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"CCI's: APPROACH TOWARDS ANTI-COMPETITIVE AGREEMENTS: AN ANALYSIS"

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(Dissertation Undertaken and Submitted in Partial Fulfillment of the LL.M. Course for the Academic Year 2010-12)

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

DECLARATION

I hereby declare that this dissertation on the topic titled as **"CCI's Approach Towards Anti-Competitive Agreements: An Analysis"** is the outcome of research conducted by me under the guidance of **Dr. Versha Vahini,** National Law School of India University, Bangalore.

I also declare that this work is original except for such help taken from such authorities as has been acknowledged at the appropriate places.

I further declare that this work has not been submitted in part or in whole for any degree at any other university.

Date: 29/5/2012

Place: Bangalore

Aakash Kukkar

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CERTIFICATE

This is to certify that the dissertation on the topic titled as **"CCI's Approach Towards Anti-Competitive Agreement: An Analysis"** submitted by **Mr. Aakash Kukkar,** ID No. 412, for the degree of LL.M. (Business Laws) of the National Law School of India University, Bangalore is the product of bona fide research carried out under my guidance and supervision. This dissertation or any part thereof has not been submitted elsewhere for any other degree.

Date: 28/05/2012

Place: Bangalore

Dr. Versha Vahini

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I am very glad to present this research work based on "CCI's Approach Towards Anti-Competitive Agreements: An Analysis". This is a sincere effort by me. I also extend my gratitude to the Librarian and the Library staff who made available the required materials.

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INTRODUCTION AND RESEARCH METHODOLOGY

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INTRODUCTION

Competition is a tool for promoting efficiency in the market. Many a times, competition has been used to enhance consumer welfare and therein efficiency and consumer welfare has been used synonymously. Competition Law is not concerned with maximizing of firms; rather it is concerned with defending market competition in order to increase welfare, not defending competitors.

Competition aims at achieving efficiency in the society through promotion of inter firm rivalry. The end result of competition is the enhancement of aggregate social wealth (economic efficiency) subject to constraint that consumers shall receive an appropriate share of such wealth (consumer welfare). Thus competition policy enunciates distinct economic objective, a blending of efficiency and consumer welfare to be achieved by a particular social instrumentality – inter-firm rivalry. Because the economic rationale of competition is neither economic efficiency nor consumer welfare standing alone, it is best described by a distinctive term – competition welfare.

Competition authorities play a vital role in ensuring and sustaining competition in the market. They help in economic development of a Country by preventing practices having adverse effect on competition. Indian Competition Act, 2002, provides for the objective of the Competition Commission, is to prevent practices having adverse effect on competition; to promote and sustain competition in markets; to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in Indian markets.

After the repealing of MRTP Act, Competition Commission of India took place of MRTP Commission and now it's their job to curb the anti-competitive practices. Soon after CCI came into force all the MRTP pending cases were

transferred to CCI. CCI has the burden and responsibility to outshine its predecessor. The researcher has limited the scope of paper to analyze CCI's operations to curb the anti-competitive agreement.

RESEARCH METHODOLOGY

STATEMENT OF PROBLEM

Competition Commission of India is facing quite a bundle of challenges in relation to anti-competitive practices *i.e, cartels, collusive bidding, sharing of markets etc.*, as they are difficult to prove. The scope of the paper is to analyze the advancement of Commission towards anti-competitive practices.

RESEARCH METHODOLOGY AND SOURCE OF DATA

For this dissertation research Researcher has relied on primary sources of data namely as different Statutes and reports, and secondary source of data namely Books, Online Databases, News Articles as well as consultation and discussions with supervisor which are valuable for researcher to find out the right path for this research. All the sources have been duly cited.

RESEARCH QUESTIONS

- Why is there a need to have a Competition Authority?
- What are the guiding principles that should be kept in consideration for the establishment and effective operation of the Competition Authorities?
- What were the reasons for the failure of MRTP Act which lead to the enactment of Competition Act, 2002?
- What is the regulatory mechanism and powers of CCI?

- What kinds of agreements are prohibited by section 3 of the Competition Act, 2002?

- What is the current approach of CCI towards anti-competitive agreements?

HYPOTHESIS

The establishment of CCI was to prevent adverse effect on competition and to maintain and sustain the same. Anti-Competitive practices are one of mal practices which can itself destroy this fundamental objective. As the object of Competition Act, 2002 requires protecting the interest of consumers; CCI has been trying to achieve the same by having consumer favorable approach.

CHAPTERIZATION

For the purpose of elucidating the topic, the dissertation is planned to be divided into following chapters:-

Chapter One; Competition Law Regime, Chapter Two; Evolution and Development of Competition Law, Chapter Three; Competition Authorities, Chapter Four; Anti-Competitive Agreements, Chapter Five; Analyzing CCI's Approach Towards Anti-Competitive Agreements, and lastly Chapter Six; Conclusion.

MODE OF CITATION

The researcher has followed a uniform mode of citation throughout this dissertation research. For Books: Name of Author, Name of the Book, Edition number, Name of Publisher, Place of Publication, Year, Page Number; For Articles: Name of Author, Title of the Article, Name of the Journal, Details of Publication, Year, Page Number; For Web Sources: Name of Author, Title of the Source, Details of Publication, Web Link, Last accessed Date.

CHAPTER ONE

COMPETITION LAW REGIME

CHAPTER: ONE

COMPETITION LAW REGIME

Principle of healthy and dynamic competition is the heart of every market. The outcome of this is to fetch the best competing firms, encourage economic growth and enthusiasm, and maximizes consumer welfare and choice. Competition is an essential feature in the lives of consumers. Competition helps in the economy for determining profit, suitable prices and the multiplicity of choice to choose from. Now the simple reason that why competition is essential for consumers is that it requires producers to offer superior deals, lesser prices, superior quality, latest products, and more choice. The objects of competition or Anti-competitive laws are to guarantee that consumers pay the most proficient price attached with the utmost superior goods and services they consume.[1] This can only be accomplished when efficient competition strategies are there[2] so that enterprises are forced to compete with each other in resulting cheaper goods and services for consumers. Therefore competition guarantees freedom of trade and checks exploitation of economic power and in so doing encourages economic democracy and ultimately leads to political stability.

This can only happen in Perfect Competition.[3] It is an important formation of market where firms produce least cost productivity and charge marginal cost price. The firms do not enjoy any kind of influence on prices. This also consists of buyers

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[1] Vinod Dhall, "*Cartels pose major challenge for competitive regulators*", (Economic Times, 2nd March, 2007)

[2] "*Efficiency is associated with competition*", (Business Line, 8th March, 2007)

[3] "*Perfect competition is the market structure wherein there are large number of firms producing and selling a product, the quantity of products bought by any buyer or sold by any seller is so small relative to the total quantity traded that changes in these quantities leave market prices unchanged, the products are homogeneous, both the buyers and sellers have perfect information about prices and there is free entry into and exit out of the market* ", H.L. Ahuja, "*Principles of Micro-Economics*",(3rd Edn. Reprint, S. Chand & Company Ltd., Delhi, 1984) at Pp. 488-490

and sellers comprising all the related information in relation to the market including the price and quality of the product. It's another feature is that the industry is having the freedom of entry and exit. The consequential outcome is accessibility of goods and services in bulk of suitable quality with reasonable prices. This also helps in constructing the competitiveness of the domestic industry.

But on the other hand it is also clear that still there is not a single perfectly competitive market in the world. This is because of several reasons but the prime factor is that the producers of goods and services are somehow able to differentiate themselves from their competition and thus create some kind of loophole in the process. This in result gives some command to these firms over prices and output concurrently and firms can charge higher price and lower output and can make higher profits. But efforts are needed on the part of firm in differentiating their products from others and advertise the same in existence of competition. It is because of this the role of competition regulator becomes even more vital. If all these enterprises in the economy are performing separately of each other then the kind of free competition we are looking for consumer welfare may not take place.[4] Therefore, the most important aim of any competition regulator is to ensure that these enterprises in a market have no illegal communication with each other.

There are different kinds of Anti-competitive practices such as, Collusion among competitors, abuse of dominant position and mergers that may substantially harm competition. But the most terrible form of practice from the competition outlook is the cartel[5] where enterprises conspire to fix prices, manage or limit production,

[4] R.S. Pindyck and D.L. Rubinfeld, *Microeconomics* 13 (3rd Edn., Prentice Hall, Inc., New Jersey, USA, 1995).

[5] *"An explicit agreement among rival firms not to compete, restrict output and to raise the price of their products is called a cartel."*

divide the market or customers, or indulge in collusive bidding.[6] 'Adam Smith', famously quoted: "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance, to raise prices.*"[7] Richard whish quoted, "*Cartels were recognized and prohibited in the days of the Eastern Roman Empire ---------- (that) punished price fixing in relation to clothes, fishes, sea urchins and other goods with perpetual exile.*"[8] The trade world is filled of illustrations of cartelization like, the global cartels for vitamins, dynamic random access memory (DRAM), graphite electrodes, the cement cartels in Germany and the airlines cartel in the EU.[9] In India too, one can find numerous examples for the same in number of industries like, cement, tyres, trucking and, recently, in airlines.

1.1 MEANING OF COMPETITION

Competition has been defined as "a situation in a market in which firms and sellers independently strive for buyers' patronage in order to achieve a particular business of objective, for example, profits, sales or market share."[10] The characteristics which give rise to pure competition are (1) large number of sellers each acting independently; (2) a homogenous or perfectly uniform product; and (3) freedom of entry of new firms. Large number of sellers and a homogenous commodity are sufficient to guarantee a perfectly elastic demand curve for the individual sellers.[11] The condition of free entry is added to ensure that, if profits exist

[6] *Supra* note. 1
[7] Adam Smith, "*An Enquiry Into the Causes of the Wealth of Nations*", 1776.
[8] Richard Whish, "*Competition Law Today: Concepts, Issues and the Law in Practice*", (Edr. Vinod Dhall, oxford university press, 2007)
[9] *Supra* note. 1
[10] World Bank, 1999
[11] D.P. Mittal, "*Competition Law & Practice*" (3rd Edn., Taxmann Publication Pvt. Ltd., New Delhi, 2011) at p. 184

in a particular industry in excess of what can be earned elsewhere under the same production conditions, new firms can enter to expand the output.[12] The competition is ordinarily associated with the full freedom for new firms to enter an industry with new and cheaper techniques or new substitute products. Competition is, therefore, a market condition in which the seller has no control or influence upon the price. If the price is influenced by reason of agreement between enterprises or concerted practice, such agreement or practice is said to be having adverse effect on competition within India.[13] The market for that purpose is the relevant market as an independent business area (and not necessarily the entire market in India) in which the competitive relationships can be affected, to be determined by the Competition Commission of India with reference to relevant product market and relevant geographical market. Price confronting the purely competitive seller is the one obtained from the intersection of the market supply and the demand schedules for the commodity the enterprise sells.[14] Competition is restrained, if the supply or demand is controlled or appreciably influenced. It is said to be under restraint when an agreement or conduct harms it in the consumer welfare sense of economies, *i.e.*, effect on price or output.

