give reasons for deviating from them for the benefit of the public. While law making and policy making strictly lie in the realm of legislature and the government respectively, it is the right of the public to know

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320 See section 49(1) of the Act  
321 See section 49 Inserted by the Competition (Amendment) Act of 2007.  
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what kind of public interest persuaded these authorities to deviate from competition principles. The Competition authorities also carry out market studies to understand state of competition in various sectors in order to advise the concerned authorities to make necessary changes so as to usher more competition or to usher competition where there is weak competition or no competition, as the case may be. Wide dissemination of results of market studies is an important tool of competition advocacy. The CCI should also continue to carry out market studies to understand the state of competition in various sectors in order to advise the concerned authorities to make necessary changes so as to usher greater competition. Further Advocacy allows competition agencies to expand its reach and play an important role in areas where its role is usually ignored. Advocacy can give a competition authority a window in the design of restructuring of industries before privatization or in the grant of concessions or in the way access rules are set. It is necessary not to restrict the canvass of CCI in its advocacy initiatives, which alone can foster a competition culture in our economy.

While the Competition Act, 2002 covers within its ambit commercial activities of government departments and government bodies, many government interventions are outside competition law. For example, consumer protection law, unfair trade laws like anti-dumping, government policies on registration of new business, taxation, corporate governance oversight, trade and FDI policies, etc. fall outside the purview of the Act but have profound impact on the state of competition in the economy. It is necessary to be able to influence in the formulation of these policies to ensure that competition dimensions are considered by the policy makers. Competition advocacy, therefore, assumes importance in the realm of government intervention in the market through policy instruments.

The CCI and Small and Medium Enterprises (SMEs)

In a new era of open economies, it is increasingly recognized that large industry cannot afford to sustain in isolation from small industry and this increasingly necessitates them to have long term linkages with the SMEs as small and large industries have distinct places where they succeed on the principle of most efficient scale of economy. The intense competition is increasingly forcing both small and large industries to leverage upon the
complementary strengths of each other in order to survive and thrive. The Small and Medium Enterprises (SMEs) have been globally recognized as a priority sector for growth and development and India is not an exception to this generality. In India, the Micro, Small and Medium Enterprises (MSMEs) contribute over 45 percent of the country's industrial production and around 40 percent of total exports. The SMEs increase competition, contribute comprehensively by the GDP ensure varied supply of goods and services and give customers wider and customized choice. Thus MSMEs unhesitatingly play a vital role and in fact they are the backbone of the Indian economy and prudence suggests that the backbone not only be protected but strengthened too on a perennial basis.

**Small and Medium Enterprises (SMEs) needs to know**

What SMEs needs to know is that the law is applicable to them as well. The focus of law is not on “size of the enterprise” which could be in terms of assets /turnover or investment in plant and machinery etc. but on the effects of business practices on competition in the relevant market in India. However, it is unlikely that SMEs would unwittingly fall foul of the law. On individual basis, since SMEs lack market power, their actions are not likely to have appreciable adverse effects on competition in India. Moreover, the exclusions and exemptions from the applicability of law are likely to dilute the effectiveness of competition law which is increasingly believed to be benign for consumers, enterprises as well as economies. However, a power does vest in the Government to grant exemptions for the applicability of law (partly or fully for a specified period) under certain circumstances including on the ground of public interest. However, it is expected that the exemptions will be an exception and not a rule. It will be relevant to state that the competition law seeks to improve economic efficiency by prohibiting anti-competitive conducts and is not meant to stimulate or introduces competition artificially. Since, SMEs are subjects to applicability of law, they should not enter into any agreement in respect of production, supply, distribution, , storage , acquisition or control of goods or provisions of services which causes or is likely to cause an appreciable adverse effect on competition within India.

