An overview of provisions relating to competition laws & consumers protection laws in India

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1. INTRODUCTION

"The main objective of the Competition Law is to promote economic efficiencies using competition as one of the means of assisting the creation of market responsive to consumer preferences." – *Supreme Court of India*

Competition can be defined as a process wherein cost efficient production is achieved in a structure having reasonable number of players (producers and consumers) with simple entry and exit procedures and where exists a close substitution between products of different players in a given industry.

Competition refers to a market situation in which sellers independently strive for buyer's patronage in order to achieve the business objectives of profit, sales turnover and market share. In other words, it is the act of competing by an enterprise against other business enterprises for the purpose of achieving dominance in the market or attaining a reward or goal. It is the foundation on which a market system works. For market economy to function effectively, this competition has to be free and fair. Such a competition stimulates innovation and productivity and thus leads to the optimum allocation of resources in the economy; guarantees the protection of consumer interests; reduces costs and improves quality; accelerates growth and development and preserves economic and political democracy.

In the absence of adequate safeguards, enterprises may undermine the market by resorting to unfair practices for their short term gains. As a result, market-distortionary practices and anti-competitive forces may restrict the working of healthy competition in an economy. Thus, there arises the need to have a proper regulatory environment which can ensure a healthy competition so that all business enterprises can grow and expand and stimulate economic development of the country. Legislation of an effective competition law should contain short term and long term policy options that can regulate the competition leverage to run the economy on a safe track with sustaining speed.

Most competition laws seek to increase economic efficiency, enhance consumer welfare, ensure fair trading, and prevent abuse of market power. The three areas of enforcement that are provided for in most competition laws are–

(i) Anti-competitive agreements

(ii) Abuse of dominance, and

(iii) Mergers which have potential for anti-competitive effect.

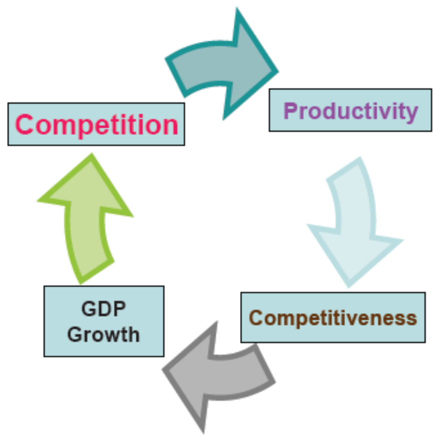
The reasons for adoption of competition laws vary across countries; these are usually on account of concerns about high level of market concentration, formation of cartels, state monopolies, privatization and deregulation, meeting with the requirements of bilateral and plurilateral trade agreements and in addition, to take care of cross border competition dimensions and concerns.

Need for competition

- The ultimate objective of competition is to secure the interest of the Consumer - it empowers the consumer and offers best guarantee for consumer protection.
- It is a means of reducing cost and improving quality.
- It also implies an open market where shortages are rapidly eliminated through the best allocation of resources.
- It accelerates growth and development; preserves economic and political democracy.

Competition and Growth

There is a positive association between GDP growth and level or degree of competition. Several studies suggest that competition enhances productivity at industry level, generates more employment and lowers consumer prices.



Competition and Democracy

The basic tenets of democracy and of market competition are ingrained in the same value system - freedom of individual choice, abhorrence of concentration of power, decentralized decision making and adherence to the rule of law. While the nature of market mechanism is judged by its ‘allocative efficiency’, the democratic institutions are judged by the degree of equity they create. Competitive markets and democratic governments are, therefore, considered complementary and need to interact in a manner that maximizes the larger public interest.

BENEFITS OF COMPETITION

IN THE MARKET

- Promotes efficiency
- Leads to higher productivity
- Punishes the laggards
- Enhances choice, improves quality
- Reduces costs
- Facilitates better governance

FOR CONSUMERS

- Lower prices
- Improved quality
- Better services
- Wider choices

FOR BUSINESS

- Availability of inputs at competitive price,
- Level playing field,
- Redressal against denial of market access and other anti-competitive agreements.

Competition Law in India

The market principles stipulating that enterprises must be prevented from abusing their dominance in the marketplace is an old one, recognized from the times of the rise of the great capitalist economies of the West. Along with this realization came laws prohibiting unfair business practices in order to encourage competition in the interests of the general public as well as smaller businesses. John D. Rockefeller's Standard Oil Co. in the early 1900s and Bill Gates' Microsoft Corp. towards the turn of the millennium are among the famous players whose activities were questioned and penalized under various laws relating to competition.

India has had its own version of such a law through the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). But an updated new legislation formulated for the liberalized and booming Indian economy, the Indian Competition Act was passed in 2002.

While the Act was passed in 2002, it has been put into force in stages. In a significant development, the government on 15th May, 2009 issued notifications giving effect from 20th May, 2009 to, among others, the provisions dealing with anti-competitive agreements (section 3) and abuse of dominance (section 4) in the Act. These sections regulate all types of agreements which, among other things, deal with production, supply, distribution, storage and control of goods or services and regulate the abuse of dominance by an enterprise or group.

Sections 5 and 6 (dealing with combination, mergers and acquisitions) came into force from June 1st 2011 by notification S.O.479(E) dated 4th March 2011.

The Competition Commission of India (CCI) will have the power to initiate cases against enterprises (i) where the "enterprise" is involved in anti-competitive agreements; and (ii) where the “enterprise” is indulging in abusing its/their dominance in the relevant market.

The important components of the Competition Act, 2002 are:

- Anti-competitive agreements
- Abuse of dominance
- Regulation of combinations
- Competition Advocacy

The Competition Act provides that an anti-competitive agreement shall be void and prohibits an enterprise or a person from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition in India.

Abuse of dominant position has been defined in the Competition Act to include directly or indirectly imposing unfair or discriminatory conditions or prices in purchase or sale of goods or services; restricting or limiting production of goods/services or market or limiting technical or scientific development relating to goods or services to the prejudice of consumers; indulging in practices resulting in denial of market access; using dominance in one market to move into or protect other markets.

The Competition Act seeks to regulate ‘combinations’ which include acquisitions or mergers or amalgamations of enterprises. Acquisition of one or more enterprise by one or more persons or merger or amalgamation of enterprises is a combination if it meets the jurisdictional thresholds based on total value of assets or turnover. Higher thresholds of assets or turnover have been prescribed when parties to combination belong to ‘group’ or have assets or turnover outside India.

The Competition Commission of India undertakes promotion of competition advocacy and creation of awareness about competition issues in India and abroad by programmes, activities etc. in this regard, by constituting Advocacy Advisory Committee(s), by developing and disseminating advocacy literature, by undertaking studies and market research for this purpose and also by encouraging academic and professional institutions to include competition law and policy in the curricula administered by them.

2. HISTORICAL BACKGROUND OF COMPETITION LAW

Law governing competition is found in over two millennia of history. Roman Emperors and Medieval monarchs alike used tariffs to stabilize prices or support local production. The formal study of "competition" began in earnest during the 18th century with such works as Adam Smith's The Wealth of Nations. Different terms were used to describe this area of the law, including "restrictive practices", "the law of monopolies", "combination acts" and the "restraint of trade".

An early example of competition law is the *Lex Julia de Annona*, enacted during the Roman Republic around 50 BC. To protect the grain trade, heavy fines were imposed on anyone directly, deliberately and insidiously stopping supply ships. Under Diocletian in 301 AD an edict imposed the death penalty for anyone violating a tariff system, for example by buying up, concealing or contriving the scarcity of everyday goods.

More legislation came under the Constitution of Zeno of 483 AD, which can be traced into Florentine Municipal laws of 1322 and 1325. This provided for confiscation of property and banishment for any trade combination or joint action of monopolies private *or* granted by the Emperor. Zeno rescinded all previously granted exclusive rights. Justinian I subsequently introduced legislation to pay officials to manage state monopolies. As Europe slipped into the dark ages, so did the records of law making until the Middle Ages brought greater expansion of trade in the time of *Lex mercatoria*.

Legislation in England to control monopolies and restrictive practices were in force well before the Norman Conquest. The Domesday Book of 1086 recorded that "foresteel" (i.e. forestalling, the practice of buying up goods before they reach market and then inflating the prices) was one of three forfeitures that King Edward the Confessor could carry out through England. But concern for fair prices also led to attempts to directly regulate the market. Under Henry III an act was passed in 1266 to fix bread and ale prices in correspondence with corn prices laid down by the assizes. A fourteenth century statute labeled forestallers as "oppressors of the poor and the community at large and enemies of the whole country." Under King Edward III the Statute of Laborers of 1349 fixed wages of artificers and workmen and decreed that foodstuffs should be sold at reasonable prices. On top of existing penalties, the statute stated that overcharging merchants must pay the injured party double the sum he received. The English law of restraint of trade is the direct predecessor to modern competition law. Its current use is small, given modern and economically oriented statutes in most common law countries. Its approach was based on the two concepts of prohibiting agreements that ran counter to public policy, unless the reasonableness of an agreement could be shown. A restraint of trade is simply some kind of agreed provision that is designed to restrain another's trade. For example, in *Nordenfelt v. Maxim, Nordenfelt Gun Co.* a Swedish arm inventor promised on sale of his business to an American gun maker that he "would not make guns or ammunition anywhere in the world, and would not compete with Maxim in any way".

The common law has evolved to reflect changing business conditions. So in the 1613 case of *Rogers v. Parry* a court held that a joiner who promised not to trade from his house for 21 years could have this bond enforced against him since the time and place was certain. It was also held that a man cannot bind himself to not use his trade generally by Chief Justice Coke. This was followed in *Broad v. Jolyffe* and *Mitchell v. Reynold* where Lord Macclesfield asked, "What does it signify to a tradesman in London what another does in Newcastle?" In times of such slow communications, commerce around the country it seemed axiomatic that a general restraint served no legitimate purpose for one's business and ought to be void. But already in 1880 in *Roussillon v. Roussillon* Lord Justice Fry stated that a restraint unlimited in space need not be void, since the real question was whether it went further than necessary for the promise's protection. So in the *Nordenfelt* case Lord McNaughton ruled that while one could validly promise to "not make guns or ammunition anywhere in the world" it was an unreasonable restraint to "not compete with Maxim in any way." This approach in England was confirmed by the House of Lords in *Mason v. The Provident Supply and Clothing Co.*

Modern competition law begins with the competition law enacted by Canada in 1889 followed by the United States legislation of the Sherman Act of 1890 and the Clayton Act of 1914. While other, particularly European, countries also had some form of regulation on monopolies and cartels, the US codification of the common law position on restraint of trade had a widespread effect on subsequent competition law development. Both after World War II and after the fall of the Berlin wall competition law has gone through phases of renewed attention and legislative updates around the world.

The number of countries with Competition laws increased phenomenally in the past 25 years from 32 in 1980 to 105 in 2008. Many more countries are in the process of enacting competition laws and the numbers are slated to increase further in the coming few years.

3. EVOLUTION OF COMPETITION LAW IN INDIA

Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy.

- That the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
- That the operation of the economic system does not result in the concentration of wealth and means of production to common detriment.

In 1964, when the Indian democracy was in its nascent stage, barely 17 years old, the Government of India appointed the Monopolies Inquiry Commission to inquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture. The Commission submitted its report along with The Monopolies and Restrictive Trade Practices Bill, 1965, which was later passed by both the Houses of Parliament and received the assent of the President on December 27, 1969. It came into force on June 1st, 1970 as the Monopolies and Restrictive Trade Practices Act, 1969. The object and reasons of the Act was to provide that the operation of the economic system did not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith and incidental thereto.

Since 1970, the Act had been amended several times to suit to the changing circumstances. However, of late, particularly after the economic reforms of early 1990s, it was felt that the MRTP Act had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there was a need to shift focus from curbing monopolies to promoting competition.

On 27 February, 1999, Yashwant Sinha, Finance minister, made the following announcement in his budget speech:

"The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions”.

In October 1999, the Government of India appointed a High Level Committee (Raghavan Committee) on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act. The Committee presented its Competition Policy report to the Government in May 2000 and gave the following recommendations:

- The MRTP Act was beyond repair and could not serve the purpose of the new competitive environment.
- The Industries (Development and Regulation) Act, 1951 was no longer necessary except for location (avoidance of urban-centric location), for environmental protection and for monuments and National heritage protection considerations etc.
- All trade policies should be open, non-discriminatory and rule-bound. They should fall within the contours of the competition principles.
- All State monopolies and public enterprises will be under the surveillance of Competition Policy to prevent monopolistic, restrictive and unfair trade practices on their part. Any form of discrimination in favour of the public sector and Government commercial enterprises except where they relate to security concerns must be removed.
- The Industrial Disputes Act, 1947 and the connected statutes need to be amended to provide for an easy exit to the non-viable, ill-managed and inefficient units subject to their legal obligations in respect of their liabilities.
- A new (Indian Competition Act) may be enacted, the MRTP Act may be repealed and the MRTP Commission wound up.

- Certain anti-competitive practices should be presumed to be illegal.
- Dominance needs to be appropriately defined in the Competition Law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions".
- Mergers need to be discouraged, if they reduce or harm competition. Mergers beyond a threshold limit in terms of assets should require pre-notification.
- The provisions relating to unfair trade practices (UTP) need not figure in the Indian Competition Act as they were covered by the Consumer Protection Act, 1986.
- The pending cases in the MRTP Commission may be transferred to the concerned consumer courts under the Consumer Protection Act, 1986.
- The pending MTP (Monopolies and Restrictive Practices) and RTP (Restrictive Trade Practices) cases in the MRTP Commission may be taken up for adjudication by the Competition Commission of India (CCI) from the stages they were in.
- The Competition Commission should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity from the fields of Judiciary, Economics, Law, International Trade, Commerce, Industry, Accountancy, Public Affairs and Administration. The investigative, prosecutorial and adjudicative functions should be separate.

The Competition Act, 2002 received assent of the President of India on January 13, 2003 and was published in the Gazette of India dated January 14, 2003.

Pursuant to the Act, the Competition Commission of India was established and one Chairperson as also an Administrative Member of the Commission was appointed on 14th October, 2003. However, before the Chairperson could enter office, public interest litigation was filed before the Supreme Court of India on 30th October, 2003 inter alia challenging the appointment on the grounds, amongst others, that since:

(a) The proposed Commission, to be headed by a bureaucrat, would replace the MRTP Commission which had all along been headed by a Judicial Member;

(b) Commission had adjudicatory functions which warranted that the Chairperson must be a Judicial Member.

The matter was finally disposed of by the Supreme Court of India in January 2005 noting that the Government of India was introducing an amendment to the law to constitute a judicial appellate authority while leaving the expert regulatory space to the Commission without answering the challenge.