The concept of competition must be understood in a commercial sense.[15] Agreements must be assessed in their market context to determine their adverse effect on competition within India. The market on which the adverse effect on competition is to be assessed has to be defined; it is the relevant market. Certain agreements by their very nature have that effect and do not, therefore, require any assessment; for

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[12] Dr. V. K. Aggarwal, "*Competition Act, 2002: Principles and objectives*", (1st Edn, Bharat Law House Pvt. Ltd, New Delhi, 2011) at p. 32

[13] S.M. Dugar, "*Guide to Competition Law*", (5th Edn, Lexis Nexis Butterworths Wadhwa Nagpur, 2010) at p. 629

[14] For detailed theory on Competition, Richard Whilsh, "Competition Law", (6th Edn, Oxford University Press, New York, 2009) at Pp. 3-18

[15] *TaTa Engg. & Locomotive Co. Ltd.* v. *Registrar of Restrictive Trade Agreement* (1977) 2 SCC 55; *Mahindra and Mahindra Ltd* v. *Union of India* (1979) 2 SCC 529

example, horizontal agreements containing price fixing, or market sharing or vertical agreements imposing resale prices.[16]

1.2 NECESSITY OF AN EFFECTIVE COMPETITION LAW REGIME

The High Level Committee on Competition Policy and Law states that:

> "Competition is a situation in the market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profit, sales or market share."[17]

The primary objective of the competition policy is to promote efficiency and maximize welfare. The definition of welfare is of paramount importance and it is the sum total of consumers surplus and producers surplus.[18] It is to be taken into account that in the presence of competition, welfare maximization is synonymous with allocative efficiency.[19] The ultimate object of competition is the interest of the consumer. The consumers' right to free and fair competition cannot be denied by any other consideration. There is also a need for supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods.[20]

The rationale behind the set up of an effective Competition Commission is for the economic development of the country by preventing practices having adverse effect on competition, and to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other

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[16] *Supra note,* 13

[17] www.competition-commission-india.nic.in/advocacy/speech_member.pdf; last visited on 30.04.2012

[18] Paul A. Samuelson & William A. Nordhaus, "*Economics*", (16th Edn., Tata McGraw-Hill Publication Co. Ltd., New Delhi, 1998) at p. 54

[19] *Supra note,* 12 at p. 33

[20] *Supra note,* 18

participants in markets.[21] An effective competition law regime is essential to developing economies experiencing rapid and significant deregulation, trade liberalization and privatization.[22] During the era in which the economies are moving from close economies to open economies, an effective competition commission is essential to ensure the continued viability of domestic industries, carefully balanced with attaining the benefits of foreign investment and increased competition.[23] A key component of any competition regime is an institutional and procedural framework fairness of enforcement actions. Essential internal procedural safeguards available in the jurisdiction concerned should include transparency of the process, and non--discriminatory application of laws, regulations, policies and procedures, without reference to the nationality of the parties concerned.[24]

Another important development that has to be taken note of is that there has been a dramatic growth in multi-jurisdictional business activity in the last decade has increased the pressure on domestic competition authorities to work more closely with their foreign counterparts. As business concerns have pursued global trade and investment opportunities on a wider scale, competition authorities have been obliged to increase the efforts at co-ordination in order to prevent or manage possible conflicts arising from the application of anti-trust laws to international business conduct.[25]

There are certain aspects that have to kept in mind viz.;

1. To put into place a set of policies that enhances competition in local and national markets. These would encompass a liberalized trade policy,

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[21] Abir Roy & Jayant Kumar, "*Competition Law in India*", (Eastern Law House Pvt. Ltd, Kolkata, 2008) at p. 246
[22] *Id.*
[23] *Id.*
[24] Pradeep S. Mehta, "*Towards A Functional Competition Policy*", (Academic Foundation, New Delhi, 2005) at Pp. 117-118
[25] *Supra note*, 21

relaxed foreign investment and ownership requirements and economic deregulation.

2. To put into place legislation designed to prevent anticompetitive business practices.[26]

In accordance with the long title of the Competition Act 2002, it shows that the objective of the Competition Commission is to prevent practices having adverse effect on competition; to promote and sustain competition in markets; to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in Indian markets. One can also draw an analogy from section 6(c) of the Consumer Protection Act 1986 that mentions that the objects of the Act, which *inter alia* provides the right to receive the goods/services at competitive prices.[27]

In the international regime, the rationale of having an effective domestic competition policy is that it should be a precursor to the international competition law, which is sought to be placed on the agenda of WTO.[28] Competition Law must emerge out a national competition policy, which must be evolved to serve the basic goals of economic reforms by building a competitive market economy. The other rationale is to benefit from the reciprocity from other countries and to have an effective mechanism against dumping and predatory pricing.

According to the World Bank, the principal objective of competition law should be to maintain and encourage competition as a vehicle to promote economic efficiency and maximize consumer welfare. The focal point of competition law should be the actual and/or potential business conduct of firms in a given market and not on

[26] *Id.*
[27] *Id.*
[28] www.wto.org/English/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm; (last visited on 08.05.2012)

the absolute or relative site of firms.[29] This requires that instead of penalizing large firm size or industry concentration competition authorities should assess whether a firm (or group of firms) can exercise "market power", *i.e.*, engage in business practices which substantially lessen or prevent competition. This is possible only when existing or potential competition is insufficient to constrain such behavior indicating barriers confront new entry and competition.[30]

The implication of this is that competition law needs to focus not only on the business conduct of firms but also on the business environment in which the firms operate. The later, results in examining the impact of various other government economic policies.[31] Thus, over and above the substantive provisions generally contained in competition law, these policies represent potential instruments to maintain and encourage competition. Effective harmonization and linkages between competition law and other government policies must therefore be attempted. Altering the business environment so as to promote competition, not only constrains anti-competitive behavior by firms, it also inculcates sound business practices and ethics.[32]

Competition, in economic sense, implies that no one seller, and no group of sellers acting in concert, will have the power to determine their level of profits by giving less and charging more. The U.S. Attorney General's Committee on Anti-Trust Laws while mentioning about 'workable competition' stated that 'where there is a workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements, so long as the profits to be anticipated in the industry are

[29] John Vickers, "*Abuse of Market Power*", Speech at the 31st Conference for the Research in Industrial Economics, Berlin.
[30] *Id.*
[31] Adi P Talati & Nahar Mahala, "*Competition Act 2002: Law, Practice and Procedure*", (Commercial Law Publishers, New Delhi, 2006) at p. 115.
[32] *Supra note*, 21, at p. 248

sufficiently attractive in comparison with those in other employment, when all risks and other deterrents are taken into account'.[33] The result would be to force the seller who sought to increase his above the level by employing a high price and limited output monopoly policy, either to give it up or to lose ground to his rivals at a rate sufficient to reduce his profits, thus defeating his policy. Competition of sellers generally results from a relationship of substitutability among goods and services offered by rivals.[34]

1.3 COMPETITION AUTHORITIES: ROLES AND TOOLS

The OECD has formulated certain guidelines that should be kept into account for the establishment and effective operation of the competition authorities.

1.3.1 INDEPENDENCE OF THE AUTHORITY

The Competition Authority should be functionally independent with regards to the administration and enforcement of competition law. Furthermore, it has to be ensured that there is adequate funding for the authority and the amount of resources, which are devoted to the competition enforcement, should be revaluated from time to time to account for the changes in market, government action and other relevant factors.[35]

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[33] American Bar Association: Report on the Internationalization of Competition Law Rules: Coordination and Convergences (December 1999)

[34] *Supra note*, 12 at Pp. 32-33

[35] "*The Roles and Tools of Competition Authorities: Fundamental Considerations*", BIAC Presentation to the OECD Global Forum on Competition, CCNM/GF/COMP/WD(2001)25, at p. 2, available at; http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD(2001)25&docLanguage=En

1.3.2 PROVIDING CERTAINTY

Certainty is a critical aspect of any business planning and it has been pointed out that there are many possibilities in cases of uncertainties in enforcement policy, which may include:[36]

1. The inhibition or prevention of innovation and the achievement of potential efficiency gains.
2. Impeding the creation of new businesses.
3. Distortions in international investment.
4. The prevention of the creation of new standards.
5. The inhibition of technology transfers.
6. The distortion of the forms and structures used to carry on business *(e.g.,* uncertainty with respect to the competition law treatment of joint ventures and the possibility of civil or criminal liability may tend to encourage companies to merge rather than create joint ventures).[37]

1.3.3 TRANSPARENCY IN OPERATIONS

There must be transparency with respect to the policies and resolution of cases by the competition authorities such as to provide certainty as to the approach of the commission in a particular case. The Commission, shall from time to time, issue news releases regarding important their enforcement guidelines. Ensuring the transparency of the investigative and enforcement functions of the authority by the publishing of normative standards is also an effective means of holding accountable the exercise of

[36] *Id.* at p. 3; *Supra note, 21* at 249-250
[37] *Id.*

the decision maker's discretion, while maintaining a flexible system such that it facilitates negotiated solutions to potential competition law problems.[38]

1.3.4 NON-DISCRIMINATION

The Commission should scrupulously follow the principle of non-discrimination and that they should not discriminate in the application of legal framework between concerns.[39]

1.3.5 DUE PROCESS TO BE FOLLOWED

There should be an effective legal system in place for the competition regime wherein it is ensured that the fundamental that appropriate safeguards are taken including effective appellate procedure such that the rights of the parties concerned can be safeguarded.[40]

1.3.6 CASE SELECTION CRITERION

It is very cumbersome to investigate each and every potential case and the authorities should only focus only on those cases, which have an adverse impact to the local economy. The principal screening factors, which should be taken into account, may be the scale and strategic importance of the conduct in question relative to the jurisdiction concerned; whether enforcement action by the authorities would support government policies, which encourage economic efficiency; and whether national, international, or major regional participants are involved in the matter.[41] The size of the market is obviously a key factor where the market is large, because the

[38] *Supra note*, 35 at p. 3
[39] *Supra note,* 21 at p. 250
[40] *Supra note*, 35 at p. 3
[41] *Id.* at p. 4 .

economic impact of even a small price increase or reduction in innovation or service would be very considerable.[42]

1.3.7 PROTECTION OF CONFIDENTIAL INFORMATION

During the process of investigation, a significant amount of confidential information is passed to the competition authorities, which can cause prejudice to the party giving the information is the same is improperly disclosed. Thus, the success of an enforcement regime depends to a substantial extent on the degree to which firms feel comfortable that information they give the authority will remain confidential.[43]

1.3.8 INTERNATIONAL CO-OPERATION AND INFORMATION SHARING

The increasing globalization of markets brings with it not only benefits, but also an increased risk of anti-competitive conduct that spans borders. In the last few years, the number of cross-border investigations is increasing and information sharing and co-operation have thus become more important. Since the last decade, Indian market has witnessed a paradigm shift, from regulated economy towards liberalization.[44] The goal of the competition policy and WTO are concomitant which is to ensure that markets are open and competitive which promotes the efficient allocation of resources. Competition law complements trade policy by ensuring that the reduction or elimination of government barriers to trade are not negated by anti-competitive behavior of private firms through the abuse of market power or through collusive behavior[45]

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[42] *Supra note*, 21 at Pp. 251-252
[43] *Id.* at p. 252
[44] *Id.*
[45] *Supra note*, 35 at p. 5

CHAPTER: TWO

EVOLUTION AND DEVELOPMENT OF COMPETITION LAW

Competition policy in India draws inspiration from the Articles 38 and 39 of the Constitution of India (which came into effect January 1950), which are a part of the Directive Principles of State Policy.[46] These articles reflect the aim of moving India toward a welfare state, and building a just and equitable society, and mandates that the State shall, in particular, direct its policy towards securing (a) "that the ownership and control of material resources of the community are so distributed as best to subserve the common good;" and (b) "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."[47]

Accordingly, after independence, the government of India assumed increased responsibility for the development of the country, and followed policies what may be called "Command and Control" laws, rules and regulations. In 1951, the *Industries (Development and Regulation) Act* (IDRA) was implemented, through which the government sought even greater control of the industrial sector through an industrial licensing policy, which required firms in many industries to have licenses for the entry into a business or the expansion of an existing business.[48] In this situation, a series of three government studies led to the enactment of the *Monopolies and Restrictive Trade Practices Act (MRTP)* (1969), the first competition law in India.[49]

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[46] S. Chakravarthy, "*India in Competition Policy and Development in Asia*" (edited by Brooks, Douglas H. and Evenett, Simon J., Asian Development Bank, Palgrave Macmillan, New York, 2005.)

[47] Article 39, Constitution of India

[48] "Industries (Developing and Regulation) Act" (1951), Act No. 65 of 1951, Government of India.

[49] The three government studies are: (a) "Hazari Committee Report on Industrial Licensing Procedure" (1955) Ministry of Industry, Government of India, New Delhi, (b) "Mahalanobis Committee Report on Distribution and Levels of Income" (1964) Government of India, New Delhi, and (c) "Monopolies Inquiry Commission Report": (1965) Government of India, New Delhi.

2.1 MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT (MRTP ACT)

The MRTP Act, India's *first* Competition Law, was enacted in December 1969 and same was came into force in June 1970. The preamble to the *MRTP Act* describes it as: "An *Act* to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices (RTPs), and for matters connected therewith or incidental thereto".[50] The *Act* was amended significantly twice, first in 1984, adding consumer protection provisions. In the next amendment in 1991, provisions related to concentration of economic power and various restrictions on dominant undertakings, like prior approval of federal government for setting up a new undertaking, were removed from the Act. Below, we discuss the *MRTP Act* briefly. Until the new law takes effect, the *MRTP Act* remains the competition law of the land, so we will discuss it in the present tense.[51]

2.1.1 OUTLINE OF THE MRTP ACT

The *MRTP Act* was clearly a product of the "command and control" mindset that dominated Indian government thinking at the time it was drafted. There was more of an effort to control who entered, exited, expanded and contracted in an industry than to foster true competition.[52]

Under the Act, a company was classified as an "MRTP Company" when it by itself or together with its interconnected undertakings had an asset value of at least

[50] "Monopolies and Restrictive Trade Practices Act" (1969), Act No. 54 of 1969, Government of India.
[51] *Supra note*, 24 at p. 31
[52] Subhadip Ghosh & Thomas W. Ross, "*India's New Competition Law: A Canadian Perspective*", at p. 5, available at; csgb.ubc.ca/files/2007_ghosh.pdf; last visited on 12-05-2012

one billion Indian rupees or was dominant in the relevant market (i.e. commanded a market share in excess of one-quarter (25%)).[53] Such MRTP companies were required to be registered with the federal government and to obtain government approval to expand an existing undertaking, establish an undertaking or carry out a merger, amalgamation, or takeover, as these were believed to lead to an undesirable concentration of economic power.[54] Public sector enterprises, co-operative societies and agriculture were exempt from the purview of the Act.[55]

The thrust of the Act was directed towards:

- prevention of concentration of economic power to the common detriment;
- control of monopolies;
- prohibition of monopolistic trade practices (MTPs);
- prohibition of restrictive trade practices (RTPs);
- prohibition of unfair trade practices (UTPs) (post-1984 amendments)

With the passage of time, it was noticed that the objectives of the MRTP Act could not be achieved to the desired extent. Accordingly, the Government appointed a High-Powered Expert (Sachar) Committee in June 1977, which recommended widening the scope of the MRTP Act to include unfair trade practices (UTPs) like misleading and deceptive advertising.[56] Subsequently, the MRTP Act was amended in 1984 to bring unfair trade practices within its ambit.