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322 Experts of address by Mr. Jawhar Sircar, Additional secretary, Ministry of Micro, Small and Medium Enterprises, Government of India in 5th India Global Summit on MSME held in March, 2008.
The SMEs need to examine as to whether it enjoys ‘dominant position’ in the relevant market and in case the answer is in the affirmative, it must not indulge in conduct which is abusive in terms of the Act\textsuperscript{323}. In the event of infringements, the CCI can pass not only prohibitory directions but also impose penalty as prescribed in the law. It is unlikely that merger / amalgamation between SMEs will attract the provisions of the Act as the total value of combining parties is not likely to exceed the threshold limits or turnover or assets as prescribed in the law. The SME is not likely to acquire but there is great preponderance of it being acquired. In that eventually, in case the total value of turnover or assets of acquirer and the target SME exceeds the limits, the responsibility to comply with the filing of notice with the CCI devolves on the acquirer and not on the target SME.

**Power of Small and Medium Enterprises (SMEs)**

A SMEs or an Association can file information in the prescribed form with the CCI and request for enquiry against any delinquent enterprises in case the latter is allegedly indulging in anti-competitive practices/ agreement or abuse the dominant position. SMEs can also file objection with the CCI in response to public notice or otherwise against any proposed acquisition, merger or amalgamation as sometimes a survival of SME is threatened. Thus, there is an obligation on the CCI to listen to the aggrieved SMEs. An SMEs can also apply for award of compensation to offset the loss or damage caused to it as a result of conducts which are held to be the infringements of the law. By doing so, it can protect itself and deter bigger enterprises from adopting abusive or anti-competitive practice and consequently SMEs can enter the markets and trade more freely. An Association of the SMEs can also take up the cause on behalf of its members directly with the CCI or can take up the cause with the concerned Department or Statuary Authority which can make a reference to the CCI for an enquiry into alleged infringement. Many a times policy or laws of the State or rules or regulations made there under results in uneven level playing field or create barrier to entry / exist or deny market access. Often, it is unintended too. In any of such eventuality, an SME or either their Association can make a request to the concerned Ministry of the Central / State Government to make a reference to the CCI for advisory opinion which the

\textsuperscript{323} See section 4 of the Act
latter is mandated to provide within 60 days. Opinion through advisory in nature but empirical evidence suggests that it is often very efficacious in bringing a reform in public action as after all it is an opinion of a specialized body in competition issues.

**The Role of Competition Commission of India (CCI)**

A statutory duty to prohibit anti-competitive agreement, abuse of dominance besides blocking of anti-competitive acquisition / merger devolves on the CCI. It is also responsibility of the CCI to tame anti-competitive elements flowing from public action –be it policy or law of the state or regulation of the statutory authority. The effective enforcement of these regulatory provisions coupled with advocacy and advisory measures will make the markets more competitive and such environment will enable the SMEs to have their inputs of better quality at lower cost which will in turn enable them to be more competitive in markets. Through effective enforcement of law, the CCI can make difficult for big companies to impose artificial entry barriers or deny market access thereby helping SMEs to enter the market and compete more freely. The predatory behavior by a dominant enterprise or group is prohibited under the Act. The restriction on such practices by the CCI will enable SMEs to pull on in the market and will also attract new players to enter into the market.

The CCI needs to undertake intensive and extensive advocacy with the State as to the need for and usefulness of competition principles and extend assistance in review of their polices and laws. It needs to create awareness and impart training in respect of competition issues and principles so that the ministry of the MSMEs at the Center and the concerned Department of the State Government, in consonance with its policy of advocacy, create awareness and build strong competition culture amongst SMEs. Further, the Information furnished by the SMEs for suitable action against an alleged delinquent enterprise needs to be examined by the CCI in the right perspective. The SMEs are apprehensive and to an extent rightly so, that they will be subject to unnecessary complaints and they would be incurring significant time, money to prove that they are innocent. The CCI needs to appraise the SMEs, their Association and the concerned Ministry as to how it will filter out the most trivial, frivolous and malicious complaints especially against SMEs. Thus, since
Government is committed to promote the growth of SMEs and to enhance their competitiveness, CCI is also mandated to preserve the competition process, ensure freedom of trade by frowning upon dominance by eliminating their exclusive and exploitative practices, obliged to protect the consumers which includes SMEs.