In this backdrop, the Act was amended in September 2007 providing for setting up of a Competition Appellate Tribunal ("the Appellate Tribunal") headed by a Judicial Member to adjudicate appeals and the compensation claims arising out of the decisions of Commission. Ever since its enactment in 2002, the provisions of the Act have selectively been brought into effect. Some of the sections of the Act were brought into force on March 31, 2003 and majority of other sections on June 19, 2003. Section 3 dealing with anti-competitive agreements and Section 4 dealing with abuse of dominance was notified on 15th May 2009 and came into force on 20th May 2009.

The provisions relating to combinations were notified on 4th March 2011 and came into effect from 1st June 2011.

The Commission and Appellate Tribunal became fully operational with effect from 20.05.2009.

Historical background of the Act in a nutshell

- 1948 - The First Industrial Policy Resolution announced
- 1951- Implementation Of The Industrial (Development And Regulation) Act, 1951
- 1955 - Hazari Committee Report on Industrial Licensing Procedure - Working of the licensing system has resulted in disproportionate growth of some big houses
- 1964 - Mahalanobis Committee Report on Distribution And Levels Of Income- Committee gave a finding that top 10 % of the population cornered 40 % of income and big business houses were emerging because of planned economy model
- 1965 - Monopolies Inquiry Commission Report of Das Gupta, Government of India appointed this Inquiry Commission "to inquire into the existence and effect of concentration of economic power in private hands." Reported that there was concentration of economic power and a few industrial houses were controlling a large number of companies and there existed large scale RTP & MTP
- 1969 - Monopolies & Restrictive Trade Practices Act was enacted
- 1984 – MRTP - Major addition relating to Unfair Trade Practices
- 1991 – MRTP - Provisions in respect of Concentration of Economic Power were deleted by omitting Part A of Chapter III of the Act w.e.f. 27.09.1991
- In October 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law under Chairmanship of S.V.S.Raghavan (former Union Commerce Secretary)
- The Committee presented its Competition Policy report to the Government on May 22, 2000
- The Competition Bill, 2002 introduced in Lok Sabha on 6th August 2001 and passed on 16th December 2002

- The Competition Bill, 2002 passed by Rajya Sabha on 12th December 2002
- The Competition Bill, 2002 received President's assent on 13th December 2002
- The Competition (Amendment) Bill, 2006 was introduced in the Lok Sabha on March 9, 2006.
- June 5, 2006 - Planning Commission constituted a Working Group on Competition Policy
- The Parliamentary Standing Committee on Finance [Chairperson: Maj. Gen. (Retd.) Bhuwan Chandra Khanduri] submitted its report on December 12, 2006.
- The Competition Amendment Bill, 2006 was withdrawn and replaced by the Competition Amendment Bill, 2007 on Aug 29, 2007
- The Competition Amendment Bill, 2007 was passed by Lok Sabha on 6th September, 2007
- The Competition Amendment Bill, 2007 was passed by Rajya Sabha on 10th September, 2007
- The Bill was passed by the President on 24th September 2007
- There were 50 amendments by Competition (Amendment) Act 2007
- 15th May, 2009 – Government issued notifications giving effect from 20th May, 2009 to, among others, the provisions dealing with anti-competitive agreements (section 3) and abuse of dominance (section 4) in the Competition Act.
- 4th March 2011 – Notified provisions relating to Combinations with effect from 1st June 2011

List of Rules and Regulations under the Competition Act, 2002

Sl.No.	Rules / Regulations

1	Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulation 2011
2	The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011
3	The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009
4	The Competition Commission of India (General) Regulations, 2009
5	The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009
6	The Competition Commission of India (Lesser Penalty) Regulations, 2009
7	The Competition Commission of India (Determination of Cost of Production) Regulations, 2009
8	Competition Commission of India (Salary, Allowances and other Terms and Conditions of Service of Chairperson and other Members) Rules, 2003
9	Competition Commission of India (Oath of Office and of Secrecy for Chairperson and other Members) Rules, 2003
10	Competition Commission of India (Term of the Selection

	Committee and the Manner of Selection of Panel of Names) Rules, 2008
11	Competition Commission of India (Return on Measures for the promotion of Competition Advocacy, awareness and training on Competition Issues) Rules, 2008
12	Competition Commission of India (Form and Time of Preparation of Annual Report) Rules, 2008
13	Competition Commission of India (Number of Additional, Joint, deputy of Assistant Director-General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) Rules, 2009
14	Competition Commission of India (Form of Annual Statement of Accounts) Rules, 2009
15	Competition Commission of India (salary, allowances, other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees) Rules, 2009
16	The Competition Commission of India (Director-General) Recruitment Rules, 2009
17	Competition Appellate Tribunal (Procedure) Regulations, 2011
18	Competition Appellate Tribunal (Salaries and Allowances and other Terms and Conditions of Service of the Chairperson and Other Members) Rules, 2009

19	Competition Appellate Tribunal (Form and fee for filing an appeal and fee for filing compensation applications) Rules, 2009
20	Competition Appellate Tribunal (Recruitment, salaries & other terms & conditions of service of officers and other employees) Rules, 2010

4. MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969 – AN OVERVIEW

The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was an Act that provided that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The MRTP Act was amended repeatedly in 1974, 1980, 1982, 1984, 1985, 1986, 1988 and 1991. The effect of these amendments was to render the provisions governing monopolies virtually inoperative, but bring unfair trade practices within the purview of the Act. The Act was 'restructured' in 1991 by omitting Sections 20 to 26 and shifting the provisions contained in Chapter IIIA regarding restrictions, acquisition and transfer of shares to the Companies Act, 1956.

Areas focused under the MRTP Act

- Prevention of concentration of economic power to the common detriment
- Control of monopolies
- Prohibition of monopolistic trade practices (MTP)
- Prohibition of restrictive trade practices (RTP)
- Prohibition of unfair trade practices (UTP)

Objectives of MRTP Act

The principal objectives sought to be achieved through the MRTP Act were:

(a) Prevention of concentration of economic power to the common detriment;

(b) Control of monopolies;

(c) Prohibition of monopolistic trade practices;

(d) Prohibition of restrictive trade practices;

(e) Prohibition of unfair trade practices.

Out of these five, the first two were de-emphasized, after the 1991 amendment to the Act. The emphasis not only shifted to the last three mentioned objectives but they were re-emphasized to the extent that monopolies tend to bring about monopolistic trade practices and the Act provides for their surveillance. Briefly, the Act was designed to guard against different aspects of market imperfections. For instance, a merger, which can increase the dominance of the combine or has resulted in a large share in the market, can be looked at in terms of the provisions of the Act and the objectives governing them.

Restrictive Trade Practices (RTPs)

A restrictive trade practice is generally one which has the effect of preventing, distorting or restricting competition. In particular, a practice which tends to obstruct the flow of capital or resources into the stream of production is an RTP. Likewise, manipulation of prices, conditions of delivery or flow of supply in the market which may have the effect of imposing on the consumer unjustified costs or restrictions are regarded as restrictive trade practices.

Certain common types of restrictive trade practices enumerated in the Act which do not have an element of competition are:

a) Refusal to deal;

b) Tie-up sales;

c) Full line forcing;

d) Exclusive dealings;

e) Concert or collusion-cartel;

f) Price discrimination;

g) Re-sale price maintenance;

h) Area restriction;

i) Predatory pricing.

Unfair Trade Practices (UTPs)

Unfair trade practice means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service adopts any unfair method or unfair or deceptive practice. (Section 36A of MRTP Act)

Essentially unfair trade practices fall under the following categories:

a) Misleading advertisement and false representation;

b) Bargain sale, bait and switch selling;

c) Offering of gifts or prizes with the intention of not providing them and conducting promotional contests;

d) False representation of the product's safety standards;

e) Hoarding or destruction of goods.

Making false or misleading representation of facts disparaging the goods, services or trade of another person is also an unfair trade practice under MRTP Act.

Monopolistic Trade Practices (MTPs)

Monopolistic Trade Practice is a trade practice which has or is likely to have the effect of:

i. maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner;

ii. unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services;

iii. limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any services rendered, in India to deteriorate;

iv. increasing unreasonably:

    a. the cost of production of any goods; or

    b. charges for the provision, or maintenance of any services;

v. Increasing unreasonably:

    a. the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or

    b. the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or in the provision or maintenance of any goods or by the provision of any services;

vi. preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

Merger and amalgamation

The MRTP Act did not prohibit mergers, amalgamations or takeovers but seeked to ensure that the arrangement served the public interest. Before the 1991 amendment, the Act frowned upon expansion of giant undertakings so as not to permit them to acquire power to put a stranglehold both on the market as well as on consumers and further industrial expansion of the country. After the 1991 amendment, the Act was restructured and pre-entry restrictions with regard to prior approval of the Government for amalgamation, merger or take-over were removed. But in relation to concentration of economic power, the law retained provisions relating to the power of the Government to direct division of an undertaking and severance of interconnection between undertakings if the working of an undertaking is prejudicial to public interest or is likely to lead to the adoption of any monopolistic or restrictive trade practices. While the power to conduct an enquiry in this regard was vested with the MRTP Commission, the order for division of undertaking or severance of interconnection could be passed only by the Government. Thus, the role of the Commission was advisory.

MRTP Commission

For enforcement of the provisions of the MRTP Act, the Monopolies and Restrictive Trade Practices Commission was established. It consisted of a Chairman and not less than two and not more than eight members, appointed by the Central Government. The Chairman was always a person who is or has been qualified to be a judge of the Supreme Court or of a High Court. The Commission was assisted by the Director General of Investigation & Registration (DG) and as many Additional, Joint, Deputy or Assistant Director General of Investigation and Registration for carrying out investigations or maintaining a register of agreements and for undertaking carriage of proceedings during the enquiry before the MRTP Commission.

Comparison between the MRTP Act and Competition Act

S. No.	**MRTP Act**	**Competition Act**
1	Arrangement and language of the MRTP Act was more complex.	The language and arrangement of sections in the Competition Act is simple and clear.
2	Registration of agreements was compulsory.	There is no requirement for registration of agreements under the Competition Act.
3	There was no regulation of combinations under the MRTP Act.	Combinations are regulated beyond a threshold limit under the Competition Act.
4	The Commission was appointed by the Government under the MRTP Act.	The Competition Commission is selected by a Search Committee.
5	No competition advocacy role for the MRTP Commission.	Competition Commission has been entrusted with the function of competition advocacy.
6	Unfair trade practices were covered under the MRTP Act.	Unfair trade practices are not covered under the Competition Act. Henceforth it will be covered under the Consumer Protection Act, 1986.

5. CONSUMER PROTECTION LAWS IN INDIA

Consumer protection laws or Consumer Laws are designed to ensure fair competition and the free flow of truthful information in the marketplace. Consumer Protection laws are a form of government regulation which aim to protect the interests of consumers.

The Consumer movement in India is a socio-economic movement which seeks to protect the rights of the consumers in relation to the goods purchased and services availed.

The Department of Consumer Affairs under the Ministry of Consumer Affairs, Food and Public Distribution is responsible for the formulation of policies for consumer cooperatives, monitoring prices, availability of essential commodities, Consumer Movement in the country and Controlling of statutory bodies like Bureau of Indian Standards (BIS) and Weights and Measures.

Legislations related to consumer protection in India

The Consumer Protection Act, 1986 is the main legislation pertaining to Consumer protection.

Other Legislations governing Consumer Protection include:

- The Consumer Protection Rules, 1987
- Consumer Welfare Fund Rules, 1992
- The Consumer Protection Regulations, 2005
- Bureau of Indian Standards (Recognition of Consumers' Associations) Rules, 1991

- The Essential Commodities Act, 1955
- Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980
- Consumer Protection (Amendment) Bill, 2011

Consumer Protection Act, 1986

The Consumer Protection Act, 1986 is a social welfare legislation which was enacted as a result of widespread consumer protection movement. It was enacted to provide a simpler and quicker access to redressal of consumer grievances. The main object of the Act is to provide for the better protection of the interests of the consumer and to make provisions for establishment of consumer councils and other authorities for settlement of consumer disputes and matter therewith connected.

The Consumer Protection Act, 1986, applies to all goods and services, excluding goods for resale or for commercial purpose and services rendered free of charge and under a contract for personal service. The provisions of the Act are compensatory in nature. It covers public, private, joint and cooperative sectors. The Act enshrines the rights of the consumer such as right to safety, right to be informed, right to be heard, and right to choose, right to seek redressal and right to consumer education.

Important terms under the Consumer Protection Act -

Consumer: According to Section 2(d) of the Consumer Protection Act, 1986, consumer means any person who - (*i*) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (*ii*) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

Explanation — For the purposes of the sub-clause (*i*), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

According to this definition, a person to be a consumer of goods should satisfy that –

- The goods are bought for consideration.
- Any person who uses the goods with the approval of the buyer is a consumer.
- Any person who obtains the goods for resale or commercial purposes is not a consumer.
- Person buying goods for self employment is a consumer.

A person is a consumer of services if –

- The services are hired or availed of.
- Consideration must be paid or payable.
- Beneficiary of services is also a consumer.

Goods: Goods mean any movable property and also include shares, but do not include any actionable claims.

Service: Service means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. (Sec.2 (1) (o))

Defect: Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods. (Sec.2 (1) (f))

Deficiency: Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Nature of complaint that can be made under the Consumer Protection Act, 1986

- Any unfair trade practice or restrictive trade practice adopted by the trader
- Defective goods
- Deficiency in service
- Excess price charged by the trader
- Unlawful goods sale, which is hazardous to life and safety when used.

Relief that can be granted under the Consumer Protection Act, 1986

(a) Repair of defective goods

(b) Replacement of defective goods

(c) Refund of the price paid for defective goods or service

(d) Removal of deficiency in service

(e) Refund of extra money charged

(f) Withdrawal of goods hazardous to life and safety

(g) Discontinue the unfair trade practice or the restrictive trade practice or not repeat it

(g) Compensation for the loss or injury suffered by the consumer due to negligence of the opposite party

(h) Adequate cost of filing and pursuing the complaint

Unfair Trade Practice and Restrictive Trade Practice under the Consumer Protection Act, 1986

According to Section 2(1)(r) **"unfair trade practice"** means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;—

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

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

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

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

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

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

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof; Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

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

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

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

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation. - For the purposes of clause (1), a statement that is—

(a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(2) permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is,

and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation.—For the purpose of clause (2), "bargaining price" means—

(a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

(b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

(3) permits—

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

(3A) withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Explanation. — For the purposes of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results *are within a reasonable time, published, prominently in the same newspapers in which the scheme was originally advertised;*

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

(6) manufacture of spurious goods or offering such goods for sale or adopts deceptive practices in the provision of services.

According to Section 2(1) (nnn) of the Consumer Protection Act, 1986, **"restrictive trade practice"** means a trade practice which tends to bring about manipulation of price or conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

(a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

(b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services;

On analysis of the above definition, it can be understood that where sale or purchase of a product or service is made conditional on the sale or purchase of one or more other products and services, it amounts to restrictive trade practice.