Following the adoption of economic reforms in early 1990s in India, most far-reaching amendments to MRTP Act were introduced in 1991. Two of the five thrust

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[53] *Id.*

[54] Chapter III, *MRTP Act*, 1969

[55] Pradeep Mehta, "*Competition Law Regime in India: Evolution, Experience and challenges*", (Concurrences, No.4, 2006)

[56] Sachar Committee 1978, 'Report of the High-powered Expert Committee on Companies and MRTP Acts', Ministry of Law, Justice and Company Affairs, Government of India, New Delhi, August, 1978.

areas, namely, prevention of concentration of economic power to the common detriment, and control of monopolies, were de-emphasized.[57] The 1991 amendments removed the need for prior Government approval to establish new undertakings or the expansion of existing undertakings, and also diluted the provisions of mergers and acquisitions (M&As). The thrust was on curbing monopolistic, restrictive and unfair trade practices. Size, as a factor, to discourage concentration of economic power, had been given up. Furthermore, the amendments deleted exemption granted to Government undertakings and cooperative sector. Exemption to agriculture was not touched, because it is an issue under the legislative control of states (provinces).[58]

2.1.2 PREVENTION OF RESTRICTIVE TRADE PRACTICES (RTPS)

The *Act* defined a RTP as a practice "which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tend to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumer unjustified costs or restrictions".[59] Broadly, the RTPs listed in the *MRTP Act* are: (i) refusal to deal, (ii) tie-up sales; (iii) full line forcing; (iv) exclusive dealings; (v) concerted practice; (vi) price discrimination; (vii) re-sale price maintenance; and (viii) area restriction.[60]

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[57] *Supra note*, 24 at p. 46
[58] *Id.*
[59] Section 2(o), MRTP Act, 1969; *Supra note*, 52 at p. 6
[60] Section 33, MRTP Act, 1969

The MRTP Act states all the above types of RTPs to be legally prejudicial to the public interest. Hence, anyone against whom the charge of RTP has been established can only plead for gateways provided in the MRTP Act.[61]

2.1.3 PREVENTION OF MONOPOLISTIC TRADE PRACTICES (MTPS)

According to the Act, an MTP is a trade practice, which has, or is likely to have, the effect of: (i) maintaining the prices of goods or charges for 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); and 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.[62]

[61] *Supra note*, 21 at Pp. 38-39
[62] Section 31, *MRTP Act*, 1969; *Supra note*,.52 at p. 6-7

2.1.4 PREVENTION OF UNFAIR TRADE PRACTICES

Unfair trade practices (UTPs), as discussed earlier, were included in the 1984 amendments of the *MRTP Act,* and effectively fall under the following categories: a) misleading advertisements and false representations, b) bargain sales, bait and switch selling, c) offering of gifts or prizes with the intention of not providing them and conducting promotional contests, d) product safety standards, and e) hoarding or destruction of goods.[63]

2.1.5 ENFORCEMENT AUTHORITIES

The *MRTP Act* provides for a MRTP Commission, whose Chairman is required to be a person who is or has been or is qualified to be a judge of the Supreme Court (highest court of India) or High Court (highest court of a State). The Commission will consist of not less than two and not more than eight other members.[64] The Commission is assisted by the Director General of Investigation and Registration for carrying out investigations, for maintaining register of agreements and for undertaking carriage of proceedings during the enquiry before the MRTP Commission.[65]

The powers of the Commission include the powers vested in a civil court and include further powers: (i) to direct an errant undertaking (under RTP or UTP) to discontinue a trade practice and not to repeat the same; (ii) to pass a 'cease and desist' order; (iii) to grant temporary injunction, restraining an errant undertaking (under RTP, or UTP) from continuing an alleged trade practice; (iv) to award compensation for loss suffered or injury sustained on account of RTP or UTP; (v) to direct parties to agreements containing restrictive clauses to modify the same; (vi) to direct parties to

[63] Section 36A, *MRTP Act,* 1969; *Supra note* 21 at Pp. 39-40
[64] Sections 5,6, *MRTP Act,* 1969; *Supra note,* 11 at p. 31
[65] Section 8, *MRTP.Act,* 1969; *Supra note,* 52 at p. 7-8

issue corrective advertisements; and (vii) to recommend to the Central Government, division of undertakings or severance of inter-connection between undertakings, if their working is prejudicial to public interest or has led or is leading to an MTP or a RTP.[66]

Thus the MRTP Commission could pass final orders in respect of RTP, and UTP, but only had an advisory role in the disposal of cases of MTPs and concentration of economic power. The central government had the sole authority to pass final orders in these other cases. Appeals against the MRTP Act can only be heard at the Supreme Court.[67]

2.2 Economic Reforms And 1991 Amendments To The MRTP Act

The year 1991 was a watershed year in the Indian economic history, as it witnessed sweeping reforms in many areas of government policies, with a remarkable change from the previous "command and control" regime to a more market-driven one. A new Industrial Policy was announced by the government in July, 1991 based on the pillars of liberalization and competition.[68]

Keeping pace with such reforms in other policy areas, an important set of amendments to the *MRTP Act* were introduced in 1991. Two of the five major areas of the *MRTP Act,* namely prevention of concentration of economic power to the common detriment; and control of monopolies, were de-emphasized, after the 1991 amendments to the *MRTP Act.* More specifically, provisions relating to concentration

[66] Sections 10, 11, 12, 36B, *MRTP Act,* 1969
[67] *Supra note*, 52 at p. 8
[68] Ahluwalia, Montek S (2002) "*Economic Reforms in India since 1991: Has Gradualism Worked?*" The Journal of Economic Perspectives, Vol. 16, No. 3 (Summer, 2002), pp. 67-88

of economic power and various restrictions on MRTP companies (e.g. the requirements to obtain prior approval of the Central Government for establishing a new undertaking, expanding an existing undertaking, amalgamations, mergers and takeovers of undertakings) were all deleted from the statute. Strikingly, then, merger control was effectively removed from the *MRTP Act.*[69]

Further, in the same year the government, through a notification, brought previously exempt public sector enterprises, cooperative societies and financial institutions under the purview of the *Act.*

2.3 Problems With The Mrtp Act

The *MRTP Act* was not very successful in its stated objectives. This was partly because the *Act* was created at a time when all the process attributes of competition such as entry, price, scale, and location were regulated through other policies over which the MRTP Commission had no influence. Unfortunately, while the *MRTP Act* was created to check the various competition concerns that resulted from the then command and control regime, it was not empowered to change the very elements of the regime that resulted in such concerns.[70]

For example, chapter III of the MRTP Act mandated that dominant companies were required to seek permission from the federal government (not the MRTP Commission) to expand, establish new undertakings, and to merge or acquire other businesses. The Government may at its discretion refer the request to the MRTP Commission for its opinion, but, in any case, it was not bound by the MRTP Commission's opinion. In fact, the frequency with which cases were sent to the

[69] *Supra note,* 52 at p. 8
[70] *Supra note,* 46

MRTP Commission for an opinion was extremely low.[71] As a result, the MRTP Commission became largely toothless to act against dominant undertakings. Moreover, no action was taken to reduce concentration of economic power that was already widespread at the time of passing of the *MRTP Act,* as noted by the three studies that led to its enactment.[72]

Another problem stemmed from the lack of proper definitions in the *Act.* A perusal of the *MRTP Act* shows that there is no definition of certain offending anti-competitive practices, for example, cartels, price-fixing, predatory pricing, and bid-rigging, with the result that bringing successful actions became very difficult.[73]

Significantly, the MRTP Commission was poorly funded, which further constrained its efficient functioning. A recent study by the non-governmental organization CUTS International included a comparative analysis of the antitrust agencies of seven developing countries, namely India, Kenya, Pakistan, Sri Lanka, South Africa, Tanzania and Zambia. The report revealed that all the other countries devoted a larger fraction of their total government budget to their antitrust agency than did India – some a much larger fraction.[74]

The problem of poor funding was compounded by the fact that the MRTP Commission required Government permission to incur expenditure beyond certain limits. This severely hampered its independence. The independence of the MRTP

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[71] *Supra note*, 55

[72] *Supra note*, 52 at p. 9

[73] *Id.*

[74] For example, India's fraction of 0.0009 was lower than those of South Africa (0.033), Sri Lanka (0.003), Tanzania (0.017) and Zambia (0.056). CUTS International, (2003) "*Pulling Up Our Socks: A Study of Competition Regimes of Seven Developing Countries of Africa and Asia under the 7-Up Project*". In a paper presented to the International Bar Association Global Competition Forum in Mexico City in 2003, Margaret Sanderson reported on competition agency staffing in a large number of countries. India's agency was reported to have only 120 employees of which only 18 were categorized as "professional". Margaret Sanderson, "*Strengthening the Economic Team within a Competition Agency*" (p. 13).

Commission was further impaired due to the discretionary power of the Government to appoint senior level officers. Moreover, the MRTP Commission sat only in Delhi, making it difficult to access for small plaintiffs in distant locations in the large country.[75]

2.4 REASONS FOR A NEW COMPETITION LAW

Several factors contributed to the need for a new competition law for India. Most importantly, it was seen that India needed a law reflective of its more open approach to business protections for competition and the competitive process should replace governmental command and control mechanisms.[76] Further, over the years, a large number of judicial decisions had weakened certain aspects of the *MRTP Act.* For example, in a case involving the American Natural Soda Ash Corporation (ANSAC), the Supreme Court of India had directed that the MRTP Commission is not permitted to take actions against international cartels if the cartel meetings took place outside the country.[77]

Another contributing factor relates to the changing international economic environment. India's Ministry of Commerce set up an Expert Group on interaction between Trade and Competition Policy, subsequent to the establishment of a similar group at the WTO, following the Singapore Ministerial Declaration of 1996.[78] The Expert Group reported that there was a need for an appropriate competition law to

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[75] *Supra note*, 52 at Pp. 9-10

[76] *Id. at p. 10*

[77] *Haridas Exports* v. *All India Float Glass Manufacturers Association*, 6 SCC 600

[78] WTO (1998) "*Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council*", WTO document WT/WGTCP/2

protect fair competition and to check anticompetitive practices, many of which could surface during the implementation of WTO Agreements.[79]

In view of the above, the Government appointed a High Level Committee on Competition Policy and Law in October 1999 to propose a modern competition law for the country in line with international developments.[80] Finally, the *Competition Act* 2002 was enacted in January 13, 2003 to replace the *MRTP Act.* The Competition Commission of India (CCI) was established in October 2003 to implement the provisions of the *Act.* Some constitutional issues delayed implementation of the law, but subsequently have been resolved with the passage of the Competition (Amendment) Bill, 2007.

2.5 Competition Act (2002) After The Amendment Bill (2007)

Since 2003, India has been in a unique situation with respect to its competition regime, in that it has two competition laws, the outgoing – but still functional – *MRTP Act* (1969) and the newly enacted, but not yet (at this writing) activated, *Competition Act* (2002). However, the *Competition Act* superseded the *MRTP Act* in 2009. The delay is due to a writ petition in the Supreme Court which challenged the validity of the Act. It claimed that since the CCI would exercise judicial functions, in view of the doctrine of separation of powers recognized by the Indian Constitution, the Chairman of the CCI should necessarily be a judge chosen by the chief justice of India.[81] The Competition Act has been consequently amended, making the CCI an expert body, and providing for the creation of an appellate body to hear appeals from the decisions

[79] Ministry of Commerce, Government of India (1999) "*Report of the Expert Group on Interaction between Trade and Competition Policy*"

[80] High Level Committee (2000) "*Report of the High Level Committee on Competition Policy and Law*" Department of Company Affairs, Government of India, New Delhi, 2000

[81] *Brahm Dutt* v. *Union of India*, AIR 2005 SC 730

of the Commission, and to provide that the Commission's orders be executed by a civil court. The Competition Amendment Bill (2007) was passed by the parliament in September 10, 2007, and after coming into force it replaced the *MRTP Act, 1969*.[82]

While the main reason for the amendment was the objection of the Supreme Court, the policy makers took the opportunity to incorporate other changes and delete some other sections to face the changing situation, and correct certain loopholes in the *Act.* In the end, the Amendment bill (2007) amended a majority of the sections of the original *Act.* These amendments include replacement of 13 sections, and complete deletion of 5 sections. Further the bill introduced 21 new sections to the Act. [83]

The objective of the *Competition Act* is written in the Preamble, which describes the establishment of a Competition Commission, "... to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India...". The key substantive provisions of the *Act* include section 3, which deals with anti-competitive agreements, section 4, which discusses abuse of dominance, sections 5 and 6, which deal with combinations (mergers).[84] Further, section 7 creates the Competition Commission of India (CCI), the new national antitrust agency charged with both enforcement and advocacy functions.[85] It must be noted that the regulation of unfair trade practices was removed from the ambit of the *Competition Act,* as there has been a separate law covering this area since 1986, the *Consumer Protection Act.*[86]

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[82] *Supra note*, 52 at p. 11

[83] *Id.*

[84] Section 5, defines a combination to be an acquisition or a merger over a certain threshold limit, specified in terms of asset or turnover.