**Sector Regulator and the CCI**

Recent years have witnessed major liberalization of national economies. In both industrialized countries and developing nations, state–owned monopolies are being wholly or partly privatized. The role of competition authorities in regulated sectors of the economy and their relationship with sector regulators have been a subject of much debate, within countries and in national forums. In the aftermath of a 1992 securities scam, several sector-specific regulators have emerged on the Indian regulatory horizon. Apparently, the multitude of regulators may frequently regulate similar aspects of corporate behavior. Literally, "regulation" means "influencing the flow of events." Under this broad definition, regulation has been in existence since time immemorial all around the world. Nonetheless, in its recent avatar, regulation has primarily meant economic regulation that consists of government rules or market incentives designed to control the price, sale, entry, exit, or production decisions of firms. The underlying rationale behind the proliferation of any regulatory authorities is the anxiety to honor the social contract's promise to protect consumer welfare. The Sector-specific regulation presents distinct challenges in competition law and policy. The roles of the competition authority and sector-specific regulators can be complimentary. However, at times, the interface between the two can also be a source of tension (relating to licensing and competition issues). The Competition Commission can make reference to a statutory authority or receive reference from statutory authority. While sector-specific regulation seeks to identify a problem ex ante and creates administrative machinery to address behavioral issues before the problem arises,

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324 Available at http://trade and competition.blogspot.com/.
325 See section 2(v) of the Act, "Statutory authority" has been defined to mean any authority, board, corporation, council, institute, university or any other body corporate established by or under any Central, State or Provincial Act for the purpose of any services or markets therefore or any matter connected therewith or incidental thereto.
competition policy generally addresses the problem ex post, in the backdrop of market conditions. The jurisdiction of the Competition Act extends to all sectors of the economy and sectors regulated by sector-specific laws as telecommunication, electricity regulator, petroleum regulator, insurance regulators are also included. In India, the Competition Act 2002 does contain a provision for mutual consultation between sector regulators and the Commission but the provision is relatively weak because it is confined only to cases where a proceeding is pending before the sector regulator and the party raises a competition issue.

Prior to Amendment Act, the Competition Act only conferred an option on any statutory body to make a reference to CCI with respect to a decision which the statutory authority has taken or propose to take, is or is likely to be contrary to any of the provisions of the Act. The Amendment Act provides powers to statutory regulators to make suo-moto reference to CCI on competition issues in addition to the present provision of making reference, when any party in a dispute before it makes such request. The Act previously provided that statutory authorities could make reference of matters to the CCI only when a party before the statutory authority raised an issue. In order to minimize contradictions between stands taken by the CCI and statutory authorities and to enhance co-operation between statutory authorities and the CCI, the amendments have made changes to enable the CCI to make references suo motu to regulatory authorities and vice versa. The Commission, on receipt of a reference, shall give its opinion to such statutory authority within sixty days of receipt of such reference. The statutory authority shall consider the opinion of the commission and thereafter, gives its finding, recording therefore, on the issue referred to in the opinion. The essence of the interface between the Commission and sector-specific regulators in India lies within sections 18, 21, 60, and 62 of the Competition Act. Section 60 of the Competition Act is the usual non obstante provision asserting the supremacy of competition legislation within the domain of competition enforcement, and both sections 60 and 62 are couched in mandatory language, yet,

326 Section 21 (1) of the Competition Act
327 Section 21 A. Inserted by competition (Amendment) Act, 2007
328 Sec 60 of the Act says, ‘the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.’ Sec 62 of the Act says ‘The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.’
ironically, section 62 hortatory declares that competition legislation ought to work along with other enactments. Even after the Commissions opinion is received, the sector regulator may pass an order ‘as it deems fit’. Which will leaves wide discretion with the regulator. Thus there should be some framework for co-ordination between the sectoral regulations and the Competition Commission of India. There should be an establishment of an Inter Agency Forum wherein the CCI and the sectoral regulators can meet and discuss policy matters. In case of an overlap, there will be mechanisms to decide which agency will take the lead, so that businesses do not have to deal with multiple regulators. The Interagency Competition Forum will also promote alignment and consistency in the regulatory and analytical approach to competition issues.