Technically, this type of arrangement is called 'tie-up sales' or 'tying arrangement'. The effect of such an arrangement is that a purchaser is forced to buy some goods or services which he may not require along with the goods or services which he wants to buy. Thus where a buyer agrees to purchase product 'X' upon a condition that he will also purchase product 'Y' from the seller, the sale of product 'Y' (tied product) is tied to the sale of product 'X' (tying product).

The buyer has to forego his free choice between competing products. This results in neutralizing healthy competition in the 'tied' market.

For example*:* A, a gas distributor insisted his customers to buy gas stove as a condition to give gas connection. It was held that it was a restrictive trade practice - *Re. Anand Gas* RTPE 43/1983 (MRTPC).

However when there is no such precondition and the buyer is free to take either product, no tying arrangement could be alleged event though the seller may offer both the products as a single unit at a composite price.

For example*:* A is a furniture dealer. He is selling Sofa at Rs. 20,000 and Bed at

Rs. 15,000. He has an offer that whoever will buy Sofa and Bed both, he will charge Rs. 30,000 only. Here the choice is open to the customer to buy the products single or composite. This is not a restrictive trade practice.

Consumer Courts

The Consumer Protection Act, 1986 provides for a three tier approach in resolving consumer disputes. There are 3 levels of consumer courts namely:

a) National Consumer Dispute Redressal Commission or National Commission: Value of claims above Rs.1 crore
b) State Consumer Dispute Redressal Commission or State Commission: Value of claims from Rs.20 lakhs to Rs.1 crore
c) District Consumer Disputes Redressal Forum or District Forum: Value of claims upto Rs.20 Lakhs

District Forum and State Commission are formed by States with the permission of the Central Government while the National Commission is formed by the Central Government. Presently there are 34 State Consumer Disputes Redressal Commissions in India.

Complaint

A complaint, hand written or typed, can be filed by a consumer, a registered consumer organisation, central or state Government and one or more consumers, where there are numerous consumers having the same interest. The complaint should be filed with the appropriate Commission depending upon the value of the claim. No stamp or court fee is required. The nature of complaint must be clearly mentioned as well as the relief sought by the consumer. It must be in quadruplicate in district forum or state commission.

Normally, complaints should be decided within 90 days from the date of notice issued to the opposite party. Where a sample of any goods is required to be tested, a complaint is required to be disposed of within 150 days; although it may take more time due to practical problems.

Consumer Protection Councils

Councils have been setup in all states and at the center to promote and protect the rights and interest of consumers. These councils are advisory in nature and can play important role in recommending consumer oriented policies to the state and central Government.

Consumer Protection (Amendment) Bill, 2011

The Government has introduced the Consumer Protection (Amendment) Bill, 2011, in Lok Sabha on December 16, 2011, to facilitate quicker disposal of cases and to widen and amplify the scope of some of the provisions of the Act. The Bill has been referred to the Standing Committee on Food, Consumer Affairs and Public Distribution.

The enactment of the Consumer Protection Act, 1986, was an important milestone in the field of consumer protection. In terms of the Act, consumer disputes redressal agencies have been set up at the 629 District, 35 State and National levels to render simple, inexpensive and speedy justice to consumers in respect of complaints against defective goods, deficient services and unfair/restrictive trade practices. With a view to faster redressal of complaints and to rationalize procedure of appointments in consumer disputes redressal agencies, it has been felt necessary to amend the Act.

Some of the proposed amendments –

- On line filing of consumer complaints
- Enforcement of orders as a Decree of Civil Court
- Payment to be made for non-compliance of the order
- Powers to District Forum
- Powers to State Government in selection process
- Experience for members
- Powers to National Commission / State Commission to direct any one to assist the case

- Monitoring system of pending cases

6. COMPETITION POLICY

Competition Policy means government measures, policies, statutes, and regulations including a competition law, aimed at promoting competitive market structure and behavior of entities in an economy. Competition policy is a critical component of any overall economic policy framework. Competition Policy is intended to promote efficiency and to maximize consumer/social welfare. It also helps to promote creation of a business environment which improves static and dynamic efficiencies, leads to efficient resource allocation and in which abuse of market power is prevented / curbed.

The Government of India is in the process of finalizing a National Competition Policy. The Ministry of Corporate Affairs had constituted a Committee under the Chairmanship of Shri Dhanendra Kumar, Former Chairperson of Competition Commission of India, for framing of National Competition Policy and related matters. The committee submitted a draft National Competition Policy and the Ministry had invited comments from all stakeholders on the policy. The policy will provide a framework to promote greater competition across sectors and unleash the full growth potential of the Indian economy.

The Policy is aimed at laying down an overarching policy framework for infusing competition principles in various policies, statutes and regulations and promoting a competitive market structure in the economy, thereby striving to achieve maximum economy efficiency in various spheres, and public welfare.

The draft policy talks about various instruments to promote competition in markets to ensure protection of consumer interests, while at the same time protecting the rights of market players to fair competition. It also aims to remove overlapping jurisdiction of various regulators and streamline laws

aimed at fostering competition. The Draft National Competition Policy stresses on the need for undertaking Competition Assessment of new and existing policies and laws at the national, regional and local level.
According to the draft policy, CCI (Competition Commission of India) will also have powers to look into matters at state level, such as agriculture and power, but impact large section of the country's population. The proposed Competition Policy also provides for an effective prevention mechanism for anti-competitive conduct, transparent and non-discriminatory market processes.

National Competition Policy is necessitated, as an overarching Policy framework, in continuation of the 1991-reforms, to infuse greater competition across sectors, and unleash fuller growth potential of the Indian economy. Faced with dynamic market realities, there is a need for promoting economic democracy, the forces of competition and transparency in markets in keeping with the rapidly changing market conditions to ensure the protection of consumer interests, while at the same time protecting the rights of market players to free and fair competition. Competition has a two-way linkage with various policies of the Government such as: fiscal policy, trade policy, investment policy, labour policy, consumer policy, environment policy, policy on intellectual property rights, sectoral regulatory policies etc.

The basic premise of the National Competition Policy (NCP) is to unlock fuller growth potential of Indian economy, which among other things could also help in tapping the opportunities arising from the demographic dividend in our country. It would seek to inculcate a competition culture across various sectors to induct greater efficiency and dynamism, bringing in innovation and technology, delivering goods and services which are competitive, thus contributing to accessibility for consumers and consumption and thereby accelerating economic development, global competitiveness, unleashing entrepreneurial energy, creating more jobs and opportunities to raise the living standards of people, thus ensuring inclusive growth.

National Competition Policy may also help to promote good governance by transparency, accountability through competing responses and avoidance of rent seeking. It would also have a positive co-relation with other strategic national objectives like employment, R&D efforts and environmental objectives. It also respects the sovereign functions of the State like defence and security etc, and would seek to encourage competition related measures only in matters having economic impact on the market.

The National Competition Policy will endeavor to:

a) Preserve the competition process, to protect competition, and to encourage competition in the domestic market so as to optimize efficiency and maximise consumer welfare. This would also make domestic firms competitive globally,
b) promote, build and sustain a strong competition culture within the country through creating awareness, imparting training and consequently capacity building of stakeholders including public officials, business, trade associations, consumers associations, civil society etc.,
c) achieve harmonisation in policies, laws and procedures of the Central Government, State Government and sub-State Authorities in so far as the competition dimensions are concerned with focus on greater reliance on well-functioning markets,
d) ensure competition in regulated sectors and to ensure institutional mechanism for synergised relationship between and among the sectoral regulators and/or the CCI and prevent jurisdictional grid locks,
e) strive for single national market as fragmented markets are impediments to competition, and

f) ensure that consumers enjoy greater benefits in terms of wider choices and better quality of goods and services at competitive prices.

The principles of the National Competition Policy are:

- Fair market process
- Institutional separation between policy making, operations and regulation
- Competitive neutrality
- Fair pricing and inclusionary behaviour
- Third party access to 'essential facilities'
- Public Policies and programmes to work towards promotion of competition in the market place
- National, regional and international co-operation

7. COMPETITION ACT, 2002 – AN OVERVIEW

As the Indian economy moved from a regulated regime towards an open market regime, there was an urgent requirement to enact legislation for fostering competition and preventing anti-competition activities. In line with the international trend and to cope up with the changing realities, the existing Monopolies and Restrictive Trade Practices Act, 1969 was repealed and the Competition Act, 2002 was enacted. Subsequently certain amendments were made to the Act in 2007 by The Competition (Amendment) Act, 2007.

The objective of Competition Act, 2002 is to position the competition policy with pragmatic options to promote the spirit of competition and harmonize the conflicts caused by the volatility of globalised markets. The Act provides for a regulatory framework of rules covering the critical areas of competition namely:

- Anti competitive agreements among enterprises
- Abuse of dominant position in the market
- Combinations / mergers between enterprises

Competition Act, 2002 aims at promoting free and fair competition in India and to protect the interests of consumers. The act provides for the establishment of a regulatory body called the "Competition Commission of India" with the basic functions of administration and enforcement of law and competition advocacy.

Competition Act, 2002 is a comprehensive enactment addressing contemporary concerns of competition and future possibilities that impact the sustainable economic development. The Act consists of 66 sections dealt with more than nine chapters covering the following areas:

I. Preliminary (Sections 1 & 2)
II. Prohibition of certain agreements, abuse of dominant position and regulation of combinations (Sections 3 to 6)
III. Competition Commission of India (Sections 7 to 17)
IV. Duties, Powers and Functions of Commission (Sections 18 to 40)
V. Duties of Director General (Section 41)
VI. Penalties (Sections 42 to 48)
VII. Competition advocacy (Section 49)
VIII. Finance, Accounts and Audit (Sections 50 to 53)

VIIIA Competition Appellate Tribunal (Sections 53A to 53U)

IX. Miscellaneous (Sections 54 to 66)

Apart from dealing with the competition misconduct, the Act also envisages a promotional role. The Competition Commission of India has an advocacy role in advising Government and creating awareness and imparting training on competition issues.

Important definitions

"**Acquisition**" means, directly or indirectly, acquiring or agreeing to acquire— (i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise. (Sec.2 (a))

"**Agreement**" includes any arrangement or understanding or action in concert,—

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. (Sec.2 (b))

“**Cartel**" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. (Sec.2 (c))

"**Consumer**" means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of

deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such
services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use. (Sec.2 (f))

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

Explanation.-—For the purposes of this clause,—

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service.

"**Goods**" means goods as defined in the Sale of Goods Act, 1930 (3 of 1930) and includes—

(A) products manufactured, processed or mined;

(B) debentures, stocks and shares after allotment;

(C) in relation to goods supplied, distributed or controlled in India, goods imported into India. (Sec.2 (i))

"**Person**" includes—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v)an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

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

(vii) Any Body corporate incorporated by or under the laws of a country outside India;

(viii) a co-operative society registered under any law relating to cooperative societies;

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses; (Sec.2 (l))

"**Practice**" includes any practice relating to the carrying on of any trade by a person or an enterprise. (Sec.2 (m))

"**Price**", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing. (Sec.2 (o))

"S**ervice**" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising. (Sec.2 (u))

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

"**Turnover**" includes value of sale of goods or services. (Sec.2 (y))

Important provisions under the Competition Act, 2002

Prohibition of Anti-Competitive Agreements

The Act assertively prohibits agreements which cause or are likely to cause an appreciable adverse effect on competition within India. Anti competitive agreements fall under two major categories namely Horizontal Agreements and Vertical Agreements.

1. Horizontal Agreements

Horizontal agreements are agreements among competitors which are at the same stage of production and in the same market. The following acts come under Horizontal agreements:

- Price fixing
- Limited production, supply
- Bid rigging / collusive bidding
- Market Sharing

2. Vertical Agreements

Vertical agreements on the other hand, denote an actual or potential relationship of buying or selling to each other which are at different stages or levels of production chain and therefore in different markets. It is not necessary that agreements in question should be a formal or written agreement. Proof of circumstantial evidence is sufficient. The following is a list of Vertical agreements:

i. Tie-in-agreements – requiring the purchaser of goods to purchase different goods not required by the purchaser. (Sec.3(4)(a))
ii. Exclusive supply agreements – restraining any dealing in goods other than those of seller. (Sec.3(4)(b))
iii. Exclusive distribution agreements – limits or restricts output or supply of goods, allocation of area or market (Sec.3(4)(c))
iv. Refusal to deal – restricts the classes of customer or sellers (Sec.3(4)(d))
v. Resale price maintenance – price stipulated by seller to the purchaser on onward resale. (Sec.3(4(e))

3. Cartels

Cartels are bad per se and pose grave threat to competition by distorting free trade. Cartels affect the developing countries more as favorable conditions exist when there are few competitors; products are uniform and leave little scope for competition; existence of communication chances between members; market is hit by either excess capacity or general recession.

Sec.2(c) of the Competition Act, 2002 defines Cartel as – "an association of producers, sellers, distributors, traders or service providers who by agreement among themselves limit, control or attempt to control production, distribution sale or price of trade in goods or provision of services."

Anti competitive agreements among cartels engaged in identical or similar trade of goods or provision of services in the following areas are prohibited. (Sec.3(3))

- Determining purchase or sale prices (Sec.3(3a))
- Limiting or controlling production / supply markets technical development, investment or provision of services (Sec.3(3b))
- Sharing of market / sharing of source of production by allocation of geographical areas, number of customer or types of goods or services (Sec.3(3c))
- Resorting to bid rigging or collusive bidding (Sec.3(3d))

Prohibition of abuse of dominant position

Abuse of dominant position refers to the market power of an enterprise to exercise leverage through exploitative and protective business practices. If an enterprise indulges in maneuvers of imposing unfair or discriminatory pricing and imposes barriers for new entrants into relevant market, it attracts the penal provisions of the Act. Sec.4 of the Act explicitly prohibits the abuse of dominant position. There will be an abuse of dominant position, if an enterprise or group acts in the following manner:

i. Conditioning purchase or sale of goods or service;

ii. Predatory pricing of goods or services;
iii. Restricting production of goods or provision of services or market there for;
iv. Restricting technical or scientific development relating to goods or services to the prejudice of consumers;
v. Indulging in practice or practices resulting in denial of market access;
vi. Concluding 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;
vii. Using its dominant position in one relevant market to enter into, or protect, other relevant market.

"Dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to -

(i) Operate independently of competitive forces prevailing in the relevant market; or

(ii) Affect its competitors or consumers or the relevant market in its favour.

Predatory price means the sale of goods or provision of services at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors.

"Group" means two or more enterprises which, directly or indirectly, are in a position to - (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or

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

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

Regulation of combinations

Sec.5 of Competition Act, 2002 provides for pre-empting the potential abuse of dominance. A combination is required to be notified to the Competition Commission of India for its approval. For this purpose, the combinations are classified into two groups.

i. Acquisition of one or more enterprises
ii. Merger or amalgamation

The test of validity of acquisition is based on the size of assets and turnover of the parties:

Group I – Parties to the acquisition have assets of more than rupees one thousand crores or turnover more than rupees three thousand crores, (Sec.5(a)(i)(A), or assets of the value of more than Five hundred million US dollars, including at least Rupees Five hundred crores in India or turnover more than fifteen hundred million US dollars, including at least Rupees fifteen hundred crores in India. (Sec.5(a)(i)(B).