[85] *Supra note*, 21 at Pp. 47-51

[86] *Supra note*, 52 at p. 12

CHAPTER THREE

COMPETITION AUTHORITIES

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3.1 COMPETITION COMMISSION OF INDIA

Administration and enforcement of the Competition Law requires an administrative set up. This administrative set up should be more proactive than reactive for the administration of the Competition Policy. This administrative set up should take a proactive stand to be specified and adopted to promote competition by not only proceeding against those who violate the provisions of the Competition Law, but also by proceeding against institutional arrangements and public policies that interfere with the fair and free functioning of the markets.[87] It is in this context that a competition authority should have the following two basic functions:

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

b) Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.[88]

The principles that govern an effective application of competition law and authority are:[89]

a) CCI should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity from the fields of judiciary, economics,

[87] Dr. S. Chakravarthy, "*MRTP Act Metamorphoses into Competition Act*", at p. 22; available at cuts-international.org/doc01.doc; last visited on 10-05-2012

[88] *Id.*

[89] Pradeep S. Mehta & Ujjwal Kumar, "*How Free Will The Competition Commission Be?*", available at; http://worldtradereview.com/webpage.asp?wID=242, last visited on 11-05-2012

law, international trade, commerce, industry, accountancy, public affairs and administration.

b) CCI should be independent and insulated from political and budgetary controls of the Government.

c) CCI should separate the investigative, prosecutorial and adjudicative functions.

d) The proceedings of CCI should be transparent, nondiscriminatory and rule-bound.

e) CCI should have a positive advocacy role in shaping policies affecting competition.[90]

The Competition Act, 2002 provides for the establishment of CCI to prevent those malpractices that adversely affect competition. Additionally, it was enacted to promote and sustain competition in markets as well as to protect the interests of consumers. Thus it was enacted to ensure free and fair trade amongst participants in Indian markets and such other matters connected therewith.[91] It provides for both substantive and procedural provisions of law. But through a landmark judgment of the Hon'ble Supreme Court, the Competition Act, 2002 has been rendered a major blow. The decision of the Supreme Court in the writ petition of *Brahm Dutt* v. *Union of India*[92] reveals the major legal complications faced by the above Act.

The constitutional validity of the establishment of the Competition Commission came to be challenged in the case of *Brahm Dutt* v *Union of India,*[93] wherein the composition of the Competition Commission was under the scanner. Section 1(3) of

[90] *Supra note* 21 at p. 253
[91] *Id.* at p. 254
[92] AIR 2005 SC 730; (2005) 2 SCC 431
[93] *Id.*

the Competition Act provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and provided that different dates may be appointed for different provisions of the Act. Therefore, some of the sections of the Act were brought into force on 31.3.2003 and published in the Gazette of India dated 31.3.2003 and majority of the other sections by a notification dated 19.6.2003. In view of bringing into force sections 7 and 8 of the Act, the Central Government had to make prescription for the appointment of a Chairman and the members as composing the Commission in terms of section 9 of the Act. The Central Government formulated the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules 2003 and under the said rules, the Central Government was to constitute a Committee consisting of a person who has been retired Judge of the Supreme Court or a High Court or a retired Chairperson of a Tribunal established under an Act of Parliament or a distinguished jurist or a Senior Advocate for five years or more, a person who had special knowledge of and professional experience of 25 years or more in international trade, economics, business, commerce or industry, a person who had special knowledge of and professional experience of 25 years or more in accountancy, management, finance, public affairs or administration to be nominated by the Central Government. The Central Government was also to nominate one of the members of the Committee to act as the Chairperson of the Committee.

The constitutional validity of the Competition Commission was mainly challenged on the ground that Competition Commission envisaged by the Act was more of a judicial body having adjudicatory powers on questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the right to appoint the judicial members of the

Commission should rest with the Chief Justice of India or his nominee and further the Chairman of the Commission had necessarily to be a retired Chief Justice or Judge of the Supreme Court or of the High Court, to be nominated by the Chief Justice of India or by a Committee presided over by the Chief Justice of India. In other words, the contention is that the Chairman of the Commission had to be a person connected with the judiciary picked for the job by the head of the judiciary and it should not be a bureaucrat or other person appointed by the executive without reference to the head of the judiciary. The contention was based upon the principle of separation of powers on the lines of the case *of Sampath Kumar* v. *Union of India.*[94]

The contention to uphold the composition of the Competition Commission was that the Competition Commission was more of a regulatory body and it is a body that requires expertise in the field and members of the judiciary who can, of course, adjudicate upon matters m dispute cannot supply such expertise. It is further contended that so long as the power of judicial review of the High Court and the Supreme Court is not taken away or impeded, the right of the Government to appoint the Commission in terms of the statute could not be successfully challenged on the principle of separation of powers recognized by the Constitution. It was also contended that the Competition Commission was an expert body and it is not as if India was the first country which appointed such a Commission presided over by persons qualified in the relevant disciplines other than judges or judicial officers.

The Apex Court refrained from giving a judgment as there were affidavits filed by the Union of India stating that there has been proposed, some amendments to the effect that Rule 3 so as to enable the Chairman and the members to be selected by a Committee presided over by the Chief Justice of India or his nominee. Hence the

[94] (1987) 1 SCC 124

Court stated that one should look at the amendments as and when notified and then address the issue of constitutionality.

The government passed a Competition (Amendment) Bill 2006 in the light of the above judicial dicta of the Supreme Court. The aforementioned Bill was passed both the Houses and the necessary changes were made under the Competition Act 2002 vide the Competition (Amendment) Act 2007. The various changes that are made *inter alia* seeks to make the following amendments to the Competition Act so as to make the CCI fully operational on a sustainable basis namely:[95]

1. CCI AS A EXPERT BODY: The amendments provided that CCI would be an expert body which will function as a market regulator for preventing anti-competitive practices in the country and it would also have advisory and advocacy functions in its role as a regulator.
2. ADJUDICATION BY CCI: The amendments provided for the omission of the provisions relating to adjudication of disputes between two or more parties by the CCI and to provide for investigation through the Director General in case there exist a prima facie case relating to anti competitive agreements or abuse of dominant position under the Competition Act 2002 and conferring power upon the CCI to pass orders on completion of an inquiry and impose monetary penalties and in doing so the CCI would work as a collegium and its decisions would be based on simple majority.
3. ESTABLISHMENT OF COMPETITION APPELLATE TRIBUNAL: The amendments provided for the establishment of the Competition Appellate Tribunal ("CAT") which shall be a three-member quasi-judicial body headed by a person who is or has been a retired Judge of the Supreme Court or the Chief

[95] *Supra note*, 21 at p. 256

Justice of a High Court and selection of the Chairperson and other Members of CAT to be made by a Selection Committee headed by the Chief Justice of the Supreme Court of India or his nominee, and having Secretaries of Ministries of Company Affairs and Law as its members. The amendment provides for hearing and imposing of appeals by the CAT against any direction issued or decision made or order passed by the CCI. The Act provided for appeals from the CCI directly to the Supreme Court of India. This provision has been successfully challenged in India. In line with case law on the matter, the amendment provided for appeals against orders passed by the CCI by providing for the establishment of the CAT. The CAT also has the power to pass orders awarding compensation resulting from violations of the provisions of the Act. In a move to enhance the ability of the CCI to collect penalties d under the Act, the CCI may make a reference to this effect to the concerned income-tax authority under the Income-tax Act 1961 for recovery of the penalty as tax due.

4. POWERS OF CAT: The amendments provides for the adjudication by CAT of claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the Competition Act 2002. To provide implementation of the orders of the CAT as a decree of a civil court. To provide for filing of appeal against the orders of the CAT to the Supreme Court.

5. INTER SE RELATIONSHIP BETWEEN SECTORAL REGULATORS AND CCI: Prior to the Amendment Act, the Competition Act only conferred an option on any statutory body to make a reference to CCI with respect to a decision which the

statutory authority has taken or proposes to take, is or is likely to be contrary to any of the provisions of the Act. However, for making such a reference the condition precedent was raising of the same issue by any party before it. It was suggested by qualified publicists that apart from issue being raised by any party, any statutory authority also on its own should have been allowed to make such a reference. The Amendment Act provides powers to sectoral regulators to make *suo motu* reference to CCI on competition issues, in addition to the present provision of making reference, when any party in a dispute before it makes such request. The Act previously provided that statutory authorities could make reference of matters to the CCI only when a party before the statutory authority raised an issue. In order to minimize contradictions between stands taken by the CCI and statutory authorities and to enhance co-operation between statutory authorities and the CCI the amendment has made changes to enable the CCI to make references *suo motu* to regulatory authorities and vice versa. This move could lead to a more uniform view and better settled law with leas dissonance between interpretations taken separately by statutory authorities and the CCI.[96]

3.2 REGULATORY MECHANISM OF CCI

As has been earlier mentioned, the CCI would act as an expert body which will function as a regulator for preventing anti-competitive practices in the country which will also have advisory and advocacy functions. The Competition Commission of India ("CCI") is a quasi-judicial and corporate body, having perpetual succession and a common deal. CCI also has the powers to acquire, hold and dispose-off

[96] *Id. at Pp. 256-259;* Competition Amendment Bill (2006)

property, both movable and immovable, to contract and can be sued and be sued.[97] Assimilation of CCI as a corporate body and at the same time describing it as a Tribunal makes it of a somewhat hybrid character. Though as a corporate body it can sue and be sued, as a quasi-judicial body it cannot, generally do so. Hence this position needs to be clarified in the light of the character of the CCI.[98]

The head office of the Commission shall be at such place as the Central Government may decide from time to time[99] which at present is in Delhi.[100] The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.[101] The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance accountancy, management, industry, public affairs, which, in the opinion of the Central Government, may be useful to the Commission.[102] The Chairperson or Member shall not hold office after he attains age of 65 years. The Chairperson and other Members will be selected by selection committee consisting of Chief Justice of India of his nominee as Chairperson and following as Members:

a) Secretary of Ministry of Corporate Affairs.
b) Secretary in Ministry of Law and Justice.
c) Two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law,

[97] *Supra note*, 21 at p. 259
[98] *Id.*
[99] Section 7(3) of the Competition Act, 2002
[100] Competition Commission of India has been established with head office at New Delhi, vide Notification No. 1198(B), dated 14.10.2003
[101] Section 8(1) of the Competition Act, 2002
[102] *Id.*

finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy.[103]

The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment.[104] The salary, and the other terms and conditions of service of the Chairperson and other Members including traveling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities shall be such as may be prescribed. The salary, allowances and other terms and conditions of service of the Chairperson or a Member shall not be varied to his disadvantage after appointment.[105] Provisions for salary, traveling allowance, conveyance and medical facilities has been made vide CCI (Salary, Allowances and other Terms and Conditions of Service of Chairperson and other Members) Rules 2003.[106]

3.3 IMPAIRMENT IN THE INDEPENDENCE OF CCI

Under the mandate of the Amendment Act, CCI is to be an expert body. However there are provisions in the Act, which substantially defeat its independence. Section 50 provides for grants by the Central Government to CCI. The Act provides that the salaries of the staff and other expenses shall be met by the Competition Fund. Such a provision takes away the independence and autonomy of CCI by including grants by the Central Government as a part of the constitution of the Competition Fund. Thus, CCI has to circuitously depend on the Central Government for meeting its infrastructural and other expenses.[107] Further, CCI is bound to follow any policy

[103] Section 9(1) of the Competition Act, 2002
[104] Section 10 of the Competition Act, 2002
[105] Section 14 of the Competition Act, 2002
[106] *Supra note*, 21 at Pp. 259-260
[107] *Id.* at p. 261

directions given by the Central Government. Further, section 56 empowers the Central Government to supersede CCI by issuing a notification and giving reasons for the same. The executive would appoint CCI being a quasi-judicial body and such power to supersede would severely affect the independent functioning of the Commission. On one hand, it is said that CCI is a quasi-judicial body and on the other hand, the Act mandates that its decisions are not final.[108]

3.4 FEATURES & OPERATIONS OF CCI

3.4.1 EXTRA TERRITORIAL JURISDICTION

Section 32 authorizes CCI only to "inquire" for acts taking place outside India but having an effect on competition in India. The Commission shall have power to inquire in accordance with provisions contained in sections 19, 20, 26, 29 and 30 of the Act, into agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India, and pass such orders as it deems fit, notwithstanding that—

(a) an agreement referred to in section 3 has been entered into outside India; or

(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

[108] *Id.*

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.[109]

The lacunae as it existed under the MRTP regime was that it did not have any extra territorial operation and the lacunae was succinctly brought out in *Haridas Exports* v. *All India Float Glass Mfrs. Association*[110] wherein it was held that MRTP Act does not have extra territorial operation.