The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anticompetitive behavior may not be high on its agenda or the laws governing the regulator may be silent on this aspect. Whereas the Competition law seeks to promote efficient allocation and utilization of resources, which are usually scarce in developing countries. A good competition law lowers the entry barriers in the market and makes the environment conducive to promoting entrepreneurship. It also ought to be acknowledged that each sector has its own set of issues and problems unique to them and efficient management of sector specific issues / problems at a micro level is equally critical in ensuring effective competition in the market.

In fact the Report of the High Level Committee on Competition Policy and Law, 1999, emphasized that although it does not directly form part of the competition law, legislation regarding various regulatory authorities falls under the larger in this regard was an aspect to be addressed329. Thus, one of the main differences between other sectoral regulator and the Competition law is that a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency

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329 The Report of the High Level Committee on Competition Law and Policy, 2000
across sectors. On the other hand, the CCI will be able to apply uniform competition principles across all sectors of economy.

**Uncertainty in the working of CCI**

The Competition Commission of India (“Commission”) became operational on September 1, 2009, heralding a new era in Competition laws in India. The Competition Act (“Act”), which is the parent legislation for regulation of competition, is now a fully operational law for regulating anti-competitive agreements, abuse of dominance and mergers and acquisitions. As of now the provisions of the Act, specifically dealing with M&A’s, are on the anvil receiving finishing touches from the Government of India, which is reviewing the comments invited from trade and industry players. The notification giving effect to this provision is expected anytime now.

Though the Competition Commission of India (CCI) has partially become functional with effect from May 2009 but several questions remain unanswered in spite of the fact that the Act has had a thorough scrutiny of the Apex Court and substantial amendment made thereafter by the Parliament before it could become functional. As stated earlier, Anti-Competitive agreements and Abuse of Dominant Position of enterprises are prohibited. The role of the CCI comes into play only after the breach has taken place. Thereby, making the adjudicatory action of the CCI an ‘ex post facto’ process. But in case of mergers the action is ex ante. The legislative intent is clear. The framers of law did not want to prohibit mergers but intended the CCI to regulate it in such a manner so that only the anti-competitive elements of a merger proposal could be looked into for modification or rejection as the case may be. Further the legal uncertainly comes when we analyze the provisions with that of “effects doctrine” provided under section 32 of the Act. In case of anti-competitive agreements, the basic filters are (a) existence of agreement between enterprise and (b) causation of ‘appreciable adverse effect on competition within India”. The factors to determine appreciable adverse effect within India is separately provided at sub-section (3) of
Section 19 of the Act\textsuperscript{330}. It does not mention anything about “relevant market – product or geographic” but of whole of India. On the other hand, the filters to analyze “Abuse of Dominant position” are – (a) Dominant position as per factors provided at sub-section (4) of section 19; (b) existence of such position within relevant product and / or geographic market within India but not whole of India and (c) abuse of dominant position as may be determined by the CCI in terms of factors provided at sub-section (2) (a) to (e) of section 4\textsuperscript{331}. Finally, the filters to examine a merger transaction are – (a) in excess of pecuniary thresholds of assets or turnover as provided under section 5 of the Act; (b) causation of appreciable adverse effect on competition within relevant market in India in terms of factors provided at sub-section (5), (6) and (7) of section 19\textsuperscript{332} and (4) of section 20, which are

\textsuperscript{330} Section 19(3) of the Act says; the Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors namely;—

\begin{itemize}
  \item[a)] Creating of barriers to new entrants in the market;
  \item[b)] Driving existing competitors out of the market;
  \item[c)] Foreclosure of competition by hindering entry into the market;
  \item[d)] Accrual of benefits to consumers;
  \item[e)] Improvements in production or distribution of goods or provision of services;
  \item[f)] Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
\end{itemize}