Group II - Assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores (Sec.5 (a)(ii)(A), or, assets of the value of more than two billion US dollars, including at least Rupees five hundred crores in India or turnover more than six billion US dollars, including at least Rupees fifteen hundred crores in India. (Sec.5(a)(ii)(B).

The test of validity of merger is based on the size of assets and turnover of the parties:

Group I – Acquisition value of assets of more than rupees one thousand crores or turnover more than rupees three thousand crores after acquisition, (Sec.5(c)(i)(A), or, after acquisition jointly owned assets of five hundred million US dollars, including at least Rupees five hundred crores in India or turnover more than fifteen hundred million US dollars, including at least Rupees fifteen hundred crores in India, (Sec.5(c)(i)(B).

Group II – Assets of value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores, (Sec.5(c)(ii)(A), or, assets of value more than two billion US dollars including at least Rupees five hundred crores in India or turnover more than six billion US dollars including at least Rupees fifteen hundred crores in India, (Sec.5(c)(ii)(B).

Overview of Rules and Regulations under the Competition Act, 2002

1. **The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011**
   This regulation deals with the manner of recovery of monetary penalty. Penalty means a monetary penalty or fine or any other sum imposed by the Commission and realizable under the Competition Act, 2002. The various modes of recovery of penalty has been enumerated under this Regulation.

2. **Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulation 2011**
   This regulation deals with the procedure with regard to the transaction of business relating to combinations. It deals with categories of transactions not likely to have appreciable adverse effect on competition in India, form of notice for proposed combination, filing of details of acquisition, mode and payment of fees, procedure for filing notice etc.

3. **The Competition Commission of India (General) Regulations, 2009**
   This Regulation deals with the procedure to be followed by the Competition Commission. The contents of the information or reference to the Commission and the procedure for filing the same are enumerated in the General Regulations. Powers and functions of the Secretary of the Commission are given in detail. The procedure for investigation by the Director General and inquiry by the Commission is also mentioned under the regulations. Procedure for taking evidence and other powers of the Commission have been enumerated in detail. Procedure for imposition of penalty is also mentioned.

4. **The Competition Commission of India (Determination of Cost of Production) Regulations, 2009**
   This Regulation deals with determination of cost of production to derive about anti-competitiveness of an agreement, dominant position of an enterprise and combinations.

5. **The Competition Commission of India (Lesser Penalty) Regulations, 2009**
   This Regulation deals with conditions for lesser penalty, grant of lesser penalty and procedure for grant of lesser penalty in case of cartels.

6. **The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009**
   Meetings of the Commission for transaction of business and their procedure have been dealt with under this Regulation.

7. **The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009**

The Commission can engage experts and professionals in the fields of economics, law, business or other disciplines related to competition. The functions, qualification, experience, classification, remuneration and procedure for selection of experts and professionals have been enumerated in the regulations.

8. **Competition Commission of India (Salary, Allowances and other Terms and Conditions of Service of the Chairperson and other Members) Rules, 2003**
   Salary, allowances and other terms and conditions of service like leave, travel allowance, medical facilities etc. of the Chairperson and other Members of the Competition Commission are dealt with under this Rule.

9. **Competition Commission of India (Oath of Office and of Secrecy for Chairperson and other Members) Rules, 2003**
   This Rule deals with the procedure for oath of office and secrecy of the Chairperson and Members of the Competition Commission.

10. **Competition Commission of India (Term of the Selection Committee and the Manner of Selection of Panel of Names) Rules, 2008**
    This Rule deals with the term of the Selection Committee, manner of selection and the functions of the Committee.

11. **Competition Commission of India (Return on Measures for the promotion of Competition Advocacy, awareness and training on Competition Issues) Rules, 2008**
    On completion of every year, return and statements containing details of measures taken for competition advocacy, creating awareness and capacity building in competition matters should be submitted to the Central Government.

12. **Competition Commission of India (Form and Time of Preparation of Annual Report) Rules, 2008**

    The Commission should submit once in every year an annual report to the Central Government. The annual report should contain details of investigations and inquiries conducted by the Commission, orders passed by the Commission, execution of orders, appeals, matters received regarding combinations, references by Central or State Governments, competition advocacy and administration and establishment matters.

13. **Competition Commission of India (Number of Additional, Joint, deputy of Assistant Director-General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) Rules, 2009**

    Salary and allowances of the Director General, Additional, Joint, Deputy or Assistant Director-General and officers and other employees of the office of Director General, their conditions of service, official visits abroad, procedure for recruitment, qualifications etc have been detailed in this Rule.

14. **Competition Commission of India (Form of Annual Statement of Accounts) Rules, 2009**

    The Commission should prepare the annual statement of accounts containing the balance sheet, income and expenditure account and receipt and payment account. The same should be forwarded to the Comptroller and Auditor General of India for the purpose of audit.

15. **Competition Commission of India (salary, allowances, other terms and conditions of service of the Secretary and officers and other**

employees of the Commission and the number of such officers and other employees) Rules, 2009

Salary, allowances and other terms and conditions of service of the Secretary, officers and employees of the Competition Commission are dealt with under this Rule.

16. **The Competition Commission of India (Director-General) Recruitment Rules, 2009**

    This Rule deals with the method of recruitment, eligibility, pay scale, disqualification of Director-General.

17. **Competition Appellate Tribunal (Salaries and Allowances and other Terms and Conditions of Service of the Chairperson and Other Members) Rules, 2009**

    Salary, allowances and other terms and conditions of service like leave, travel allowance, medical facilities etc. of the Chairperson and other Members of the Competition Appellate Tribunal are dealt with under this Rule.

18. **Competition Appellate Tribunal (Procedure) Regulations, 2011**

    This Rule deals with the procedure to be followed by and before the Tribunal.

19. **Competition Appellate Tribunal (Form and fee for filing an appeal and fee for filing compensation applications) Rules, 2009**

    This Rule deals with the procedure for filing an appeal before the Competition Appellate Tribunal.

20. **Competition Appellate Tribunal (Recruitment, salaries & other terms & conditions of service of officers and other employees) Rules, 2010**

Salary, allowances and other terms and conditions of service of the officers and employees of the Competition Appellate Tribunal are dealt with under this Rule.

8. ANALYSIS OF KEY CONCEPTS AND ISSUES OF COMPETITION LAW

The Competition Act, 2002 deals with four major concepts namely:

- Anti - Competitive Agreements
- Abuse of Dominant position
- Regulation of Combinations
- Competition Advocacy

I. ANTI-COMPETITIVE AGREEMENTS

Firms enter into agreements, which may have the potential of restricting competition. Agreements which cause or are likely to cause appreciable adverse effect on competition are anti-competitive agreements. Anti-competitive agreements are prohibited under the Competition Act, 2002.

An agreement includes any arrangement or understanding or action in concert which need not be formal or in writing and where such an arrangement is intended to be enforceable by legal proceedings or not. (Sec.2 (b) of Competition Act, 2002)

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

Explanation.-— for the purposes of this clause,—

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service.

Anti-competitive agreements fall under two major categories namely Horizontal Agreements and Vertical Agreements. Horizontal agreements are those among competitors while vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. Anti-competitive agreements i.e. prohibition of certain agreements is dealt with under Section 3 of the Competition Act, 2002.

Horizontal Agreements

Agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. An example of such agreement is the one between enterprises dealing in the same product or products. If parties to the agreement are both producers or retailers (or wholesalers) they will be deemed to be at the same stage of the production chain.

The Competition Act presumes that the following four types of agreements between enterprises, involved in the same or similar manufacturing or trading of goods or provision of services have an appreciable adverse effect on competition :

- **Agreements regarding prices** - These include all agreements that directly or indirectly fix the purchase or sale price. This is also known as Price-fixing. (Sec.3(3)(a))

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

  The prices can be fixed by buyers or sellers. The term price includes many components of price consisting of discounts, rebates, delivery charges, special fees etc. So an agreement concerned with any of these components of price amounts to price fixing. Price fixing requires a conspiracy between two or more sellers or buyers; the purpose is to coordinate pricing for mutual benefit of the traders.

- **Agreements regarding quantities** - These include agreements aimed at limiting or controlling production, supply, markets, technical development, investment or provision of services. (Sec.3(3)(b))

  An agreement to restrict production or output is illegal because reducing the supply of a product will ultimately result in increase in its price.

- **Agreements regarding market sharing** - These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way. (Sec.3(3)(c))
  Competitors in order to make more benefits, agree with each other to divide the markets by territory or on the basis of the customers. Such agreements between competitors are illegal by nature.

- **Agreements regarding bids (collusive bidding or bid rigging)** - These include tenders submitted as a result of any joint activity or agreement. (Sec.3(3)(d))

However there is an exception that the presumption would not apply to a joint venture agreement which increases efficiencies in production, supply, distribution, storage, acquisition or control of goods or provisions of services.

Bid Rigging

Bid rigging is defined as any agreement between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. (Explanation to Section 3(3))

In simple words, bid rigging is a form of fraud in which a commercial contract is promised to one party even though for the sake of appearance, several other parties also present bids. The bids end up suiting a single player. Besides affecting the end-consumer’s interest, these anti-competitive practices take a toll on the public exchequer as public money is flushed out to wrong hands.

Cartels

Cartel as defined under Section 2(c) of the Competition Act, 2002 includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Cartels are created by anti-competitive horizontal agreements among business enterprises. They pose a great threat to competition and ultimately tend to destroy the free trade. In fact cartels are secret agreements between business firms with the sole objective of fixing prices or sharing markets between them.

The important characteristics that constitute a Cartel are:

- an agreement which includes arrangement or understanding;
- agreement is amongst producers, sellers, distributors, traders or service providers i.e. parties are engaged in identical or similar trade of goods or provision of service, and
- agreement aims to limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services

Vertical agreements

Vertical agreements are those agreements between enterprises at different stages of the production chain. For example, an agreement between the manufacturer and a distributor is a vertical agreement. It is not necessary that the agreement should be a formal or written agreement. Proof of circumstantial evidence is sufficient.

The various types of Vertical agreements envisaged under the Competition Act, 2002 are:

a) Tie-in-arrangement (Sec.3(4)(a))

This arrangement includes any agreement that requires the purchaser of the goods to purchase different goods that is not required by the purchaser. Its objective is to pressurize or force the customer to buy a particular product or lease a product or service and if he is not interested to threaten him by withholding any other product or service. A tie-in arrangement will become illegal when an enterprise uses its market power that it has on a particular product and by taking advantage does not sell or lease that product to the customer until and unless he agrees to buy another product that the enterprise wants him to buy.

For example, there is a medical shop in a remote place and it puts a condition that whoever wants to buy medicines from that shop should also buy two litres of orange juice. Under such circumstances, the customer is forced to buy the orange juice although he might not require the juice. Therefore the medical shop has used its market influence to force the sale of an entirely different product along with the product that is required.

b) Exclusive supply agreement (Sec.3(4)(b))

Any agreement that restricts the purchaser in the course of his trade from acquiring or dealing in any goods other than those of the seller or any other person is considered as an Exclusive supply agreement. Such agreements result in major harm to the competition as the competitors of the seller are not in a position to compete in the market. Generally, requirements and arrangements referring to quality, specifications, quality control, raw materials, packing materials, quantities, terms of delivery, etc., may be made. However, if either the buyer or the seller has significant market share then entering into a long-term exclusive supply agreement may cause competition concerns.

For example, buyer asking the manufacturer not to manufacture identical goods for any other buyer without the consent of the buyer is considered to be restrictive.

c) Exclusive distribution agreement (Sec.3(4)(c))

Any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods is considered as an Exclusive distribution agreement.

In an exclusive distributor agreement, the supplier and wholesaler-distributor agree that the wholesaler-distributor will deal exclusively with the supplier for certain products. Such agreements foreclose the supplier's competitors from accessing the marketplace through the exclusive distribution network. Such arrangements will violate the competition law if their effect substantially lessens or tends to create a monopoly in any line of commerce.

d) Refusal to deal (Sec.3(4)(d))

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

There is no absolute right to be supplied, and though in general businesses have the freedom to determine who to deal with, there are circumstances where a refusal to deal will be illegal. Competitors may agree not to deal with others or to do so only on collectively determined terms, with the intention of significantly damaging these businesses or reducing the competition in the market.

e) **Resale price maintenance (Sec.3(4)(e))**

Resale price maintenance includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. In other words, resale price maintenance refers to any attempt by an upstream supplier to control or maintain the minimum price at which the product is resold by its customer. This prevents the resellers from competing too fiercely and thereby drives down its profits. Insisting that a product be resold at a specific margin, or limiting the discounts that a reseller may offer, in essence restricts the reseller's ability to set a price and is accordingly prohibited.

Agreements not anti-competitive

Agreements permitted by law are not anti-competitive. The Act gives due recognition to intellectual property rights, wherein the prohibition against anticompetitive agreements will not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights under the following legislations:

a. The Copyright Act 1957,

b. The Patents Act 1970

c. The Trade and Merchandise Marks Act, 1958

d. The Geographical Indications of Goods (Registration and Protection) Act, 1999

e. The Designs Act, 2000

f. The Semi-conductor Integrated Circuits Layout-Design Act, 2000

Thus any agreement for the purpose of restraining infringement of such Intellectual Property Rights or for imposing reasonable conditions for protecting such rights will not be subject to the prohibition against anticompetitive agreements. (Section 3(5)(i) of Competition Act, 2002).

Similarly, exports enjoy exemptions from such prohibition, which will not apply to the right of any person to export goods from India to the extent to which the agreement relates exclusively to the export of goods or services. (Section 3(5)(ii) of Competition Act, 2002).

Inquiry by Competition Commission into anti-competitive agreements

Section 19 empowers the Commission to inquire in to any alleged contravention of the prohibition of anti-competitive agreements under Sec.3 of the Competition Act, 2002. It can do on its own motion or on receipt of a complaint from any person, consumer or their association or trade association; or a reference made to it by the Central Government or a State Government or a statutory authority.