3.4.2 COMMISSION'S POWER DESPITE OTHER LAWS

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

3.4.3 COMMISSION HAS POWERS OF CIVIL COURT

The Commission shall have, for the purposes of discharging functions under this Act, the same powers as are vested in the civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters:[111]

a) summoning and enforcing the attendance of any person and examining him on oath;
b) requiring the discovery and production of documents;
c) receiving evidence on affidavits;
d) issuing commissions for the examination of witnesses or documents;

[109] Section 32 of the Competition Act, 2002
[110] 2002 AIR SCW 3077
[111] Section 36(2) of the Competition Act, 2002

e) subject to the provisions of sections 123 and 124 of the Indian Evidence Act 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office.[112]

The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry before it.[113] The Competition Commission can engage experts and professional of integrity and outstanding ability, who have special knowledge of or experience in economics, law, business or such other disciplines related to competition, to assist the commission in discharging its functions.[114]

As per section 64(2)(*d*), CCI can make regulations to provide for procedure to be followed for engaging experts and professionals. The Commission may direct any person: (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, accounts or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of the Act; (b) to furnish to the Director General or the Secretary or any officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of the Act.[115]

CCI can pass final orders as well as interim orders. CCI can rectify its orders but cannot review its orders. Appeal against orders of CCI shall lie with Competition

[112] Section 36(2) of the Competition Act, 2002
[113] *Supra note*, 21 at p.271
[114] Section 17(3) of the Competition Act, 2002
[115] Section 36(4) of the Competition Act, 2002

Appellate Tribunal. Where during an inquiry before the Commission, the Commission is satisfied that an act in contravention of section 3(1) or section 4(1) or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, grant a temporary injunction restraining any party from carrying on such act until the conclusion of such inquiry or until further orders without giving notice to the opposite party, where it deems necessary. Thus, Commission can issue ex parte interim stay orders. Appeal can be filed with CAT against such order under section 53A(1) of the Competition Act.[116]

With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act. The Commission may make amendment of its own motion or for rectifying any such mistake which has been brought to its notice by any party to the order. The Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.[117] Appeal can be filed with CAT against such order under section 53A(1) of the Competition Act.

3.4.4 EXECUTION OF MONETARY PENALTY

In the event that a party fails to pay monetary penalty imposed by Competition Commission, the same can be recovered as specified under regulations to be made by Commission. The penalty can also be recovered in accordance with provisions of Income-tax Act by making reference to concerned income-tax authority.[118]

[116] *Supra note*, 21 at p. 272
[117] Section 38 of the Competition Act, 2002
[118] Section 39 of the Competition Act, 2002

3.4.5 GRANT OF COMPENSATION

In the event that any person suffers loss or damage if an enterprise violates directions given by Commission or contravenes decision or order of Commission, the aggrieved person can make application to Competition Appellate Tribunal for compensation. Thus, compensation can be awarded only by CAT and not by CCI.[119]

3.4.6 IMPOSING PENALTIES

In the event that any person or enterprise fails to give notice to the Commission under section 6(2) of the Competition Act, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of the combination.[120]

Further, in the event that any person fails to comply with a direction given by Commission under sections 36(2) and 36(4) or by the Director General while exercising powers of investigation referred to in section 41(2), the Competition Commission shall impose on such person a penalty of rupees one lakh for each day during which such failure continues.

If any person, being a party to a combination, makes a statement which is false in any material particular, or knowing it to be false; or omits to state any material particular—knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.[121]

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[119] Section 53A (1)(b) of the Competition Act, 2002
[120] Section 43A of the Competition Act, 2002
[121] Section 44 of the Competition Act, 2002

3.4.7 LENIENCY PROVISION

The aim of offering leniency is both to make it easier to expose cartels and to reduce the desire to participate in a cartel at all. Experience from other countries has shown that the option of leniency has a major preventive effect. It increases the risk of exposure of cartel participants, since all undertakings now have the option of approaching the authorities and informing them about a cartel in which they have participated, and applying for leniency.[122]

The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a hill and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations.[123] However, lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed to be made under section 26 has been received before making of such disclosure. The lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section. However, if he does not continue to co-operate with Commission after making the disclosure, lesser penalty will not be imposed. Additional penalty can be imposed on producer, seller, distributor, trader or service provide included in cartel, if he had not complied with conditions or had given false evidence or disclosures made were not vital.[124]

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[122] *Supra note*, 21 at p. 274

[123] Section 46 of the Competition Act, 2002

[124] *Supra note*, 21 at p. 274-275

3.5 APPOINTMENT OF DIRECTOR GENERAL

The Central Government shall appoint a Director General for assisting CCI in conducting inquiry into contravention of any of the provisions of the Act or to perform other functions as provided by or under the Act.[125] The Additional, Joint, Deputy and Assistant Director General or such officers or other employees so appointed shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General. The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees shall be such as may be prescribed by rules.[126]

The Director General shall, when so directed by the Commission, assist the Commission investigating into any contravention of the provisions of this Act or any rules or regulations made there under. The Director-General shall have all the powers as are conferred upon the Commission under section 36(2).[127] The Commission has powers to (a) issue summons and examine on oath; (b) require discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for examination of witnesses or documents; (e) requisitioning public record or document or copy of such record or document from any office, These powers can be exercised by Director General, while investigating a contravention.[128]

[125] Section 16(1) of the Competition Act, 2002
[126] Section 16(3) of the Competition Act, 2002
[127] Section 41(3) of the Competition Act, 2002
[128] Section 36(2) of the Competition Act, 2002

Commission will be guided by principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have powers to regulate its own procedure.[129]

3.6 COMPETITION APPELLATE TRIBUNAL (CAT)

3.6.1 FORMATION OF CAT

The Appellate Tribunal will consist of Chairperson and not more than two other members appointed by Central Government.[130] Chairperson of CAT shall be a person who is or has been judge of Supreme Court or Chief Justice of High Court Member of Appellate Tribunal shall be a person of ability, integrity and standing and who has special knowledge of, and professional experience of not less than twenty-five years in 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.[131]

3.6.2 FUNCTIONING OF CAT

CAT will be guided by principles of natural justice and it can regulate its own procedure. CAT can dismiss a petition for default or decide it *ex-parte* and such order of dismissal or *ex-parte* order can be set aside. The proceedings before CAT are deemed to be judicial proceedings. If Appellate Tribunal cannot execute its order, it will be sent to Court within whose local jurisdiction the registered office of the company or place of residence of the person is situated. Orders of CAT will be

[129] Section 36(1) of the Competition Act, 2002
[130] Section 53C of the Competition Act, 2002
[131] Section 53D of the Competition Act, 2002

executed as a decree of Court. CAT can directly send the order to a civil court for execution. The order will be executed by that Court as if it is a decree of that Court.[132]

Appeal against the order of Competition Commission can be filed with Competition Appellate Tribunal (CAT). Provisions in respect of Competition Appellate Tribunal (CAT) are contained in sections 53A to 53U. The CAT will—(a) hear and dispose of appeals against order of CCI and (b) adjudicate claims for compensation and pass orders for recovery of compensation. The compensation can be claimed under section 42A or 53Q(2) of the Competition Act. Appeal can be filed with CAT by Central Government, State Government or enterprise or any person who is aggrieved by decision, direction or order of CCI. Appeal should be filed within 60 days in prescribed form. Delay in filing appeal can be condoned by CAT if sufficient cause is shown. The Tribunal shall give opportunity of hearing to parties and pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. Copy of order shall be sent to parties to appeal and also to CCI. CAT will endeavor to dispose of the appeal within six months from receipt of appeal. Thus, the time limit of six months is not mandatory.[133]

3.6.3 POWERS OF CAT

CAT can summon witnesses, enforce their attendance, require discovery and production of documents, receive evidence. Every proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195

[132] *Supra note*, 21 at Pp. 276-277
[133] *Id.*

and Chapter XXVI of the Code of Criminal Procedure 1973, The Appellate Tribunal can also review its own decisions.[134]

In the event that the orders of Competition Appellate Tribunal are contravened without any reasonable ground, punishment of imprisonment upto three years and penalty upto Rs. one crore can be imposed by Chief Metropolitan Magistrate, Delhi. Compliant will be filed by officer authorized by Appellate Tribunal, Appeal against order of CAT can be made to Supreme Court which should be filed within 60 days, but Supreme Court can condone the delay.[135]

3.6.4 AWARDING COMPENSATION BY CAT

The Appellate Tribunal can award compensation for any loss or damage shown to have been suffered by a person as a result of contravention of provisions of Chapter II of the Act. Appellate Tribunal will make enquiry and order for compensation. It may obtain recommendations of Competition Commission before passing order.[136]

[134] Section 53O of the Competition Act, 2002
[135] Section 53Q of the Competition Act, 2002
[136] Section 53N(3) of the Competition Act, 2002

CHAPTER FOUR

ANTI-COMPETITIVE AGREEMENTS

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

CHAPTER: FOUR

ANTI-COMPETITIVE AGREEMENT

4.1 OBJECTIVE FOR PROHIBITION OF ANTI-COMPETITIVE AGREEMENTS

The competition laws of various countries imbibe the idea that no enterprise or association of enterprises or person or association of persons shall enter into any agreement which relates to production, supply or distribution of goods or provision of services which causes or is likely to cause an appreciable effect on competition in their country and that such an agreement would be declared void.[137] The same rests on the premise that competition law is designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade, and that unrestrained interaction of competitive forces will yield the best allocation of economic resources of the country, the lowest prices, the highest quality and greatest material progress.[138]

Section 3 of the Competition Act, 2002, deals with the prohibition of agreements, which have an adverse impact on competition. One of the objectives of the Competition Act 2002 is to prevent adverse effect on competition. As a necessary corollary to this, the Act provides for anti-competitive agreements under section 3(1) of the Act which provides as under:

"No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution,

[137] *Supra note*, 21 at p. 53

[138] *Northern Pacific Railway Company & Northwestern Improvement Company* v. *United States of America* 356 US 1

storage, acquisition or control of goods or provisions of services, which causes or is likely to cause an appreciable adverse effect on competition within India."

On reading the section, it becomes clear that the Act does not provide that agreements between enterprises and persons are prohibited. The Act recognizes the positive synergies that flow out of such agreements.[139] Section 3(1) clearly states that no enterprise or a person shall enter into an agreement, which causes or is likely to cause an appreciable adverse effect on competition within India. It is further clear from the provision that if an agreement does not have any appreciable adverse effect then it will remain out of the purview of this provision. But, if someone alleges that an agreement is likely to cause appreciable adverse effect, then, there will be an action under this section. Thus, the provision of section 3(1) casts a duty on enterprises to examine the proposals for agreement or arrangement from its long-term effect on competition in the market.[140] One needs to recognize the strategic importance of section 3(1) of the Act. The term 'appreciable adverse effect on competition', used in section 3(1) has not be defined in the Act. However, section 19(3) states that while determining whether an agreement has an appreciable adverse effect on competition under section 3, the Commission shall have due regard to all or any of the following factors:

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;

[139] *Supra note*, 21 at p. 54
[140] *Supra note*, 11 at p.171

f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.[141]

4.2 OVERVIEW OF ANTI-COMPETITIVE AGREEMENT

An anti-competitive agreement might be characterized as one, which interferes with the commercial freedom of either party to the agreement (or even a third party) to trade freely as it would wish. Agreements, which confer territorial exclusivity, for example, may be regarded as potentially anti-competitive because the exclusive appointment prevents similar appointments being made in the same territory and the supplier competing with his distributor, reducing intra-brand competition.[142] The competition laws treat such concerted actions very harshly on the premise that concerted activity is fraught with anti-competitive risk as it deprives the marketplace of the independent centers of decision making.[143] Under the protection of the Indian law, the scope of agreement has been specifically dealt with. Section *2(b)* of the Competition Act 2002 which defines the word "agreement" as under:

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

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

ii. whether or not, such arrangement, understanding or action is intended to be enforceable by legal proceedings.