\textsuperscript{331} Section 4 (2) says —There shall be an abuse of dominant position, if an enterprise or a group,—

\begin{itemize}
  \item[a)] Directly or indirectly, imposes unfair or discriminatory ---
    \begin{itemize}
      \item[i)] Conditions in purchase or sales of goods or services ;or
      \item[ii)] Price in purchase or sale (including predatory price) of goods or services.
    \end{itemize}
  \item[b)] Limits or restricts ---
    \begin{itemize}
      \item[i)] Production of goods or provision of services or market therefore, or
      \item[ii)] technical or scientific development relating to goods or services to the prejudice of consumers; or
      \item[c)] indulges in practices or practices resulting in denial of market access
      \item[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;
      \item[e)] Uses its dominant position in one relevant market to enter into, or protect, other relevant market.
    \end{itemize}
\end{itemize}

\textsuperscript{332} Section 19 sub section (5), (6) and (7) says — (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 ”.

\begin{itemize}
  \item[(6)] The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely;—
    \begin{itemize}
      \item[i)] Regulatory trade barriers;
      \item[j)] Local specification requirements;
      \item[k)] National procurement polices;
      \item[l)] Adequate distribution facilities;
      \item[m)] Transport costs;
      \item[n)] Language;
\end{itemize}
different than what is provided for anti-competitive agreements; and abuse of dominant position. Interestingly, the power to inquire and investigate anti-competitive practices of overseas enterprises having effect in India is available at section 32 of the Competition Act. This section on careful examination shows that while scrutinizing allegation of abuse of dominant position by enterprise the CCI would also consider the factors relating to “appreciable adverse effect on competition in the relevant market in India’. This factor, however, is not required to be looked into when the CCI reexamines any section 4 violation involving domestic enterprises. Thus, overseas enterprises may have to pass through additional filter in case of a scrutiny against abuse of dominant position. This may likely to cause additional hardship to an overseas enterprise qua domestic enterprises.

Moreover, the pre-amended Competition Act provided for a voluntary merger control regime. The local nexus thresholds as well as penalty for non-filing were not part of the Competition Act then. With the amendment made in the Competition Act in September 2007, the voluntary regime has been substituted by ‘compulsory notification” regime and local nexus thresholds have been inserted. Consequently, the law provided for an enabling provision to impose penalty against enterprises for not obtaining pre-merger clearance from the CCI for modifiable merger transactions. Section 5 and 6 of the Competition Act do not provide for express retrospective application of the law and proviso to section 1(3) empowers the Government of India to notify different sections of the Competition Act on different dates. In exercise of such powers the Government of India till date has not notified section 5, 6, 20, 29-31- all relating to merger control. The confusion comes when one looks into the proviso to sub-section (1) of section 20 of the Competition Act. It says that CCI shall not initiate any inquiry under this Sub-section after the expiry of one year from the

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(o) Consumers preference;
(p) 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:—
(g) Physical characteristic or end-use of goods;
(h) Price of goods or service;
(i) Consumer preferences;
(j) Exclusion of in-house production;
(k) Existence of specialized producers;
(l) Classification of industrial products
date on which such combination has taken effect. Meaning thereby, that the CCI may re-open any less than one year old merger transaction, if it so desires. Merger transactions generally, passes through various phases till they are finally concluded. It may take more than one year from the time the initial phase between combining entities began to till they finally closed the deal. The transaction of combination between enterprises in the absence of express retrospective condition at section 6 of the Competition Act under compulsory regime should need to be notified to the CCI only after some formal agreement has reached between parties and before the final closure of the deal. Failure to notify has properly been plugged by inserting the penal provision at section 43A in the Competition Act. Therefore, the condition of instituting investigation one year post-closure of a deal as provided under sub-section (1) proviso appears redundant – perhaps an omission to delete the same while carrying out the amendment of the Act from voluntary to compulsory regime. Having not deleted this proviso, has kept the matter open to all interpretations and confusions. This kind of feature in the merger law is not seen in the competition laws of any developed and young jurisdictions. The confusion is likely to impact cross-border merger substantially.