While determining whether an agreement has an appreciable adverse effect on competition, the Commission will take into consideration all or any of the following factors, namely:—

a. creation of barriers to new entrants in the market;

b. driving existing competitors out of the market;

c. foreclosure of competition by hindering entry into the market;

d. accrual of benefits to consumers;

e. improvements in production or distribution of goods or provision of services;

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

Section 26 provides for the procedure for inquiry relating to an apprehended anti-competitive agreement. Accordingly, the Commission, if it is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation made in to the matter. The Director General shall, on receipt of such direction from the Commission, submit a report of his findings within such period as may be specified by the Commission. On the other hand, on receipt of a compliant, if the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary. After the Director General submits his report of investigation, the Commission shall forward a copy of the report to the parties concerned or to the Central Government or to the State Government or to the statutory authority, as the case may be. If the report of the Director General relates to a complaint and such report recommends that there is no contravention of the provisions of the Act, the Commission shall give the complainant an opportunity to rebut the findings of the Director General. If after hearing the complainant, the Commission agrees with the recommendations of the Director General, it shall dismiss the complaint. If after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint. If the report of the Director General relates to a reference made by a Government or statutory authority and recommends that there is no contravention of the provisions of the Act, the Commission shall invite comments of the Government concerned or of the statutory authority on the report. On receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a *prima facie* case. If the report of the Director General recommends that there is a contravention of the provisions of the Act, and also if the Commission is of the opinion that further inquiry is called for, it shall inquire in to such contravention.

Where after inquiry the Commission finds that any agreement is in contravention of section 3, it may pass all or any of the following orders, namely:—

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

(b) Impose such penalty, as it may deem fit which shall not be more than ten per cent of the average annual turnover of the last three preceding financial years, up on each such person or enterprises which are parties to such agreement.

(c) Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order of the Commission;

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

(e) Pass such orders as it may deem fit.

In case any agreement under section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader, or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher.

II. ABUSE OF DOMINANT POSITION

Abuse of dominant position is a serious violation under the Competition Act, 2002. Section 4 of the Act specifically states that no enterprise should abuse its dominant position. It also states that there will be an abuse of dominant position if an enterprise imposes unfair or discriminatory conditions or prices in the purchase or sale of goods or provision of services or if it limits or restricts production of goods or provision of services or technical and scientific development or it denies market access, etc.

The Competition Act does not frown on dominance as such. An enterprise is free to grow as large as it pleases or achieve as big a market share as it can. The problem arises only when there is an abuse of dominance.

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.

Dominant position means a position of strength enjoyed by an enterprise, in the relevant market, in India, which enable it to –

i. Operate independently of competitive forces prevailing in the relevant market; or
ii. Affect its competitors or consumers or the relevant market in its favour.

Therefore the two elements of dominance that need to be proved together are the position of strength of an enterprise and the behaviour that affects the competitors or consumer or market.
"Relevant market" means the market which may be determined with reference to the relevant product market or the relevant geographic market or with reference to both the markets. (Sec.2(r))
“Relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. (Sec.2(s))
“Relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. (Sec.2(t))

Predatory pricing

Predatory pricing is the practice of selling a product or service at a very low price, intending to drive competitors out of the market, or create barriers to entry for potential new competitors. If competitors or potential competitors cannot sustain equal or lower prices without losing money, they go out of business or choose not to enter the business.

According to Explanation (b) to Section 4 of the Competition Act, 2002, predatory price means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 has been enacted to determine the cost in predatory pricing. According to Regulation 3(1), cost will generally be taken as average variable cost, as a proxy for marginal cost. But in specific cases, the Commission may, depending on the nature of the industry, market and technology used, consider any other relevant cost concept such as avoidable cost, long run average incremental cost, market value etc. Meanings of important terms under the regulations are given hereunder:

a. Average variable cost means the total variable cost divided by total output during the referred period.
b. Total variable cost means the total cost minus the fixed cost and share of fixed overheads, if any, during the referred period.
c. Total cost means the actual cost of production including items, such as cost of material consumed, direct wages and salaries, direct expenses, work overheads, quality control cost, research and development cost, packaging cost, finance and administrative overheads attributable to the product during the referred period.
d. Total avoidable cost means the cost that could have been avoided if the enterprise had not produced the quantity of extra output during the referred period.
e. Long run average incremental cost is the increment to long run average cost on account of an additional unit of product, where long run cost includes both capital and operating costs.
f. Market value means the consideration which the customer pays or agrees to pay for a product which is sold or provided or can be sold or provided, as the case may be.
g. Marginal cost is the change in total cost that arises when the quantity produced changes by one unit.

The Competition Commission has adopted the Average Variable Cost as the appropriate measure of cost to determine the predatory price. There is a general presumption that where the enterprise sets its sale price below its Average Variable Cost, then it has engaged in predatory pricing.

Inquiry by Competition Commission into abuse of dominant position

Section 19 empowers the Commission to inquire in to any alleged contravention of abuse of dominant position under section 4 of the Competition Act, 2002. It can do on its own motion or on receipt of a complaint from any person, consumer or their association or trade association; or a reference made to it by the Central Government or a State Government or a statutory authority.

Section 26 provides for the procedure for inquiry relating to abuse of dominant position. Accordingly, the Commission, if it is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation in to the matter. The Director General shall, on receipt of such direction from the Commission, submit a report of his findings within such period as may be specified by the Commission. On the other hand, on receipt of a compliant, if the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary. After the Director General submits his report of investigation, the Commission shall forward a copy of the report to the parties concerned or to the Central Government or to the State Government or to the statutory authority, as the case may be. If the report of the Director General relates to a complaint and such report recommends that there is no contravention of section 4, the Commission shall give the complainant an opportunity to rebut the findings of the Director General. If after hearing the complainant, the Commission agrees with the recommendations of the Director General, it shall dismiss the complaint. If after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint. If the report of the Director General relates to a reference made by a Government or statutory authority and recommends that there is no contravention under section 4, the Commission shall invite comments of the Government concerned or of the statutory authority on the report. On receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a *prima facie* case. If the report of the Director General recommends that there is a contravention of section 4, and also if the Commission is of the opinion that further inquiry is called for, it shall inquire in to such contravention.

Where after inquiry the Commission finds that action of an enterprise in a dominant position is in contravention of section 4, it may pass all or any of the following orders, namely:—

(a) Direct any enterprise or association of enterprises or person or association of persons, as the case may be involved in abuse of dominant position to discontinue such abuse of dominant position.

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

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

(d) Pass such orders as it may deem fit.

Factors to be considered while deciding abuse of dominance

Section 19(4) of the Competition Act, 2002 stipulates that the Competition Commission while inquiring whether an enterprise enjoys a dominant position or not should consider all or any of the following factors, namely:—

a) Market share of the enterprise -

   The market share of the enterprise will depend upon the nature of sector and issue under investigation. For example, the market share of an airline could be measured on the basis of number of flights, number of aircrafts; number of passenger's carrying capacity, the city pairs etc. and each parameter may give different results.

b) Size and resources of the enterprise –

   Large size and superior financial position or resources may be a contributing factor to a dominant market position.

   In India, the cash rich BCCI with virtual strangle-hold over cricket has not accorded recognition to the ICL as a league, and has denied access to cricket grounds and prevented ICL players and coaches from participating in BCCI sponsored activities. The financial clout and other resources at the command of BCCI enabled it to promote its own sponsored IPL by excluding the ICL formed by Essel Group in May, 2007. The presence of two cricket leagues namely the IPL and ICL would have led to increased competition to the benefit of cricket fans, cricketers and market as a whole. (News item in Economic Times of 28th April, 2009 under the caption "Cricket and the Competition Law")

c) Size and importance of the competitors -

   The competitor's size and importance need to be determined while checking for abuse of dominance. Market share of one competitor in the market will determine the competition constrain on the other player. For example both Pepsi and Coke enjoy a major share in the soft drink market which reflects that one has ability to exercise competitive pressure on another and therefore, neither of them ought to be determined as dominant in the relevant market.

d) Economic power of the enterprise including commercial advantages over competitors-
Superior market position or resources may be a causative factor to a dominant market position. Life Insurance Corporation of India has the benefit of prior entry and that of sovereign guarantee in the personal insurance market and thereby has commercial advantage over new entrants.

e) Vertical integration of the enterprises or sale or service network of such enterprises –
The vertical integration and benefit of well-established distribution system may also act as a barrier to entry as it can discourage or impede access for a potential entrant to the market.
Sales network may also be a relevant factor and have a commercial advantage over its rivals.

f) Dependence of consumers on the enterprise –
In public utilities, the dependence of the consumers is quite high. For example – Most of the electricity boards are state owned with very few private companies in this sector. Likewise the LPG market is mostly state owned.

g) Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise –

Public sector undertakings do have an edge over new private sector entrants. For example in India, Shell and Reliance ventured into marketing of oil in a big way but had to close their oil dispensing outlets due to absence of competitive neutrality between public sector and private sector by confining the subsidy only to public sector oil companies.

h) Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers –

   Barriers to entry, exit or expansion and durability to market power are important factors in the assessment of dominance. The substantial entry barriers shield existing competitors from competition and foster market power. The barriers could be structural, regulatory or strategic one. The structural barriers could be on account of peculiar nature of industry e.g. cost advantages for the incumbent, supplier-customer relationship, switching cost, sunk cost, economies of scale and scope, technological knowhow etc. An idle capacity of a player in industry could discourage a prospective entrant to enter the market. The regulatory barriers are those which are created by the State in the form of laws, regulations and administrative practice e.g. tariff and non-tariff barriers. The strategic barriers are those which are created by the incumbent in a market which have the effect of deterring entry e.g. long term supply contracts, exclusivity contracts, over investment in capacity or advertising, exclusive dealing or tying etc.

i) Countervailing buying power –

An enterprise may be constrained not only by actual and potential competitors but also by its customers. If there are competitors with adequate capacities to meet demand, a buyer's threat to switch to another supplier may have a considerable disciplinary effect on a supplier that sells a major part of its production to a single buyer.

j) Market structure and size of market –
Market structure which is characterized by a sole supplier of goods/services either on standalone basis or by virtue of common ownership makes conditions conducive to exercise market power affecting competition, consumers or market.

k) Social obligations and social costs –
Social obligations performed by an enterprise should be given consideration by the Commission. For example, while considering the dominance of the Indian Railways, its important role in ensuring connectivity between various places in the country at affordable fares should be taken into consideration.

l) Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition –
An enterprise' contribution to economic development should also be taken into consideration while determining the dominant position of the enterprise.

m) Any other factor which the Commission may consider relevant for the inquiry.

Factors to be considered while determining relevant market

For determining whether a market constitutes a relevant market, the Commission should give due regard to the 'relevant geographic market' and 'relevant product market'.

Section 19(6) of the Competition Act, 2002 stipulates that the Competition Commission while determining the relevant geographic market should consider all or any of the following factors, namely:-

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

Section 19(7) of the Competition Act, 2002 stipulates that the Competition Commission while determining the relevant product market should consider all or any of the following factors, namely:-

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

Division of enterprise enjoying dominant position

Section 28 empowers the Commission to direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

The Order for division of enterprise by the Commission may provide for all or any of the following matters namely:-

a) the transfer or vesting of property, rights, liabilities or obligations;
b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
d) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
e) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
f) any other matter which may be necessary to give effect to the division of the enterprise.

Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise will not be entitled to claim any compensation for such cesser.

III. REGULATION OF COMBINATIONS

The Competition Act, 2002 provides for regulation of combinations. Combination includes acquisition of shares, control, voting rights or assets, mergers and amalgamations. Only those combinations where the total value of the assets or the turnover of the combining parties exceeds the threshold limits prescribed are regulated by the Act.

Thresholds for Combinations

In case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India. Hence the Act provides for sufficiently high thresholds in terms of assets/turnover for mandatory notification to the Commission.

Broad overview of combinations is presented in the form a table below:

Individual / Group	**Assets / turnover in India**	**Assets / turnover in or outside India**
Acquisition by an acquirer (individual)	Joint assets over Rs.1500 crores or turnover over Rs.4500 crores.	Joint assets over US$ 750 million including at least Rs.750 crores in India or turnover over US$ 2250 million including at least Rs.2250 crores in India.
Acquisition by a group	Group asset over Rs.6000 crores or turnover over Rs.18000 crores.	Group assets over US$ 3 billion including at least Rs.750 crores in India or turnover over US$ 9 billion including at least Rs.2250 crores in India.

Determination of value of assets

The value of assets will be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets will include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights.

Exceptions

Share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund made pursuant to any covenant of a loan agreement or investment agreement will fall outside the combination provisions of the Competition Act, 2002. But these investment institutions should notify the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement etc. in Form III (Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011) within seven days from the date of acquisition to the Competition Commission.

Compulsory Notice to the Commission

Any person or enterprise that proposes to enter into a combination should give notice in Form I (Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011) to the Competition Commission of India along with prescribed fee of Rs.10 lakhs within thirty days of:

- Board's approval in case of merger/amalgamation; or
- Execution of any agreement or document for acquisition.

Optional Notice

The parties to the combination engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than fifteen percent (15%) in the relevant market and the parties to the combination that are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than twenty five percent (25%) in the relevant market may give notice in Form II (Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011) to the Competition Commission of India along with prescribed fee of Rs.40 lakhs.

Combination to take effect

The proposed combination cannot take effect for a period of 210 days from the date it notifies the Commission or till the Commission passes an order, whichever is earlier. If the Commission does not pass an order during the period of 210 days, the combination will be deemed to have been approved.

Regulation 28(6) provides that the CCI shall endeavor to make its final determination on the combination notice within 180 days of filing of details of combination in Form I or Form II.

Regulation 5 and Regulation 19 provide that the time taken by the parties in providing information on direction of CCI is excluded from the relevant review period. These cases are: (1) Removing defects in notice, or (2) Furnishing additional information by the parties.

Exemptions

Regulation 4 read with Schedule - I of Combinations Regulations, 2011 provides exemption to the following transactions which ordinarily are not likely to have any adverse competitive impact and therefore, the parties to such transaction do not require filing notice to the CCI.

The list of the exempted transactions includes:

1) Acquisition up to 25% of the shares or voting rights of the target enterprise, solely as an investment or in the ordinary course of business provided no other controlling rights are acquired.

2) Acquisition of the shares or voting rights where the acquirer prior to acquisition has at least 50% of the shares or voting rights in the target enterprise except when it leads from joint to sole control.

3) Intra-group acquisition involving a holding company and its subsidiary wholly owned by enterprises belonging to the same group and/ or involving subsidiaries wholly owned by enterprises belonging to the same group.

4) Deals taking place entirely outside India with insignificant local nexus and effects on markets in India.

5) Acquisition of stock in trade, raw material, stores, spares or current assets in the ordinary course of business.

6) Acquisition of shares or voting right pursuant to a bonus issue, stock split or consolidation or buy back of shares or right issue provided no control is acquired.

7) Amended or renewed tender offer where a notice has been filed prior to such amendment or renewal offer.

8) Acquisitions of current assets in the ordinary course of business.

9) Acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker in the ordinary course of the business and in the process of underwriting or stock broking.

Factors to be considered while inquiring into Combinations

Section 20(4) of the Competition Act, 2002 stipulates that the Competition Commission while inquiring whether a combination would have an appreciable adverse effect on competition in the relevant market should consider all or any of the following factors, namely:—

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of combination in the market;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or arc likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(/) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Inquiry and Investigation into Combination

Section 20 empowers the Commission to inquire into any combination which has caused or is likely to cause an appreciable adverse effect on competition in India. It can do on its own motion or on receipt of a complaint from any person, consumer or their association or trade association; or a reference made to it by the Central Government or a State Government or a statutory authority. But the Commission should not initiate any inquiry after the expiry of one year from the date on which such combination has taken effect.