This means that in order to fall under this definition, a concerted action on the part of enterprises or persons is a pre-requisite. Even when parties to such an

[141] *Supra note*, 21 at Pp. 54-55
[142] *Id.* at p. 55
[143] *Copperwel Corpn.* v. *Independence Tube Corporation* 467 US 752

arrangement do not intend to create any legally enforceable mutual duties and liabilities, it shall be considered as an agreement under this Act.[144] In the case of *Technip S.A* v *S.M.S. Holding Pvt. Ltd.,*[145] court observed that the term covers an understanding as well as an agreement, and an informal as well as a formal arrangement which leads to the purchase of share to acquire control of a company. No written proofs of agreements are required, as writing has been done away with. The definition is designed in such a way as to produce a vast and sweeping coverage for joint and concerted anti-competitive actions. There is no need for an explicit agreement in cases of conspiracy where joint and collaborative action is pervasive in the initiation, execution, and fulfillment of the plan.[146] It has been a controversial issue as to what constitutes an agreement to come within the ambit of competition enquiry. But, there is no need for an explicit agreement in writing but there should be consensus between the parties concerned also referred to as meeting of minds or concurrence of wills.[147] It is sufficient that the parties to the agreement have expressed their joint intention to conduct themselves in the market in a specific manner. As regards the form in which the common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms.[148]

4.3 BURDEN OF PROOF

Competition improves quality, lowers prices and makes people aware of the attraction of buying a product or service. Maximum benefits are claimed to flow when production is competitively carried out. The antithesis of the competition is

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[144] *Supra note*, 21 at p. 56
[145] (2005) 5 SCC 466
[146] *United States* v. *General Motors* 384 US 127
[147] *CFI judgment in Volksawagen AG* v. *Commission* (2003)
[148] *Commission* v. *Bayer AG* [2004]4 CMLR 13

monopoly, which generally is achieved when a few producers instead of competing with each other come together, and forms an association or a cartel.[149] As observed by the Supreme Court of India in *Union of India* v *Hindustan Development Corporation,*[150] a cartel "*is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly*". Cartel has been defined in section 2(c) of the Competition Act 2002 as under:

> "*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.*"

After removing competition and creating the conditions of monopoly, the cartel of businessmen prevents the market forces from operating smoothly and to the benefit of consumers. It tries to increase the profits by raising prices of the goods or by cutting their output to create conditions of scarcity for raising prices thereof. The monopoly created by the cartel is as such not conducive to progress. It retards growth and impedes the improvement of the levels of living of the people.[151]

While the formation of a cartel amounts to an anti-competitive trade practice, which is in disputably against the public interest, the existence of a cartel is seldom proved by direct evidence. Generally no express agreement showing its existence is ever found. It has to be proved by circumstantial evidence by setting up a chain of events leading to a common understanding or plan. The underlying issue is what, at

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[149] *Supra note*, 21 at p. 59
[150] (1994) CTJ 270 (SC) (MRTP)
[151] *Supra note*, 21 at p. 60

the minimum, constitutes that 'meeting of the minds' which must be directly or circumstantially established to prove that there is a restrictive effect on competition.[152]

4.3.1 DETERMINATION OF CARTEL

In one of the earliest enquiries of the alleged conspiratorial cartelisation, *Alkali & Chemical Corporation of India Ltd. and Bayer (India) Ltd.*[153] were engaged in the manufacture and sale of rubber chemicals and among themselves commanded a dominant share of the total market in the product. They were charged with making identical increase in prices on five to six occasions on or around the same dates. There was, however, no direct evidence of the existence of concert behind the rapid increase in the price. In its order, while dismissing the charges leveled against the respondents, the MRTP Commission observed that:

> *"in the absence of any direct evidence of cartel and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in proof of any plus factor to bolster the circumstances of price parallelism, we find it unsafe to conclude that respondents indulged in any cartel for raising the prices."*

Determination of the existence of a cartel by cogent evidence is an exceptional job for the competition authorities because of less or no evidence of price pattern.[154] This is because not only the element of meeting of mind is essentially necessary but also, as laid down by the Supreme Court in *Haridas Exports* v. *All India Float Glass Manufacturers Association,*[155] the mere formation of cartel by itself will not give rise to an action. Something more must have to be proved to demonstrate the detrimental

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[152] *Id.*
[153] RTPE 21 of 1981, Order dated 3-7-1984
[154] *Supra note*, 21 at p. 61
[155] (2002) CTJ 353 (SC) (MRTP)

effect thereof. These hurdles came in the way of a manifestly existent cartel of cement manufacturers. Cement Manufacturers' Association with *44* cement manufacturers were prosecuted in an enquiry initiated by the MRTP Commission against them. It was alleged that the manufacturers had formed a cartel, which was responsible for increasing the prices of cement in all parts of the country. The Commission immediately granted an injunction which, when contested, had to be revoked because the assumptions relied upon did not stand proved.

4.3.2 PRICE INDICATORS ARE SUFFICIENT

In *Vitamins Cartel's* case, leading producers of vitamins including Roche AG and BASF of Germany, Rhone-Poulenc of France, Takeda Chemical of Japan formed a cartel dividing up the world market and price fixing for different types of vitamins during the 1990s. The cartel operated for over 10 years and later prosecuted with the help of Rhone-Poulenc which defected from cartel and cooperated with US authorities. Roche paid fines of US $500 million and total fine collected exceeded US $1 billion in the US alone. The overcharges paid by 90 countries importing vitamins were estimated to the tune of US $2700 million during the 1990s. The analysis also revealed that jurisdictions with weak cartel enforcement regime suffered more. With respect to quantum of damages India incurred overcharges of more than US $25 million.[156]

4.3.3 MUST PROVE INJURY

It has to be noted that the actions undertaken under the ambit of anti-competitive agreements is that the plaintiff must prove injury, which is connected to an antitrust action, which is protected by the relevant statute. In *Atlantic Richfield*

[156] G.R. Bhatia, "*Combating Cartels – Issues & Challenges*", available at; http://www.competition-commission-india.nic.in/speeches_articles_presentations/GR.BhatiaArticle.pdf; last visited on 15-05-2012

Company v *USA Petroleum Company*[157] where the Court observed that private plaintiff may not recover damages under Clayton Act merely by showing injury causally linked to illegal presence in market; instead, plaintiff must prove existence of antitrust injury, which is to say injury of type anti-trust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Injury, although causally related to anti-trust violation, nevertheless will not qualify as "antitrust injury" under Clayton Act unless it is attributable to anti-competitive aspect of practice under scrutiny, as it is inimical to anti-trust laws to award damages for loss stemming from continued competition.[158]

Under the EC treaty, for an agreement to be anti-competitive, its main object should be to prevent or distort competition and one needs not prove that the effect of the agreement was anti-competitive.[159] It has been mandated that contract which is in restraint on trade, which has an appreciable effect on competition, is repugnant to the antitrust laws. Herein it has been pronounced by judicial dicta that the concept of trade also encompasses cases where agreements or practices affect the competitive structure of the market. Agreements and practices that affect the competitive structure by eliminating or threatening to eliminate a competitor are subject to the competition rules.[160] It has been mandated by judicial pronouncements that the courts outlaw only unreasonable restraints i.e. restraints that harm competition in the market place. The judicial dicta in *Standard Oil Co.* v *United States,*[161] wherein it was stated that only undue restraints of inter-state or foreign trade or commerce are prohibited by the

[157] 495 US 328
[158] available at; http://www.fordham.edu/law/faculty/patterson/antitrust/materials/arco.html; last visited on 15-05-2012
[159] Article 81 of the EC Treaty
[160] *Campagnie Maritime Beige* [1996] ECU 11-1201
[161] [1911] 221 US 1

provisions of declaring illegal every contract, combination in the form of trust or otherwise or conspiracy, in restraint of such trade or commerce, and making guilty of a misdemeanor every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of such trade or commerce.

The essence of the competition law is injury to the public and it is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.[162] It has to be appreciated that reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines.[163] The aspect that whether this type of restraint is reasonable or not must be judged in part at least, in the light of its effect on competition, for, whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.[164]

Under the EC Treaty as regards anti-competitive agreements, an agreement, which may affect trade, is within the contours of Article 81(1). The concept of trade is not limited to traditional exchanges of goods and services across the countries but it is a wider concept covering all cross border economic activity including

[162] *United States* v. *Trenton Potteries Co.* 273 US 392
[163] *Supra note*, 21 at p. 64
[164] *United States* v. *Trans-Missouri Freight Association* 166 US 290

establishment.[165] The function of the notion *may affect* trade is to foresee with a sufficient degree of probability on the basis of factors of law or fact that the agreement may have an influence on the pattern of trade between the member states.[166] The pattern of trade test has been followed to derive whether the agreement affects trade between the member states and the same involves and examines it at three stages *i.e.* a sufficient degree of probability on the basis of set of objective factors of law or fact, an influence on the pattern of trade between the Member States and a direct or indirect, actual or potential influence on the pattern of trade.[167] In addition to the same, one has to look into the legal and factual environment in which the agreement or practice operates. The relevant economic and legal context provides insight into the potential for an effect on trade and one has to see the barriers to trade between nations, which are external to the agreement.[168]

The entire concept of appreciable adverse effect on competition is made subjective that may vary from case to case and, therefore, under section 19(3) of the Competition Act, 2002, it is provided that while determining whether an agreement has an appreciable adverse impact on competition or not, the Competition Commission of India (CCI), the nodal agency, incorporated under the administrative set up of the Act, has to look at the following factors:

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;

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[165] *Supra note,* 21, at p. 66
[166] *Kerpen & Kerpen* [1983] ECR 4173
[167] *Supra note,*21 at p. 66
[168] *Id.*

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.[169]

4.4 TYPES OF AGREEMENTS

There is a distinction that is made of anti-competitive agreements, *i.e. horizontal agreements* and *vertical agreements.*

4.4.1 HORIZONTAL AGREEMENTS & ANTI-COMPETITIVE BEHAVIOR

Horizontal Agreements are agreements between competitors operating at the same level in the economic process *i.e.*, enterprises engaged in broadly the same activity. In other words, these are agreement between two or more enterprises that are at the same stage of production chain and in the same market.[170]

The aspect that they are at the same market implies the fact that the parties to the agreement must be both producers, or retailers or wholesalers. The degree of cooperation may vary from carrying out research and development to establishing a new company through the means of a joint venture.[171] These agreements can have pro-competitive benefit like it may highly beneficial to the competitive structure of the market and also leads to the synergy of operations by pooling of resources for the ultimate benefit of the consumers. However there can be situation wherein the agreement is meant only for maximizing the profits for the parties involved at the expense of the consumers.[172]

[169] *Id.* Pp. 66-67
[170] Specified in Section 3(3) of Competition Act, 2002
[171] *Supra note,* 21, at p. 68
[172] *Supra* note, 11 at Pp. 173-174

The parties concerned can fix prices or output, to share markets and if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products. The operation of the horizontal agreements can be varied ranging from cartels to parallelism.[173] The operation of cartels has a tendency to be very complex and it varied according to the number of participants and the nature of the market in question. In the cases for cartels, there must be in place a credible mechanism in place for enforcing the agreement between the cartel members and a method of detecting the cheating on the cartel provisions. There can also be situations wherein there is no overt collusion between the cartel members but they act in manner, which seems to be a collusive behavior in line with the existing market forces. This situation is referred to as the concept of parallel behavior or parallelism.[174]

Thus one can see that the aspect of parallelism would come within the ambit of concerted practice as by its very nature, concerted practice does not have all the elements of contract but arise *inter alia* out of the behavior of the parties concerned. Although parallel behavior does not *ipso facto* be identified as concerted practice, it may lead to strong evidence of a concerted practice if it leads to conditions of competition, which do not correspond in the normal conditions of market having regard to the nature of the products, the size of the parties involved and the volume of the said market.[175]

There have been guidelines prescribed under the competition laws to judge as to whether a horizontal agreement is anti-competitive or not. There has been a blanket

[173] *Supra note*, 21, at p. 68
[174] *Id.*
[175] *Imperial Chemical Industries Limited* v. *Commission* [1972] ECR 619

ban on agreements of price fixing, output limitation or sharing of market or customers.[176] The other agreements have to be analyzed on the premise of market related criteria such as the market position of the parties and structural factors. The analysis starts by analyzing the position of the parties in the market affected by the agreement. It determines whether the parties can exercise market power, *i.e.* have the ability to cause negative effects as to the prices, output, innovation or variety or quality of goods and services.[177] The other aspect that needs to be considered is the combined market share of the parties concerned. If the parties have low combined market share, it does not lead to competition issues. In addition to the criterion of market share, one has also to look into market concentration *i.e.* position and the number of competitors in the market.[178]

4.4.2 VERTICAL AGREEMENTS & ANTI-COMPETITIVE BEHAVIOR

Vertical agreements are between non-competing undertakings operating at different levels of manufacturing and distribution process. These are agreements between manufacturers of components and manufacturers of products, between producers and wholesalers, or between producers, wholesalers and retailers.[179]

Vertical agreements can improve economic efficiency, within a chain of production or distribution, by facilitating better coordination between the participating undertakings and that it can lead to reduction in the transaction and distribution costs of the parties and to an optimization of their sales and investment limits.[180] The competition laws should not restrict the vertical agreements which are not