It is worth to note that, the CCI is very confused when it comes to Terms and Condition of Combinations. The section 31 (12) of the Act stipulates a working period of ninety working days whereas section 31(11) says that the CCI shall become functus officio once 210 have expired from the date the parties to the combination have notified the CCI and same having been found in order by the CCI. The amended law has used the words “working days” and “days” repeatedly. The illustration of this is available in sub-section 31(6), 31(8) and 31(9). The overall waiting period of 210 days gets extended if “working days” are adhered to. This defeats the very purpose of sub-section 31(11) and results in additional hardship to parties to transaction of combination. Waiting period in a merger

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333 Section 31 (6) of the Act says --- If the parties to the combination do not accept the modification proposal by the Commission under sub-section (3), such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission under the sub-section. Section 31(8) says --- If the Commission does not accept the amendment submitted under sub-section (6), then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission under sub-section (3). Section 31 (9) says --- If the parties fail to accept the modification proposed by the Commission within thirty working days referred to in sub-section (6) or within a further period of thirty working days referred to in sub-section (8), the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provision of this Act.
control is very vital to the parties to the transaction especially in cross-border cases. In several jurisdiction, the waiting period are less compared to India and if the same gets extended due to legal fiction available in the substantive law then the complication increases for the notifying enterprises. Further, the CCI and the Appellate Tribunal – COMPAT – were mandated to discharge additional duties with effect from 31st August, 2011. The additional duties were to be in the nature of disposing of balanced undecided cases of the erstwhile Monopolies and Restrictive Trade Practices Commission. The Government of India decide to wind up the monopolies Commission with immediate effect –14th October, 2009 precisely --- thereby resulting in transfer of all pending cases to the COMPAT other than unfair trade practices cases and investigation s to the Director General (Investigation and Registration )s office . The fate of the compensation applications ___ popularly known as Section 12B interlocutory applications -- and the UTP case s remains unanswered for the parties in so far as appeals those may arise from the orders of the National Commission. The burden on the COMPAT and the CCI would be extra too much at this point of time because both these authorities, as of now, are struggling to bring their own houses in order. The impact of the uncertainty would directly be on the litigants. Moreover the statutory regulations that the CCI is mandated to make in terms of section 64 of the Competition Act may not be able to remedy the uncertainties. The regulations cannot supersede the substantive provisions of the principal statute. According to the government sources, corporate affair Minister, Mr. .Salman Khurshaid, said that CCI has to get cracking. In the recent past, the commission has come under severe criticism from various quarters for not having disposed of a single case334. So far, the Commission has more than 35 pending cases. However, the minister said that the Commission is still new in the country and is doing a reasonable job. System has to be developed, as the CCI has spent a lot of time in advocating and travelling in picking up knowledge. “I think they have just got about their full staff, and I think it is unfair to say that they have not cleared any cases ----- I think they are doing fine”335. However, the companies are worried about 210 days to clear on M&A cases and urged that 210 day period to be cut down. The industries were worried that seven

334 The statement was made before the notification of the section 7 of the Act.
335 See www.ccgov.com
months was too long a period. The Ministry has taken the matter for concern to reduce the period of 210 and also hinted that banking and industry sector may be excluded from the ambit of the CCI, but as of now no final decision has been taken.