Section 29 provides for the procedure for investigation of combination.

- The Commission will issue a show cause notice to the parties to the combination to respond within 30 days of the receipt of the notice as to why investigation in respect of such combination should not be conducted.

- After receipt of the response of the parties to the combination the Commission may call for a report from the Director General and such report should be submitted by the Director General within such time as the Commission may direct.
- If the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, or receipt of report from the Director General, whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.
- The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file

his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published.

- The Commission may, within fifteen working days from the expiry of the period mentioned above call for such additional or other information as it may deem fit from the parties to the said combination.
- The additional or other information called for by the Commission should be furnished by the parties to the Combination within fifteen days from the expiry of the period mentioned above.
- After receipt of all information and within a period of forty-five working days from the expiry of the period mentioned above, the Commission shall pass appropriate orders.

Orders of Commission on certain combinations

After completion of investigation into any combination, any of the following orders may be passed by the Commission (Section 31):

1) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination.
2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
3) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.

4) The parties, who accept the modification proposed by the Commission, should carry out such modification within the period specified by the Commission.
5) If the parties to the combination, who have accepted the modification fail to carry out the modification within the period specified by the Commission, such combination will be deemed to have an appreciable adverse effect on competition and the Commission can deal with such combination in accordance with the provisions of the Competition Act.
6) If the parties to the combination do not accept the modification proposed by the Commission, such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission.
7) If the Commission agrees with the amendment submitted by the parties it shall, by order, approve the combination.
8) If the Commission does not accept the amendment submitted, then the parties will be allowed a further period of thirty working days within which such parties should accept the modification proposed by the Commission.
9) 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 will be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.
10) Where the Commission has directed that the combination should take effect or the combination is deemed to have an appreciable adverse effect on competition, then without prejudice to any penalty or any prosecution which may be initiated, the

Commission may order that the acquisition or acquiring of control or the merger or amalgamation should not be given effect to. The Commission may also frame a scheme to implement its order.

11) If the Commission does not on expiry of the period of two hundred and ten days from the date of notice given to the Commission of the proposed combination, pass an order or issue direction, then the combination will be deemed to have been approved by the Commission. While determining the period of 210 days, the period of 30 days mentioned in sub-section (6) and (8) will be excluded.

12) Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties.

Appeals

The Central Government has notified a Competition Appellate Tribunal (COMPAT) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act, such as orders relating to notification of combination, inquiry by the Commission and penalties.

An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.

IV. COMPETITION ADVOCACY

Competition Advocacy is defined as the ability of the competition office to provide advice, influence and participate in government economic and regulatory policies in order to promote more competitive industry structure, firm behavior and market performance. (World Bank)

The International Competition Network (ICN) defines competition advocacy as under:

Competition advocacy "refers to those activities conducted by a competition authority related to the promotion of a competitive economic environment by means of non-enforcement mechanisms, mainly through its relationship with other Governmental entities and by increasing public awareness of the benefits of competition."

There is a direct relationship between competition advocacy and enforcement of a competition law and this connection is especially strong in transition and developing economies where an appropriate understanding or appreciation of the merits of competitive market economic systems is often lacking.

Section 49 of the Competition Act, 2002, empowers the Competition Commission of India (CCI) to undertake 'competition advocacy'. Advocacy role takes the Commission beyond being merely an 'enforcing authority' to be 'an advocate of competition' and to take suitable non-enforceable measures with an aim to create and strengthen awareness of the role of competition among market players and stakeholders, thereby encouraging compliance and reducing the need for enforcement action on erring enterprises.

Advocacy Role of Competition Commission

The Commission has, taken up competition advocacy efforts simultaneously at the three levels of the governments in India viz. central, state, and municipal governments, besides undertaking advocacy with the other stakeholders such as the business chambers, consumer activists and statutory bodies of professionals such as lawyers, chartered accountants, cost accountants and company secretaries.

9. COMPETITION COMMISSION OF INDIA

Competition Commission Of India has been established as autonomous body charged with the responsibility to prevent practices having adverse affect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto.

The basic functions of the Competition Commission are:

a) Administration and enforcement of competition law and competition policy to foster economic efficiency and consumer welfare.
b) Involve proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.

The Competition Commission of India is being guided by the following principles in its approach to its work:

1. To be in sync with markets; have good understanding of market forces.
2. To minimize cost of compliance by enterprises, and cost of enforcement by Commission.
3. To maintain confidentiality of business information; to maintain transparency in Commission's own operations.
4. To be a professional body, equipped with requisite skills.
5. To maintain a consultative approach.

Chapter III of the Competition Act, 2002 deals with the establishment, composition of commission, term of office etc; Chapter IV deals with the duties, powers and functions of the Commission and Chapter V deals with the duties of the Director General.

Composition of the Commission

The Commission will consist of a Chairperson and not less than two and not more than six other members. The Chairperson and Members of the Commission will be appointed by the Central Government by a Selection Committee procedure. The Chairperson and every other Member should be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission. The commission finally became operative in May 2009.

Term of office

The Chairperson and every other Member should hold office for a term of five years from the date on which he enters upon his office and will be eligible for re-appointment. But the Chairperson or members will not be allowed to continue in office if he has attained the age of sixty five years.

Resignation, removal and suspension

On submission of resignation in writing to the Central Government, the Chairperson or member will be allowed to hold office for a period of three months from the date of submission of resignation or until a person has been appointed as his successor or until the expiry of his term of office, whichever is earlier.

The Central Government can remove the Chairperson or any other Member from his office, if such Chairperson or member –

(a) is, or at any time has been, adjudged as an 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 a Member.

Administrative powers

The Chairperson has the powers of general superintendence, direction and control in respect of all administrative matters of the Commission. The Chairperson can also delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the Commission.

Vacancy not to invalidate proceedings of the Commission

No act or proceeding of the Commission will be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the Commission; or

(b) any defect in the appointment of a person acting as a Chairperson or as a
Member; or

(c) any irregularity in the procedure of the Commission not affecting the merits of the case.

Inquiry by the Commission

The Commission may initiate inquiry into anti-competitive agreements or abuse of dominance:

- ✓ On its own on the basis of information and knowledge in its possession; or
- ✓ On receipt of an information; or

- ✓ On receipt of a reference from the Central Government or a State Government or a statutory authority.

On receipt of information or reference or on its own, if the Commission is satisfied that there is prima facie case, it can direct the Director General to investigate the matter and report his findings to the Commission. On receipt of the investigation report from the Director General, the Commission will determine whether the behaviour under inquiry is anti-competitive, after hearing the concerned parties and pass appropriate orders.

Information to the Commission

Any person, consumer, consumer association or trade association can provide information relating to anti-competitive agreements and abuse of dominant position. The Central Government or State Government or an authority established under any law can make a reference for an inquiry. "Person" includes an individual, HUF, firm, company, local authority, cooperative or any artificial juridical person.

The information can be filed on the issues like anti-competitive agreements and abuse of dominant position or a combination.

Competition Commission of India (General) Regulations 2009 deals with the procedure for submitting information or reference to the Commission. Information or reference or responses to the Commission should be sent to the Secretary, in person or by registered post or courier service or facsimile transmission addressed to the Secretary or to the authorized officer. However, any separate or additional document(s) that is relied upon in support of the information, or reference should be filed in the form of a "Paper Book", at least seven days prior to the date of the ordinary meeting, after serving the copies of the said document(s) on the other parties to the proceedings, with documentary proof of such service. Such documents need to be serially numbered, prefaced by an index and should be supported by a verification.

All information(s) or references or responses or other documents which are required to be filed before the Commission should be typed in Arial 12 fonts on one side of A4 size (210 x 297mm or 8.27”x11.69”) white bond paper in double space with 2” margin on the left and 1” margin on all other sides. Only neat and legible photocopies or scanned documents duly certified as true copies should be filed as exhibits or annexes.

The reference to the Commission should contain the following details:

- The information should be in the form of statement of facts, containing details of the alleged contraventions of the Act. A complete list enlisting all documents, affidavits and evidence, as the case may be, in support of each of the alleged contraventions may also be furnished. A brief narrative in support of the alleged contraventions will help the commission to examine the case expeditiously and in its right perspective.
- Relief or interim relief that is sought from the Commission should be mentioned.
- The information along with the appendices and attachments should be complete and duly verified by before submitting to the Commission.
- The information filed should be signed by the individual himself/ herself, including a sole proprietor of a proprietorship firm, the Karta in the case of a Hindu Undivided Family (HUF), the Managing Director and in his or her absence, any Director, duly authorized by the board of directors in the case of a company, etc.
- The counsel may also append his or her signature to the information or reference as the case may be.

Investigation

At the apex level of the investigative wing, there is an official who has been designated as Director General (DG). The Director General will not have *suo* *motu* powers of investigation. He will only look into the complaints received from the CCI and submit his findings to it. Investigators will be solely responsible for making enquiries, for examining documents, for making investigations into complaints and for effecting interface with other investigative agencies of the Government including Ministries and Departments. The DG has been vested under the Act with powers, which are conferred on the Commission, namely, summoning of witnesses, examining them on oath, requiring the discovery and production of documents, receiving evidence on affidavits, issuing commissions for the examination of witnesses etc.

Depending on the load of work on the Commission, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General will be appointed by the Central Government.

Acts taking place outside India but having an effect on competition in India

The Commission has power to inquire in accordance with the provisions contained in Sections 19, 20, 26, 29 and 30 of the Competition Act, 2002 into any agreement or abuse of dominant position or combination if it has or is likely to have an appreciable adverse effect on competition in the relevant market in India and pass appropriate orders although –

a) An agreement has been entered into outside India;
b) Any party to such agreement is outside India; or
c) Any enterprise abusing the dominant position is outside India; or
d) A combination has taken place outside India; or
e) Any party to combination is outside India; or
f) Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

Power to issue interim orders

Section 33 of the Competition Act, 2002 empowers the Competition Commission to issue interim orders. If during an inquiry, the Commission is satisfied that an act in contravention of Section 3 (Anti-competitive agreements) or Section 4 (Abuse of dominant position) or Section 6 (Regulation of combinations) has been committed and continues to be committed or that act is to be committed, the Commission can temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders. The order can be passed even without giving notice to the party if deemed necessary.

Commission's powers to issue Orders

The Commission can direct any enterprise or person or their associations to discontinue with anti-competitive practice, which is also known as 'cease and desist' order. The Commission can impose penalty up to 10% of the turnover, which can go up to the higher of three times of the profit or 10 per cent of the turnover for each year of cartelization. The Commission has the power to modify any agreement or direct an enterprise to abide by its orders. The Commission is also empowered to order division of an enterprise which enjoys dominant position in order to prevent abuse of such position.

Rectification of Orders

The Commission is empowered to amend any Order passed by it to rectify any mistake apparent from the record of the case. The Commission may make an amendment on its own motion or if the mistake has been brought to the notice of the Commission by any party to the Order. While rectifying the mistake the Commission is not allowed to amend any substantive part of the Order.

Execution of orders of Commission

In case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under the Competition Act, 2002 in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

Appearances before the Commission

A person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Advisory Committees

To seek the opinion of the best available intellectual capital on competition matters, the Commission has constituted a number of expert advisory committees that comprise eminent experts from the legal profession, economics, industry, academia, consumer representatives and others. As of now there are four advisory committees.

- Advocacy
- Infrastructure
- Market studies
- Regulations

10. COMPETITION APPELLATE TRIBUNAL

The Competition Appellate Tribunal is a statutory organization established under the provisions of the Competition Act, 2002 to hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission of India under section 26 (2) and (6), section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Competition Act, 2002.

The Appellate Tribunal shall also adjudicate on claim for compensation that may arise from the findings of the Competition Commission of India or the orders of the Appellate Tribunal in an appeal against any findings of the Competition Commission of India or under section 42A or under section 53Q (2) of the Act and pass orders for the recovery of compensation under section 53N of the Act.

The Central Government has set up the Appellate Tribunal on 19th October, 2009 having its Headquarters at New Delhi. Hon'ble Dr. Justice Arijit Pasayat, former Judge of Supreme Court, has been appointed as the First Chairperson of the Appellate Tribunal. Besides, the Chairperson, the Appellate Tribunal will consist of not more than two Members to be appointed by the Central Government. The Chairperson of the Appellate Tribunal will be a person, who is, or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A Member of the Appellate Tribunal should be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty-five years in, competition matters, including competition law and policy, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which in the opinion of the Central Government, may be useful to the Appellate Tribunal. The Chairperson or a Member of the Appellate Tribunal will hold office for a term of five years and can be eligible for re-appointment provided that no Chairperson or other Member of the Appellate Tribunal can hold office after he has attained the age of sixty-eight years or sixty-five years respectively.

Every appeal should be filed within a period of 60 days from the date on which a copy of the direction or decision or order made by the Competition Commission of India is received and it should be in the prescribed form and be accompanied by the prescribed fees. The Appellate Tribunal may entertain an appeal after the expiry of the period of 60 days if it is satisfied that there was sufficient cause for not filing it within that period.

The Appellate Tribunal will not be bound by the procedure laid down in the Code of Civil Procedure, 1908 but will be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government. The Appellate Tribunal will have, for the purposes of discharging its functions under the Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908). Every order made by the Appellate Tribunal will be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein. If any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he will be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both.

11. PENALTIES

Chapter VI of the Competition Act, 2002 deals with imposition of penalties by the Competition Commission.

Sl. No	Contravention	Penalty / Compensation	Section
1	Orders of Competition Commission of India	Rupees One Lakh for each day of contravention subject to a maximum of Rupees Ten crore	42(2)
2	Orders of Competition Commission of India under Section 42(2)	Imprisonment for a term upto three years or with fine upto Rupees Twenty five crore or with both.	42(3)
3	Orders of Competition Commission of India	Make application to the Appellate Tribunal and claim compensation for any loss or	42A

		damage suffered.	
4	Failure to comply with directions of Competition Commission of India / Director General	Rupees One Lakh for each day of contravention subject to a maximum of Rupees One crore.	43
5	Non furnishing of information on combinations	Penalty upto one percent of total turnover or the assets whichever is higher of such combination.	43A
6	Making false statement or omission to furnish material information with regard to Combination	Minimum – Rupees Fifty Lakhs Maximum – Rupees One crore	44
7	Offences in relation to furnishing information	Up to Rupees One crore	45

Provision for lesser penalties

Leniency provision is incorporated under Section 46 of the Competition Act, 2002. If the requirements of section 46 are met, Competition Commission is empowered to impose lesser penalty in cartel cases.