[176] Guidelines on Horizontal Cooperation OJ (2001) C 3/2.
[177] *Supra note,* 21, at Pp.68-69
[178] *Id.* at p. 69
[179] Specified in Section 3(4) of Competition Act, 2002
[180] *Supra note,* 11, at p.173

indispensable to the attainment of the positive effects and certain types of vertical agreements like minimum and fixed resale prices should come within the prohibition of the competition laws.[181] Normally exemptions are granted to vertical agreements. However, there are certain hard core restrictions, the inclusion of which in an agreement makes the agreement void. Such restrictions include:

1. Resale Price Maintenance, are agreements or concerted practices having their direct or indirect object the establishment of a fixed or a minimum price level to be observed by the buyer.
2. The agreements or concerted practices wherein the agreement has as it's direct or indirect object the restriction of sales by the buyer, as far as it relates to the territory into which or the customers to whom the buyer may sell the contracts goods or services. It relates to the market partitioning by the territory or by the customer.
3. The restriction of active or passive sales to end users by members of as selective distribution system operating at retail level of trade; restriction of cross supplies between distributors operating at different level of trade.[182]

4.4.2.1 EXCLUSIONARY PRACTICES

The common examples of exclusionary Practices are vertical agreements and they infringe the law if they have the effect of reducing competition. The vertical restraints, which have the potential of foreclosing competition by hindering the entry into the market:

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[181] *Id.*

[182] *Supra note*, 21 at p. 70

(i) *Exclusive Dealing and Purchasing:* Under such an agreement a retailer agrees to purchase or deal in the goods of only one manufacturer making entry difficult for the new manufacturers.[183]

(ii) *Exclusive Distribution:* Under such agreements the manufacturer supplies one or selected number of retailers making entry difficult for the new retailers.[184]

(iii) *Tie in Sales, Full time Forcing, Quantity Forcing and Fidelity Discounts:* Tie in sales make the purchase of one product conditional on the sale of another (tied) product. Full line forcing is an extreme case of the former where the retailer must stock the full range of the manufacturer's products. Under quantity forcing the retailer is required to purchase a minimum quantity of certain product. Under fidelity discounts, the retailer receives discounts based on its proportion of its sales coming from the manufacturer.[185]

(iv) *Slotting Fees:* This requires the manufacturer to pay a fee to get its product stocked. Such entry could make difficult for entry of the new manufacturers.[186]

4.5 ANTI-COMPETITIVE AGREEMENT – "CAUSES OR LIKELY TO CAUSE APPRECIABLE ADVERSE EFFECT ON COMPETITION"[187]

Section 3 prohibits agreement which "causes or is likely to cause an appreciable adverse effect on competition within India". The phrase requires determination first "competition within India", and then whether that competition "is or likely to be adversely and appreciably affected" by the said agreement. Adverse effect results when the agreement harms the competitors in the consumer welfare

[183] *Id.* at p. 71
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] Section 3(1) of the Competition Act, 2002

sense of economies *i.e.,* effect on price or output. That adverse effect to an appreciable extent on the competition must be the consequence of the agreement.[188] That consequence may even be unintended. It is not always necessary to find a specific intent in order to find the agreement having an appreciable adverse effect on the competition and thus contravening section 3(1).[189] It is sufficient that the likely effect is the consequence of the persons' conduct or rather business arrangements. Because the essence of violation is the illegal agreement, the proper analysis focuses upon the potential harm that would ensue if the conspiracy is successful, and not upon the actual consequences.[190]

The conduct of the party, therefore, should be such which may have appreciable effect on competition within India. The conduct or a contract between two parties not resulting the said consequences, is not prohibited.[191] *In Mahindra & Mahindra Ltd.* v. *Union of India,*[192] the Supreme Court observed, in the context of section 2(o) of the MRTP Act, 1969, defining the expression "restrictive trade practice";

> *"It is clear from the definition that it is only where a trade practice has the effect, actual or probable, of restricting, lessening or destroying competition that is liable to be regarded as restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be, to some extent, in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive*

[188] *Supra note*, 11 at p. 175
[189] *Id.*
[190] *Summit Health* v. *Pinhas* 500 US 322
[191] *Pawan Hans Ltd.* v. *Union of India* [2003] 114 Comp. Cas. 676 (SC)
[192] [1979] 2 SCC 529

or not, it has to be decided not on any theoretical or a prior reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition."

Thus, only the agreement which has the effect, actual or probable, of causing appreciable adverse effect on competition within India, is forbidden under section 3(1), and not otherwise. The element of competition must be present before the question of prohibition could arise.[193]

4.5.1 ANTI-COMPETITIVE AGREEMENT – "LIKELY TO CAUSE", THE PROBABILITY OF ADVERSE EFFECT

An agreement is anti-competitive, which causes or is likely to cause adverse effect on the competition. The agreement should be the cause of the adverse effect. Cause is something that occasions or effects a result. The effect of the agreement and its economic impact rather than technical form is important.[194]

The adverse effect on the competition within India, if it is the result or likely result of the agreement, that agreement is anti-competitive within the meaning of section 3(1) and unlawful. The purpose of such agreement should be to produce an adverse effect on competition. In *Ashton* v. *CIR*,[195] their Lordship said that if an arrangement has a particular purpose, then that would be its intended effect and that if it has a particular effect, it will be its intended purpose. The motive of a person to adopt a particular course of action is not important, as its sole and dominant purpose, *i.e.,* the design of effecting something to be achieved or accomplished. The overt act must be looked at to find out the effect, whether such effect is calculated, or designed

[193] *State of UP* v. *Gir Prasad* [2004] 15 ILD 441 (SC)
[194] *Supra note*, 11 at p. 176
[195] (NZ) 75 ATC 6001

or could be predicted. Adverse effect should be the consequence of the agreement, though that consequence may not be intended.[196]

The probability and not merely possibility of its consequence as appreciably affecting competition is the requirement. All that is necessary to see is that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have influence, direct or indirect, actual or potential, on competition. [197]

4.6 ANTI-COMPETITIVE AGREEMENT – "APPRECIABLE ADVERSE EFFECT"

The expression "appreciable adverse effect on competition" has not been defined abstractly or in general terms in the Act. Every case has to be examined individually and facts considered peculiar to business, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable.[198]

The adverse effect of the agreement on competition within India must be significant. It refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sort of agreements in varying time and circumstances.[199] The words "adverse effect on competition" embraces acts, contracts, agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition or unduly obstructing due course of trade.

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[196] *Supra note*, 11 at p. 176
[197] *Id.*
[198] *Id.* at Pp. 181-182
[199] *Supra note*, 13 at p. 689

Public interest is the first consideration. It does not necessarily mean interest only of the industry.[200]

The section only embraces agreements, contracts or acts which operate to the prejudice of public interest by unduly restricting competition. The section saves those whose effect is only partial or otherwise reasonable. Such a saving provision is necessary in the interest of the freedom of an individual to contract only when the contract causes appreciable adverse effect, it is declared void.[201] The public policy is to prohibit, or treat as illegal, contracts, or acts entered into which intend to do wrong to the public and which unreasonably restrict competitive conditions, limit the right of individuals, restrain the free flow of commerce, or bring about public evils such as the enhancement of prices, and not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise which do not unduly restrain commerce, but to protect that commerce from contracts or combinations by methods which would constitute interference with it or an undue restraint upon it.[202]

The "effect" requirement is not to be given a broad interpretation as to cover every agreement which appears to be restriction on conduct, but to be seen with reference to competition. Vertical agreement with a restrictive clause may fall outside the prohibition, if found on investigation, to be pro-competitive restrictions sometimes are "necessary" for the agreement to be of commercial value. Further, "effect" being more adverse is not enough for prohibition. It has to be appreciable.[203]

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[200] *Hondas Exports* v. *All India Float Glass Manufacturers Association* [2002] 111 Comp. Cas. 617 (SC)]

[201] *Supra note*, 11 at p. 180

[202] *Standard Oil Company* v. *United States* 221 US 1

[203] *Supra note*, 11 at p. 180 .

4.7 ANTI-COMPETITIVE HORIZONTAL AGREEMENT – VOID[204]

Section 3(1) prohibits agreement in respect of every form of activity in relation to trade; production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Such agreements are void under section 3(2) of Competition Act, 2002. The word "void" denotes nullity. It means that which has no force and effect, is without legal efficacy, is incapable of being enforced, or has no legal or binding force. A thing which is void must be a nullity for all. It is totally non-existent. What is prohibited is the agreement in respect of goods (production, supply, distribution, storage, acquisition or control) or services (provision) which has or is likely to have an adverse effect on competition within India. In an agreement the clause which has that effect is void, and not others, provided it is severable from the rest of the terms. Severability is striking out in whole or in part.[205]

The void term is separated from valid terms where it is separable. However, where it is not separable the whole agreement does not survive. Nullity affects the prohibited clause in the agreement.[206] The courts may lean towards saving the valid terms of the agreement from the void by deleting it as severable, provided sufficient consideration remains to support.

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[204] Section 3(2) of the Competition Act, 2002

[205] *Supra note,* 11, at p. 194

[206] *Societe Technique Miniere* v. *Maschinene Bau Ulm GmbH* [1666] ECR 235, European Court of Justice

4.8 AGREEMENTS PRESUMED ANTI-COMPETITIVE[207]

What is prohibited is the agreement which has appreciable adverse effect on competition. Yet certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the law does not require proof that an agreement of that kind is, in fact, anti-competitive in the particular circumstances. These agreements are presumed to have appreciable adverse effect on competition. These are set out in subsection (3) of section 3 and they are *per se* void. It is not just a formal contract between, but also concerted practice of, or decision taken by, any person and enterprise or between enterprises or associations of enterprises or of persons, including cartels, engaged in identical or similar trade of goods or provision of services.[208] Agreements, practices or decision of persons or enterprises or their associations engaged in identical goods or provision of services are anticompetitive. What is anti-competitive, which so engaged, is —

- any agreement entered into:
    - between enterprises or associations of enterprises or persons or associations of persons, or
    - between any person and enterprise, or
- practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels.

Such agreement, practice or decision should be such which

- directly or indirectly determines purchase or sale prices;

[207] Section 3(3) of Competition Act, 2002
[208] *Supra note*, 11 at p. 195 .

- limits and controls production, supply, markets, technical development, investment and provision of services;
- shares the market or source of production or provision of services by way of
  - allocation of geographical area of market, or
  - type of goods or services, or
  - number of customers in the market, or
  - any similar way;
- directly or indirectly results in bid rigging or collusive bidding.[209]

4.8.1 AGREEMENT FIXING PRICES[210]

Sub-section (3) clause (a) of section (3) deals with Agreement fixing purchase or sale prices. This clause is fairly comprehensive to cover all types of collective agreements regulating trade terms and conditions between the sellers or between the buyers. The agreements falling under this clause are commonly referred to as collusive price collusive price fixation, collusive (or level) tendering, cartel etc.[211] The collusive arrangement, generally speaking, is with respect to:

(i) price of the product;

(ii) grant of commission, discount or rebates;

(iii) grant of credit;

(iv) terms of warranty;

(v) allocation of territories or market share.[212]

In fact, most of the agreements would fall under this clause, whenever the agreement is collectively entered into between two (or more) manufacturers/suppliers

[209] Section 3(3) of Competition Act, 2002
[210] Section 3(3) (a) of the Competition Act, 2002
[211] *Supra note*, 13, at p. 690
[212] *Id.* at p. 691

or two (or more) dealers/buyers. Such cartels, in particular, amongst producers/manufacturers give them enormous power to dictate prices and other terms of sale to the wholesalers and retailers in the marketing channel. Whenever a group of suppliers come together to fix the price of the product or service in concert, they voluntarily, as a group, give up price competition and bring about mutually administered prices, ignoring consumer interest. Such concerted action may also be resorted for preventing the entry of new entrepreneurs in the market.[213]

In every such agreement, two (or more) persons act according to a scheme or plan to achieve a common object or goal. It is not necessary that all their actions must be demonstrated by an express or written agreement; it may be inferred from the circumstances surrounding the transactions. The transactions may point out to a course of dealing or facts indicating that the parties had an opportunity to meet, exchange views and conspire. An intention to combine or conspire in restraint of trade is necessary in such an action. If it is proved that some form of contact existed between the persons who combine or conspire, there will be no hesitation in inferring a combined or concerted action. [214]

Generally speaking, on coming to a conclusion about the existence of a collusive arrangement, one or more of the following factors, individually or in combination, need to be considered:

(1) Number of firms in the industry—whether it is small;

(2) Level of concentration in the industry—whether it is high;

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[213] *Id.*

[214] *Id.*

(3) Barriers, if any, restricting entry in the industry, arising, *inter alia,* from Government policies on industrial licensing, import control, foreign collaboration etc.;

(4) Pace of technological advancement in the industry—whether it is low;