Examinations and Decisions made by the Competition Commission of India and Competition Appellate Tribunal;

In the recent decision, in *Competition Commission of India v. Steel Authority of India Ltd.* the Supreme Court of India, reversing the decision of the Competition Appellate Tribunal has declared that no opportunity of hearing was required to be given by the Competition Commission of India to any person before beginning to investigate a case or complaint. The Appellate Tribunal had declared that the principles of natural justice were inviolable and thus hearing opportunity was mandatory whereas the Commission of the opinion that if such opportunity was given the very basis of investigation would be eroded away, and thus appealed against the order of the Tribunal to the Supreme Court. The Bench formulated for itself the issues required to be answered in terms of the powers of the Competition Commission and the procedure to be followed. Further, the Supreme Court of India has refused to interfere in the investigation being conducted by Competition Commission of India (CCI) into the alliance between Kingfisher Airlines and Jet Airways. The alliance between Jet Airways and Kingfisher was announced in October 2008, and includes code-sharing on domestic and international flights and cost –cutting measures such as joint fuel management and cross-utilization of crew. The complaint has been filed before the CCI by a frequent filer who alleges that the alliance would lead to the formation of the cartel. Following the allegations, the Kingfisher approached the Bombay High court when CCI begun the probe last year to examine whether the alliance was a case of Carterlisation, Kingfisher and Jet Airways cooperated in fuel management, ground handling, and cross-selling of flight tickets to select destinations. The combined share of the two airlines in domestic passenger traffic was around 45 percent. The Supreme Court’s standpoint clarifies the powers, functions and jurisdiction of the newly established watchdog and makes it clear

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336 CIVIL APPEAL NO.7779 OF 2010 [D.No.12247 OF 2010]
that the CCI can investigate agreements that are pre-date the Competition Act of 2009337. The Supreme Court decision is significant not only because it will allow the CCI to proceed with its investigation into the alliance between Kingfisher and Jet, but also because it sends out a clear message that it is unwilling to interfere with the investigations conducted by the Director General and the CCI at every stage. The Kingfisher was forced to withdraw its plea.

**Conclusion**

Competition is the engine of free enterprise. Competition laws have been described as *Magna Carta* of free enterprises. Competition is important for the preservation of economic freedom and our free enterprise system. The need for competition law arises because market can suffer from failures and distortions, and various players can resort to anti-competitive activities such as cartels, abuse of dominance etc. which adversely impact economic efficiency and consumer welfare. Thus, there is a need for competition law to provide a regulative force which establishes effective control over economic activities. During the era in which the economies are moving from close economies to open economies, an effective competition commission is essential to ensure the continued viability of domestic industries, carefully balanced with attaining the benefits of foreign investment increased competition. The Competition Commission of India is established by Central Government to implement the Competition Law. The Commission is Competition law enforcing agency. It has also been assigned to take a proactive stand to promote competition. Thus Competition Commission has two basic functions, a) administration and enforcement of competition law and competition policy to foster economic efficiency and consumer welfare; b) involvement proactively in Governmental policy formulation to ensure that markets remain fair, open, flexible and adaptable. Furthermore Competition Appellate Tribunal is also empowered to adjudicate the claim for compensation and for hearing appeal against the direction of decision made or order passed by the Commission. Recently, on 28th February, 2009, the Government appointed the Chairperson and two other members of the Commission, who have assumed office. The present chairman of the Competition Commission of India is Mr. Dhanendra Kumar and Competition Appellate Tribunal is headed by Dr. Justice Arijit

337 See [www.cci.gov](http://www.cci.gov)
Pasayat (Retd Judge) of Supreme Court of India, and they too have assumed office recently. Along with regulatory functions the Commission is assigned with the noble duty of advocating the Government’s both Central and State on policy making and other relevant Laws. In some countries, the advocacy role is supported by a statutory provision in the law, as in India, while in some other countries; it is undertaken as an administered measure. The Commission has been undertaking work relating to competition advocacy and institution building. Thus, the Commission can function as stated above easy only if the Government provide the required infrastructure. The bottom –line is, though the Competition Commission of India (CCI) has partially become functional with effect from May 2009 but several questions remain unanswered in spite of the fact that the Act has had a thorough Scrutiny of the Apex Court and substantial amendment made thereafter by the Parliament before it could become functional.