Section 46 provides that, if any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of alleged violations and such a disclosure is vital, the Commission may impose upon him a lesser penalty than as prescribed under the Act or rules or regulations. However, lesser penalty will not be levied where before making such disclosure, the report of investigation directed under section 26 has been received. Further, lesser penalty will be imposed only in respect of the producer, seller, distributor, trader or service provider included in the cartel, who has made full, true and vital disclosures.

The provision for lesser penalty under section 46 will cease to operate if the person making the disclosure does not continue to cooperate with the Commission till the completion of proceedings before the Commission. Section 46 further provides that any producer, seller, trader or service provider included in the cartel will also be liable to imposition of penalty, if in the course of proceedings, he had – (i) not complied with the condition on which the lesser penalty was imposed by the Commission; or (ii) given false evidence; or (iii) the disclosure made is not vital.

Procedure for imposing penalty

The procedure for imposition of penalty under the Competition Act, 2002 is mentioned in Regulation 48 of the Competition Commission of India (General) Regulations, 2009. Accordingly no order or direction imposing a penalty under the Act should be made unless the person or the enterprise or a party to the proceeding, during an ordinary meeting of the Commission, has been given a show cause notice and reasonable opportunity to represent his or her or its case before the Commission. In case the Commission decides to issue show cause notice to any person or enterprise or a party to the proceedings, as the case may be, the Secretary should issue a show cause notice giving not less than fifteen days asking for submission of the explanation in writing within the period stipulated in the notice. The Commission on receipt of the explanation, and after oral hearing if granted proceeds to decide the matter of imposition of penalty on the facts and circumstances of the case.

Crediting sums realised by way of penalties

All sums realised by way of penalties under the Competition Act should be credited to the Consolidated Fund of India.

Contravention by companies

"Company" means a body corporate and includes a firm or other association of individuals.

"Director", in relation to a firm, means a partner in the firm.

Where a person committing contravention of any of the provisions of the Competition Act, 2002 or of any rule, regulation, order made or direction issued there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, will be deemed to be guilty of the contravention and will be liable to be proceeded against and punished accordingly. But such person will not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

Where a contravention of any of the provisions of the Competition Act, 2002 or of any rule, regulation, order made or direction issued there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer will also be deemed to be guilty of that contravention and will be liable to be proceeded against and punished accordingly.

12. IMPORTANT CASES

1) **JSPL vs. SAIL**

Judgment by Supreme Court of India pronounced on 9th September 2010

The Supreme Court inter alia held as under –

- An appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53(A)(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication e.g. taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A.
- Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.
- The Commission, in cases where the inquiry has been initiated by the Commission suo moto, shall be a necessary party and in all other cases the Commission, being expert body, shall be a proper party in the proceedings before the Tribunal for complete adjudication, effective and expeditious disposal of matters.
- During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party

from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary.

- In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view.

2) **Amir Khan Productions Private Limited v. Union of India**
   Judgement by High Court of Bombay decided on 18.08.2010
   It was held that mere issuance of show cause notice under Section 26(8)/Section 27, like issuance of a charge-sheet in a departmental inquiry, cannot be treated as pre-judging the issue, merely because the petitioners had raised some of the legal contentions in the replies to the notice issued by the DG and thereafter also the Commission has issued show cause notices. That can never mean that the Commission will not consider the petitioners objections against maintainability of the proceedings. The Court granted liberty to the petitioners to raise all available contentions, including preliminary objection against legality or otherwise of initiation of the proceedings against the petitioners.

3) **Interglobal Aviation Ltd. vs. Secretary CCI**
   Delhi High Court decided on 06.10.2010
   The basic issue in these Writ Petitions was that the CCI has no jurisdiction to deal with these matters because these were the matters pending before the erstwhile MRTP Commission as the same were referred by the MRTP Commission to DG (I&R) for merely preliminary investigation under Section 11(1) of MRTP Act. It was the case of petitioners that Section 66(6) of the Competition Act (CA) was meant to cover only such cases where DG (I&R) took suo-motto notice under

Section 11(2) of MRTP Act and investigations were incomplete at the time of repeal of MRTP Act.

The Hon'ble Court held that there is nothing in the language of Section 66(6) of CA to suggest this. The resultant position is that all investigations and proceedings which were pending before DG (I&R), MRTP Commission as on the date of repeal of MRTP Act, whether by way of a reference made to it by the MRTP Commission under Section 11(1) or taken up by DG (I&R) suo-motto under Section 11(2) of the MRTP Act, would stand transferred to the CCI in terms of Section 66(6) of the CA. There is, therefore, no illegality in the action of transferring the investigations pending before the DG (I&R), MRTP Commission to the CCI.

4) **Vitamin Cartel Case**

In April 2003, the Korea Fair Trade Commission (KFTC) decided to issue corrective order and impose surcharge on six vitamin producers belonging to Switzerland, Germany, France, Japan and the Netherlands, who participated in the vitamin international cartel. The amount of surcharge aggregated more than USD 3 million in total. These six companies, accounting for 90 per cent market share in the world bulk vitamin market, agreed to allocate the sales volume and coordinate price of bulk vitamins such as vitamin A, E, B5, D3, and Beta Carotene in the global market. Vitamins A, E and beta-carotene are important inputs for the production of foods, medicine, cosmetics and animal feed. Bulk vitamin is used in manufacturing animal feeds, medicine, foods and cosmetics. The concerned industries in Korea were learnt to have imported bulk vitamin of about US$185 million during the above period from the six companies. As the conspiracy affected the Korean economy throughout the 1990s, the behavior of these firms affected all Korean citizens, who were prevented from benefiting from the price reductions that would have resulted from a competitive market.

5) **Boeing and McDonnell - Douglas**

Proposed combination of Boeing and McDonnell - Douglas relating to aircraft industry was allowed by US Anti-trust Authorities, but was refused by European Commission.

6) **General Electric and Honeywell**

Combination of General Electric and Honeywell relating to Jet Engines was allowed by US Anti-trust Authorities but refused by European Commission.

7) **Microsoft Case**

In a recent landmark decision that received wide publicity, the European Union Competition Commissioner found Microsoft, the world's largest software company, guilty of abusing its dominant position in the market for the personal computer operating system, and violating, the EU Treaty's Competition Rules. The European Commission imposed on Microsoft a record fine of Euro 497 million (US $ 612 million equivalent to approximately Rs. 2630 crores). The EU ruling is the latest in a series of brushes that Microsoft has been having with competition regulators for the last several years.

8) **Seamless Steel Tubes Case**

8 companies (4 European and 4 Japanese) were fined by European Commission in 1999 for an illegal market sharing cartel. The companies are British Steel Ltd; Vallourec SA; Dalmine SpA; Salzgitter Mannesmann GmbH (4 European companies) and Nippon Steel Corp; Sumitomo Metal Industries Ltd; Kawasaki Steel Corp; NKK Corp (4 Japanese companies). Total fines of € 99 million imposed on these companies. The Europe - Japan Club required that the domestic markets of the different

producers should be respected. Commission found it to be a very serious infringement of Art 81 (1) of EU Treaty. 7 of these 8 companies appealed to the Court of First Instance, which upheld Commission's decision in substance, but reduced fees by 13 million on appealing companies as Commission had not produced sufficient evidence covering the entire duration of the infringement.

9) **Brazilian case of price fixing in flat rolled steel products**

Until 1992 steel products were subject to price controls, which were administered in part by SEAE. In July 1996 representatives of the Brazilian Steel Institute met with officials of SEAE and informed them that its members intended to increase their prices on these products by certain specified amounts on a specific day. On the day after the meeting SEAE informed the Institute by fax that such an agreement was a violation of competition law and illegal. Nevertheless, the three producers each increased price of these products in early August that year. The increases were approximately as those given to SEAE by the Steel Institute. Aside from the presentation to the SEAE by the Institute there was no direct evidence of concerted action.

CADE's decision that parties were guilty was based on the "parallelism plus" theory, because in addition to the economic evidence, some circumstantial event was associated to the price parallelism. The first issue taken into account was the fact that price increase of the companies at similar rates and dates could not be explained just by referring to it as oligopoly's interdependence. Although CADE did not consider the meeting as direct evidence of collusion, the Commissioners understood that it constituted a strong indication that there had been previous meeting among the companies to discuss matters before actually taking them to the government

10) Soda Ash Cartel case

In September, 1996, American Natural Soda Ash Corporation (ANSAC) comprising of six American producers of soda ash attempted to ship a consignment of soda ash at cartelized price to India. - Based on the ANSAC membership agreement, the M.R.T.P. Commission held it as a prima facie cartel and granted interim injunction in exercise of its powers in terms of Section 14 of the M.R.T.P. Act. The Supreme Court, however, overturned the order of the Commission inter alia, on the ground that it did not have authority to prohibit imports.

11) Trucking Cartel case

Eliminating competition in the market by fixing the freight rates without liberty to the members of the truck operator union to negotiate freight rates individually is common in the trucking industry. The M.R.T.P. Commission passed 'Cease & Desist' order against Bharatpur Truck Operators Union, Goods Truck Operators Union, Faridabad, and Rohtak Public Goods Motor Union. In the absence of any penalty provision, however, no fines could be imposed.

12) Bayer AG case

Bayer AG was a major global supplier of insecticides except in USA. It developed a new unique and potent active ingredient for insecticides for household use and secured a patent for the technology. It licensed the new technology to S C Johnson & Sons, a dominant market leader in pesticides market, the market Johnson's market share was 50-60%. The DOJ challenged this licensing arrangement which reduced incentives of Bayer to compete with Johnson in manufacture and sale of household insecticides and which further helped Johnson to increase its dominance in the US market. The Court decided that Bayer should offer the patented ingredients to other manufacturers and also those that Bayer may introduce later. Through this decision, the court sought the maintenance of competitive markets while protecting the IPR.

13) **Price-fixing in the petrol sector**

According to OECD Annual Report on Competition Policy Developments in Brazil (2002), the Administrative Council of Economic Defense (CADE) has fined Sindiposto, an association of petrol stations, and its President a total of approximately US$ 105,000 after Sindiposto was found to have engaged in price-fixing by having advised its members to set prices and profit margin for fuel sales, as well as concerted price increases. According to a CADE official, cartelization attempts of the petrol sector in Brazil has been a subject of more than 30 investigations by the Brazilian competition authorities out of a total of about 260 cartel investigations. According to information released by the Secretariat of Economic Law, 56 per cent of cartel complaints relate to the petrol sector.

14) **Cement Cartel**

In Argentina, five cement companies were prosecuted for operating a cartel that lasted for 18-years from 1981 to 1999 and the Argentine authority imposed a total fine of US$ 107 million, which is more than three times the highest fine assessed by Argentine authority in any previous case. Romania also fined total EUR 28,500,000 on its three cement companies for their participation in a cement cartel and the fine represented 6 per cent of the companies' annual turnover.

15) Boaters Cartel

Siem Reap in Cambodia is a very popular tourist town, which houses the famous Angkor Vat temples. There are three means of transportation from Phnom Penh to Siem Reap – boat, road and air. The competition between boat companies has been intense and the prices came down from US $ 10 to US $ 5. The boaters discussed among themselves and resolved that they will charge US $ 10 from Khmer nationals and US $ 20-25 from foreigners. They further agreed that they would not compete with each other and would share their departure schedules. There was no written agreement and only an understanding and it constitutes a cartel agreement.

16) Airlines Cartel

The Competition Commission in South Africa referred to its Competition Tribunal, a case alleging that four airline companies had conspired to simultaneously announce in May, 2004 a fuel surcharge in identical amounts. After the investigation, prompted by news reports of the price increase, an airline applied to the Commission for leniency under the Commission's Corporate Leniency Policy. The applicant cooperated with the Commission and was not cited as a respondent and the Commission recommended a fine up to 10% of the turnover of each of the respondent.

13. COMPETITION LEGISLATION IN OTHER COUNTRIES

About 90 countries in the world have enacted their own competition laws to restrict the unhealthy and immoral competition by the traders and also with an aim of safeguarding the interests of the consumers in those countries.

1) United States –

Anti-trust policy of US owes its origin to industrial revolution which was marked by the shift of economic wealth and political power to industrial empires. It brought a new breed of business culture that led to building of giants through alliances. It was during this time around the 20^{th} century that anti-trust policies were legislated. These policies generally were based on distrust of a big business and rarely aimed at promoting competition. The fundamental anti-trust statutes are as follows:

i. **Sherman Act, 1890:** Section 1of Sherman Act, 15 U.S.C.1, sets forth the basic antitrust prohibition against contracts, combinations and conspiracies "in restraint of trade or commerce among the several States or with foreign nations". Section 2 of the Act, prohibits monopolization, attempts to monopolize and conspiracies to monopolize "any part of trade or commerce among the several States or with foreign nations". Section 6a of the Act, defines the jurisdictional reach of the Act with respect to non-import foreign commerce.

ii. **Clayton Act, 1914:** It enlarged the scope of anti-trust policy by including price discrimination, exclusive dealings and mergers. Section 7 of the Clayton Act, 15 U.S.C.18, prohibits any merger or acquisition of stocks or assets "wherein any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly".

iii. **Federal Trade Commissions Act, 1914:** It broadened the scope of anti-trust Acts and established a commission known as the Federal Trade Commission which was empowered to deal with major anti-trust practices and entities.

iv. **National Cooperative Research and Production Act:** It promotes research and development by providing a special antitrust regime for research and development joint ventures.

v. **Export Trading Company Act, 1982:** This act has been formulated to increase US export of goods and services. It promotes a better provision of export trade services to US producers and suppliers by minimizing restrictions on trade financing provided by financial institutions.

vi. **The Wilson Tariff Act, 1984:** This Act "prohibits every combination, conspiracy, trust, agreement or contract" made by or between two or more persons or corporations, either of whom is engaged in importing any article from a foreign country into United States, where the agreement is intended to restrain trade or increase the market price in any part of the United States of the imported articles, or of "any manufacture into which such imported article enters or is intended to enter".

2) Australia –

Australia has embarked upon a new legal initiative combining consumer protection rights with anti-competition measures. The Trade Practices Act, 1974 has facilitated the establishment and empowerment of Australian competition and consumer commission to ensure a transparent administration of trade practices. The Act expressly prohibits anti-competitive agreements, which include price fixing and primary / secondary market boycott.

3) Canada –

In Canada, the Competition Act is a federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. Its purpose is to maintain and encourage competition in Canada in order to –

- Promote the efficiency and adaptability of the Canadian economy
- Expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada

- Ensure that small and medium sized enterprises have an equitable opportunity to participate in the Canadian economy
- Provide consumers with competitive prices and product choices.

4) China –

The idea of a comprehensive Anti monopoly Law for the People's Republic of China surfaced in 1987, in response to the diverse and incoherent existing laws such as Anti-Unfair Competition Law, Price Law, Foreign Trade Law. Representatives from various agencies and academic institutions began drafting the new Law in 1994. However, the initial drafts often reflected divergent and inconsistent goals among its various agencies. The final version of the law was finally adopted by the People's Congress on 30 August 2007 and took effect on 1st August 2008. The main aim of the law is to –

- Advance consumer interests
- Promote economic efficiency
- Protect economic security, which includes subjecting foreign acquisitions of Chinese corporations to national security review.

5) Russia –

The Law on the Protection of Competition came into effect in the Russian Federation on 26th October 2006. The stated aim for establishing the law was to bring the Russian Federation to be in line with the general trend of competition regulation in Europe. Beyond western European competition laws against dominance, the Competition Law in Russia expressly presumes existence of dominance by defining thresholds –

- A company is in dominance if it dominates more than 50% of market share.

- A company with less than 35% of market share, unless in exceptional case, is not considered dominant.
- A collective dominance exists when up to three companies hold a combined market share exceeding 50%.
- A collective dominance exists when up to five companies hold a combined market share exceeding 75%.
- A safe harbor margin of up to 20% market share per company for agreements between companies of different segments of a supply chain.

The law also places restrictions on aids from, and public procurement policies of, federal, provincial or municipal governments that otherwise would encourage anti-competition. The law is enforced by the Federal Anti-Monopoly Service (FAS). The law also gives the FAS authority over approval of company mergers stipulating various combinations of thresholds of assets of merging companies, an excess of which would require prior approval from the FAS. The scope of regulation of the FAS is focused on the commodity market and financial services with mandates over operations and transactions not just within the Russian Federation but also those taking place outside the boundaries of Russia which would have anti-competitive effects on the Russian market place. In addition to a distinct competition law, the Code of Administrative Offences has also been amended to increase liability of anti-competitive practices. Punitive measures against anti-competitive practices are meted out in terms of percentages of revenues of a company.

6) United Kingdom –

The Competition Act 1998 and the Enterprise Act 2002 are the most important statutes for cases with a purely national dimension. However if the effect of a business' conduct would reach across borders, the European Union has competence to deal with the problems, and exclusively EU law would apply. Like all competition law, that in the UK has three main tasks –

- Prohibiting agreements or practices that restrict free trading and competition between business entities. This includes in particular the repression of cartels;
- Banning abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position. Practices controlled in this way may include predatory pricing, tying, price gouging, refusal to deal and many others;
- Supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to remedies such as an obligation to divest part of the merged business or to offer licences or access to facilities to enable other businesses to continue competing.

The Office of Fair Trading (OFT) and the Competition Commission are the two primary regulatory bodies for competition law enforcement in United Kingdom.

7) European Union –

European Community competition law regulates the exercise of market power by large companies, governments or other economic entities. In the European Union, it is an important part of ensuring the completion of the internal market, meaning the free flow of working people, goods, services and capital in a borderless Europe. Four main policy areas include –

- Cartels, or control of collusion and other anti-competitive practices which has an effect on the EU. This is covered under Articles 81 of the Treaty of the European Community (TEC).

- Monopolies or preventing the abuse of firms' dominant market positions. This is governed by Article 82 of TEC.

- Mergers, control of proposed mergers, acquisitions and joint ventures involving companies which have a certain, defined amount of turnover in the EU. This is governed by the Council Regulation 139/2004 EC (the Merger Regulation also known as ECMR).

- State aid, control of direct and indirect aid given by Member States of the European Union to companies. This is covered under Article 87 EC (ex Article 92).

Primary competence for applying EU competition law rests with European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorates General. On 1 May 2004 a decentralized regime for antitrust came into force which is intended to increase the application of EU competition law by national competition authorities and national courts.

14. PROFESSIONAL OPPORTUNITIES

1) Appearance before Commission

Section 35 of competition act, 2002 specifically allows chartered accountants to represent a complainant, defendant or the director general to present a case before the competition commission of India. This implies that the accountants can represent a party in cases relating to anti-competitive agreements, abuse of dominance and combination (mergers etc.) and regulation cases. Therefore, chartered accountants should acquaint themselves on Competition Act, 2002 and other regulations and notifications relating to it. Chartered Accountants can appear on the behalf of the enterprise in the following cases:

- Chartered accountants may appear for parties before the CCI in cases relating to abuse of dominance as unfair and discriminatory purchase and price levels, predatory pricing, conclusion of contracts with obligations having no connection with the subject of contracts etc have high accounting overtones and dimensions. Therefore, chartered accountants with their expertise in accountancy and related subjects can contribute substantially.

- Chartered accountants may appear for parties before the CCI in cases relating to combinations regulation. The knowledge and expertise of Chartered Accountants are needed for
  - threshold analysis
  - value of assets determination
  - value of turnover determination
  - market share analysis
  - level of competition analysis
  - group impact
  - control impact
  - failing business costing and impact
  - weighing benefits of combination against adverse impact of combination

Chartered Accountants can do valuation of assets and turnover of an enterprise which is acquired or merged with other enterprise to determine whether the threshold limit under section 5 are attracted or not. The assets are to be valued at book value as shown in the audited books of accounts under section 5 of the Competition Act.

2) Devising Competition Compliance Programme (CCP) for the enterprise

Compliance involves the active efforts on the part of an enterprise to comply with the provisions of the Act. When the enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly it does not infringe the provisions of the Act, it can be stated to maintain a Competition Compliance Programme. A Chartered Accountant can play an important role in devising a CCP.

Objective of CCP:

The Competition Compliance Programme should have the following three main objectives:

(i) Prevent violation of law, i.e. the Competition Act 2002 and all Rules, Regulations & Orders made there-under.

(ii) Promote a culture of compliance, and

(iii) Encourage good corporate citizenship

Features of CCP

A well formulated and adequate compliance programme should address the business realities faced by the enterprise concerned. It should have following essential features-

- Explicit statement of the commitment of senior management to the Compliance Programme
- Availability of an Enterprise's Compliance Policy
- Training and education of employees
- Compliance manual
- The main principles of the compliance policy should be set out in simple and plain language that is easily understandable.
- An effective Compliance Policy may include seeking a written undertaking from employees to conduct their business dealings within the compliance framework and taking disciplinary action against employees whose actions result in an infringement of the law.
- The relevant procedures should enable the employees to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law. These practices should be included in the "best practices" norms of every enterprise.

3) Training officers and employees

An enterprise should consider having an active training programme that includes instruction by knowledgeable professionals having expertise and experience in corporate compliances. Chartered Accountants being experts in corporate compliances can play a vital role here. The training should be as practical as possible, including case studies drawn from the enterprise's actual experiences. It should also highlight the consequences of violations. The objective is to enable all officers and employees to develop capabilities to recognize and identify law-violating activity related to their business. Compliance education must contain sufficient practical explanation/examples on difficult legal concepts and issues. It is, therefore, advisable that enterprises integrate compliance education as part of overall training and education programme of the enterprise.

4) Act as a Compliance Officer

In order to ensure effectiveness of compliance programme, it is desirable that a Compliance Officer with appropriate delegation of authority be appointed to enforce the Compliance Programme. A chartered Accountant with its expertise and knowledge can fit in this role. A Chartered Accountant in the role of the Compliance Officer should preferably be an independent professional with expertise and core competency in compliance and compliance management. He should be a focal point and in charge of designing a program, motivating officers and employees, managing any accompanying administrative/ organizational issue, preparing compliance manual, and auditing compliance.

5) Drafting Compliance Manual

To facilitate compliance, the enterprises should develop a Compliance Manual and distribute it to their officers and employees as detailed guidelines for compliance with the provisions of the Act. The Chartered Accountants with their drafting skills and knowledge of the laws pertaining to corporate compliances are best suited for drafting such documents.

The Compliance Manual must have the following features:

- The manual should incorporate the features set in CPP and contain up-to-date information regarding its business(es), its operational environment, and relevant competition regimes.
- It is necessary that the manual incorporates full, relevant and correct information and is properly distributed.
- The Compliance Manual should be developed, distributed and implemented under the overall supervision of Compliance Officer.
- In-charge(s) of Departments/Divisions should be put under obligation to inform the Compliance Officer of any changes in the business environment and market scenario that may have bearing on compliance, including the opinion of subordinates concerning the Compliance Manual.
- The Enterprises are advised to constitute a Compliance Committee comprising senior management, with ultimate responsibility of overseeing the Compliance Programme, including conducting periodic review of its effectiveness.

6) Internal Audit

To ensure effective compliance of completion laws a system of audit may be required. Therefore, at the time of the start of the compliance programme an internal audit of procedures and documents, including email, may be introduced. This may be repeated at intervals to ascertain if the policy is working. The nature of such audit will have to be tailored to the nature of the enterprise concerned.

While auditing the procedures, documents and emails of each and every employee may be a herculean task it would be always possible to identify those individuals who are most at risk and to conduct an audit of a “snap shot” of their e-mails on a given day. External legal advisers could be employed to do such auditing to avoid embarrassment to the employees concerned while auditing their correspondence/e-mail.

Chartered Accountants with their auditing skills and knowledge of business and regulatory environment are best suited for the job.

15. IMPORTANT WEBSITES

1	Competition Commission of India	www.cci.gov.in
2	Competition Appellate Tribunal	http://compat.nic.in/
3	Federal Trade Commission (United States)	www.ftc.gov/
4	Federal Trade Commission Bureau of Consumer Protection	www.**ftc**.gov/bcp/consumer.shtm
5	OECD	www.oecd.org
6	World Trade Organization	http://www.wto.org/
7	UNCTAD	http://www.unctad.org/competition
8	Global Competition Forum	www.globalcompetitionforum.org
9	International Competition Network (ICN)	www.internationalcompetitionnetwork.org
10	EUROPA - European Commission - Competition	www.ec.europa.eu

11	Centre on Regulation and Competition U.K (CRC)	www.competition-regulation.org.uk
12	WTO - Interaction between Trade and Competition Policy	http://www.wto.org/english/tratop_e/comp_e/comp_e.htm
13	International Consumer Protection and Enforcement Network (ICPEN)	www.icpen.org
14	APEC Competition Policy & Law Database	www.apeccp.org.tw
15	The Office of Fair Trading - U.K consumer and competition authority	www.oft.gov.uk
16	Competition Commission U.K	www.competition-commission.org.uk
17	American Antitrust Institute	www.antitrustinstitute.org
18	The Competition Authority- The Chief Regulatory Agency in Ireland	www.tca.ie
19	American Bar Association's Section of Antitrust	www.abanet.org/antitrust/
20	Australian Competition and Consumer Commission (ACCC)	www.accc.gov.au
21	CUTS International (Consumer Unity & Trust Society)	www.cuts-international.org
22	National Consumer Disputes Redressal Commission	http://ncdrc.nic.in/
23	Ministry of Consumer Affairs, Food and Public Distribution	http://fcamin.nic.in/

About the Author

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Mr.Rajkumar S Adukia is an eminent business consultant, academician, writer, and speaker. A senior partner of Adukia & Associates he has authored more than 34 books on a wide range of subjects. His books on IFRS namely, "Encyclopedia on IFRS (3000 pages) and The Handbook on IFRS (1000 pages) has served number of professionals who are on the lookout for a practical guidance on IFRS. The book on "Professional Opportunities for Chartered Accountants" is a handy tool and ready referencer to all Chartered Accountants.

In addition to being a Chartered Accountant, Company Secretary, Cost Accountant, MBA, Dip IFR (UK), Mr. Adukia also holds a Degree in Law and Diploma in Labor Laws. He has been involved in the activities of the Institute of Chartered Accountants of India (ICAI) since 1984 as a convenor of Kalbadevi CPE study circle. He was the Chairman of the Western Region of Institute of Chartered Accountants of India in 1997 and has been actively involved in various committees of ICAI. He became a member of the Central Council in 1998 and ever since he has worked tirelessly towards knowledge sharing, professional development and enhancing professional opportunities for members. He is a regular contributor to the various committees of the ICAI. He is currently the Chairman of Committee for Members in Industry and Internal Audit Standard Board of ICAI.

Mr. Adukia is a rank holder from Bombay University. He did his graduation from Sydenham College of Commerce & Economics. He received a Gold Medal for highest marks in Accountancy & Auditing in the Examination. He passed the Chartered Accountancy with 1st Rank in Inter CA & 6th Rank in Final CA, and 3rd Rank in Final Cost Accountancy Course in 1983. He started his practice as a Chartered Accountant on 1st July 1983, in the three decades following which he left no stone unturned, be it academic expertise or professional development. His level of knowledge, source of information, professional expertise spread across a wide range of subjects has made him a strong and sought after professional in every form of professional assignment.

He has been coordinating with various professional institutions, associations' universities, University Grants Commission and other educational institutions. Besides he has actively participated with accountability and standards-setting organizations in India and at the international level. He was a member of J.J. Irani committee which drafted Companies Bill 2008. He is also member of Secretarial Standards Board of ICSI. He represented ASSOCHAM as member of Cost Accounting Standards Board of ICWAI. He was a member of working group of Competition Commission of India, National Housing Bank, NABARD, RBI, CBI etc.

He has served on the Board of Directors in the capacity of independent director at BOI Asset management Co. Ltd, Bharat Sanchar Nigam Limited and SBI Mutual Funds Management Pvt Ltd. He was also a member of the London Fraud Investigation Team

Mr. Rajkumar Adukia specializes in IFRS, Enterprise Risk Management, Internal Audit, Business Advisory and Planning, Commercial Law Compliance, XBRL, Labor Laws, Real Estate, Foreign Exchange Management, Insurance, Project Work, Carbon Credit, Taxation and Trusts. His clientele include large corporations, owner-managed companies, small manufacturers, service businesses, property management and construction, exporters and importers, and professionals. He has undertaken specific *assignments on fraud investigation and reporting in the corporate sector and has developed background material on the same.*

Based on his rich experience, he has written numerous articles on critical aspects of finance-accounting, auditing, taxation, valuation, public finance. His authoritative articles appear regularly in financial papers like Business India, Financial Express, Economic Times and other professional / business magazines. He has authored several accounting and auditing manuals. He has authored books on vast range of topics including IFRS, Internal Audit, Bank Audit, Green Audit, SEZ, CARO, PMLA, Anti-dumping, Income Tax Search, Survey and Seizure, Real Estate etc. His books are known for their practicality and for their proactive approaches to meeting practice needs.

Mr. Rajkumar is a frequent speaker on trade and finance at seminars and conferences organized by the Institute of Chartered Accountants of India, various Chambers of Commerce, Income Tax Offices and other Professional Associations. He has also lectured at the S.P. Jain Institute of Management, Intensive Coaching Classes for Inter & Final CA students and Direct Taxes Regional Training Institute of CBDT. He also develops and delivers short courses, seminars and workshops on changes and opportunities in trade and finance. He has extensive experience as a speaker, moderator and panelist at workshops and conferences held for both students and professionals both nationally and internationally.. Mr. Adukia has delivered lectures abroad at forums of International Federation of Accountants and has travelled across countries for professional work.

Professional Association: *Mr. Rajkumar S Adukia with his well chartered approach towards professional assignments has explored every possible opportunity in the fields of business and profession. Interested professionals are welcome to share their thoughts in this regard.*