(5) Whether the product is homogeneous and the demand for it is relatively inelastic;

(6) Whether the competing firms are able to exchange information easily about the prices and other terms of sale;

(7) Whether there is an effective trade association in the industry, which closely monitors the activities of its constituents. (When standard price lists are published by a trade association, it gives the parties to the agreement, the power to control the market and it is inconsequential whether that power is exercised or not and the arrangement actually results in a price increase or not.)[215]

The simultaneous price increase of certain brands of toilet soap by the two dominant soap manufacturers could not be said to be on account of any concert between them merely because both happened to be members of the executive committee of soap manufacturers' association. In an oligopolistic industry like that of toilet soap, where a few units dominate the industry and each unit is having its eye on the other to see what its behavior will be, there will be inter-dependence without any overt acting together.[216] Likewise, merely because two manufacturers of AC Pressure pipes quoted identical prices for different types of the said product, would not by

[215] *Id.*

[216] *Hindustan Lever Ltd. and Tata Oil Mills Co. Ltd.,* RTP Enquiry No. 4/1978, Order dated 22- 7-1982.

itself make it a case of concerted action by the process of collusive tendering, when there was no evidence of collusion between the parties in regard thereto.[217] Similarly, the identical prices quoted by three storage battery manufacturers against tenders invited by Director General. Supply and Disposals, could not be brought within the ambit of parallel pricing as it could not be proved that the prices quoted by them eliminated competition. The first respondent being the bulk supplier of batteries having a large share of the market, the other two manufacturers could not be blamed for treating it as price-leader and quoting prices identical with or similar to the price quoted by it. Parallel price moves by the small companies in a standardized market, which closely followed and imitated the prior moves of the industry leader, were insufficient to imply the existence of a price fixing conspiracy.[218]

In *re Bengal Tools Limited,*[219] respondents were found to have quoted identical rates for various items in response to tenders floated by Salem Steel Plant, even though their costs of production varied. Steel Plant was rather wonder-struck how these parties located at different places in the country were able to quote same rates. The Commission observed that in spite of no positive evidence of the parties having met and decided upon the rates was forthcoming, yet the onus of establishing existence of concert stood discharged by circumstantial evidence. This raised presumption in favour of a cartel and the onus of disproving cartel stood shifted to the respondents.

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[217] *RRTA* v, *Hyderabad Asbestos Cement Products Ltd. and Anr,* RTP Enquiry No. 17/1979, Order dated 20-12-1982.

[218] *In re Choride India Ltd. and Others,* RTP Enquiry No. 46/1977, Order dated 12-5-1981

[219] RTP Enquiry No. 120/1984, Order dated 25-4-1986

4.8.2 AGREEMENT LIMITING OR CONTROLLING PRODUCTION, SUPPLY, ETC[220]

This clause (b) is divided in two parts, the first relating to production or supply of goods, and the second relating to restriction on investment and technical development.

4.8.2.1 RESTRICTING OR WITHHOLDING OUTPUT OR SUPPLY

The underlying object of such agreements is to regulate the flow of supplies of goods or services of a particular kind in the market, so that the producers engaged in that line of activity may benefit equally in times of prosperity or may face the setback uniformly in adverse market conditions.[221] Various measures may be adopted for the purpose, e.g., size of capital investment, installed capacity, quantity or value of existing production or sale. Manufacturers may at times agree not to fully use their manufacturing capacity by keeping their machines idle during a specified period of time either to overcome the adverse economic conditions or to earn higher profits by creating conditions of scarcity through manipulating the flow of supplies in the market.[222]

Hindustan Pilkington Glass Works Ltd. and Window Glass Ltd.,[223] entered into an agreement with Surat Cotton to prevent Surat Cotton from making or selling certain glass products in consideration of payment of agreed compensation by Pilkington and Window Glass. The agreement also provided that Surat Cotton was to sell its existing stocks to them and that it would keep its plant idle or scrap the same and would not associate with any other person for making and selling the specified

[220] Section (3)(3)(b) of Competition Act, 2002
[221] *Supra note,* 11 at p. 221-222
[222] *Supra note,* 13 at p. 702- 703
[223] RTP Enquiry No. 2/1972, Order dated 14-2-1975

products. Pilkington and Window Glass also arrived at a common marketing arrangement through Associated Patterned and Wired Glass (APWG), a Company promoted by them for the purpose. APWG was assigned the task of procuring all orders for the products manufactured by Pilkington and Window Glass and to distribute the same in equal proportion between the said two promoting companies for execution. On the application of the RRTA, that the said agreements were meant to limit the output and supply of glass products to eliminate competition, the Commission passed the 'cease and desist' order, and declared the impugned clauses of the agreement void.

In the case of *Andhra Pradesh Paper Mills Ltd.*[224] and nine others, it was alleged that these paper manufacturers were changing the pattern of production of paper to adversely affect the flow of supplies of ordinary white printing and writing paper. The case was, however, closed after enquiry by the Commission on being informed that the Paper (Control of Production) Order, 1974 had since come into operation and that the ordinary white printing and writing paper was no longer in short supply.

4.8.2.2 RESTRICTION ON INVESTMENT AND TECHNICAL DEVELOPMENT

There are different ways, direct and indirect, for eliminating competition. The imposition of restriction on the deployment of any machinery or the use of any manufacturing process, for production of goods is a direct way to achieve this purpose. Such restriction can be put by an entrepreneur, who has a dominant say and/or share in the market for goods of any particular description, and who either provides his technical knowledge to other, or avails of the production facilities of other smaller

[224] RTP Enquiry No. 5/1973, Order dated 31-1-1976.

units engaged in the same line of activity. Such arrangements are, however, too conspicuous and are rarely resorted to openly.[225]

Bata,[226] engaged in the manufacture of leather and rubber canvas footwears, entered into agreements with small scale manufacturers for purchase of footwear, to be sold by it under its own brand. The agreements prohibited these manufacturers from purchasing raw material and components from parties other than those approved by Bata. It also required them to use the moulds sold/supplied by Bata exclusively for manufacturing footwear for Bata's requirement. The Commission held these conditions imposed by Bata, as restrictive trade practice and prejudicial to the public interest.

4.8.3 ALLOCATION OF AREA OR MARKET[227]

Among the dealers of a manufacturer, division of market is commonly arranged through allocation of territory or area in which each dealer is required to operate. The manufacturer may designate a territory as the primary responsibility of a particular dealer and obligate him to use his best efforts to exploit the allocated market or area.[228]

Restriction designed to achieve territorial or market allocation may take many forms. Generally speaking, it is done under the terms of an agreement, which either prohibits the dealer from selling to customers outside a designated area or by confining the dealer to sell the goods to specified category(ies) of customers. Such a restriction can also be indirectly practised by not assigning any territory or customers

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[225] *Supra note*, 13 at p. 704
[226] *RRTA* v. *Bata India Ltd.* (1976) 46 Comp Cas 441
[227] Section 3(3)(c) of Competition Act, 2002
[228] *Supra note*, 13 at p. 705

as such, but by withdrawing any concessions, by imposition of penalty or by requiring the defaulting dealer to share his commission with the dealer whose area or market has been encroached upon.

The territorial or market restriction imposed by the manufacturer may result in imperfect competition, and thereby reduce the customer's choice. Often, it might be used by the manufacturer to enhance the monopoly power of his dealers so that the manufacturer, in turn, could extract higher prices from them. It may also enable the dealers to engage in price discrimination. On the other hand, this practice could be usefully employed by a manufacturer to increase the efficiency of his operations and that of his dealers by providing certain measures of product promotion, by increase in the range of customers to be contacted by the dealer and cost reduction for self and the dealers.[229]

Where a product *(e.g.,* domestic solar hot water system, coolers, solar stills) requires frequent and prompt after-sale service, allotment of territories for marketing of goods so that the dealers in one area may be in sole service to the customers, such a restriction would not be hit by clause (c); in the absence of such a restrictive provision, dealer in one area may give such service at an increased cost to the consumers in other areas leading to additional burden on them.[230]

In re Hindustan Lever Ltd.[231] the Commission considered the provision in the agreement entered into by Hindustan Lever, which is engaged in the production of consumer products like vanaspati and toilet preparations, with its Re-distribution Stockists requiring that the stockist shall not re-book or in any way convey, transport or dispatch parts of stock of products received by him outside Poona, except when he

[229] *Id.*
[230] *Id.*
[231] RTP Enquiry No. 11/1974, Order dated 17-3-1976.

is so expressly directed in writing by the Company. The Commission held that this inter-town restriction fell under sections 33(1) (g) and 2(o) of the Act, and declaring the impugned clause of the agreement relating to area allocation void, passed the 'cease and desist' order. On appeal, the Supreme Court[232] upheld die Commission's order and dismissed the appeal, taking into account the nature of goods involved in the agreement.

In *RRTA v. Mahindra and Mahindra Ltd.,*[233] by an *ex parte* order for failure to appear, the territorial restriction imposed on its dealers by Mahindra (which is engaged in the manufacture of motor vehicles-jeeps), was held to be restrictive and struck down by the Commission. Later, on review application, the matter was heard by the Commission and its application was dismissed. Thereafter, on appeal the Supreme Court[234] set aside the order of the Commission, being not a speaking order and not based on any material to justify the effect of competition on the trade practice.

4.8.4 BID RIGGING AND COLLUSIVE BIDDING[235]

Agreements which directly or indirectly result in bid rigging or collective bidding are presumed to be anti-competitive. Explanation to sub-section (3) defines "bid rigging" to mean an agreement amongst the Competitors joining hands together at the time of bidding with the object to distort competition.[236] Such agreements are referred to as "knock out" generally. Bid rigging or colluding are anti-competitive.

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[232] AIR 1977 SC 1285
[233] RTP Enquiry No, 91/1975, Order dated 14-5-1976.
[234] AIR 1979 SC 798
[235] Section 3(3)(d) of Competition Act, 2002
[236] *Supra note*, 11 at p. 231

Rigging is an agreement which has the adverse effect on competition. Collusion is a secret agreement for illegal purposes or a conspiracy.[237]

In *Swift & Company* v. *United States*[238] the Supreme Court of the United States found a combination of proportion of the dealers in fresh meat throughout the United States illegal. The combination was not to bid against, or only in conjunction with, each other to regulate prices in and induce shipments to the livestock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolies' commerce among states.

4.9 ANTI-COMPETITIVE VERTICAL AGREEMENTS — UNLAWFUL[239]

There are some agreements between manufacturers and distributors and suppliers or retailers which are not so presumed if they contribute to the improvement of production and distribution and promote technical and economic progress and allow at the same time consumers a fare share of the benefits. The prohibition as provided in section 3(1) also applies to vertical agreements between non-competing enterprises operating at different levels. The concept refers to certain types of business practices that relate the resale of products by manufacturers or suppliers.[240] They are embodied in agreements between operators on a line of business situated at different stages of the value-added chain. Such agreements are also anti-competitive, if they cause or are likely to cause an appreciable adverse effect on competition.[241] They include :—

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[237] *Subhas Chandra* v. *Ganga Prasad*, AIR 1967 SC 878
[238] 196 US 375
[239] Section 3(4) of the Competition Act, 2002
[240] *Supra note*, 11 at p. 235
[241] *Supra note*, 240

- to purchase a second product distinct from the main product which is a condition of purchase (tie-in agreement);
- to purchase a specific brand of product exclusively from him (manufacturer) and not from others (exclusive supply agreement);
- to sell the product in a territory exclusively assigned to him (distributor) (exclusive distribution agreement);
- to restrict persons by any method to whom goods are sold or from whom goods are bought(refusal to deal);
- to resell the product at the fixed minimum price (resale price maintenance).

These agreements are considered illegal only if they result in affecting competition adversely to an appreciable degree.

These restraints are applied for various reasons. When a supplier deals in technically complex products, he may desire that consumers purchasing them receive a minimum pre-sale service and are fully informed about the products qualities and capabilities and, therefore, the retailers are specialised. If the products are luxury and branded items, he may restrict supply to retailers selling from a high quality location to ensure the aura of exclusivity and prestige of the product in the mind of consumers. He may, therefore, restrict supply to retailers who agree to comply with the obligations as to service and sales promotion.[242]

If the restraints are such as to enhance competition, they are not, and if they foreclose the market, reduce rivalry and facilitate collusion they are, void. To determine, the rule of reason is applied. Thus, vertical agreements may have both

[242] *Supra note*, 11 at p. 237

negative and positive effects. If the negative effect outweighs the positive, the agreement is declared void. The negative effects are—

- foreclosure of other suppliers or other buyers by raising barriers to entry;
- reduction of inter-brand competition between companies operating on market, including facilitation of collusion amongst suppliers or buyers;
- reduction of intra-brand competition between distributors of the same brand.[243]

The main objection to the exclusive contracts is their probable adverse effect on the market of foreclosing it to other competitors. That objection does not hold good if the agreements could be justified by showing that the economic advantages to the customers outweighs the anti-competitive effects, for example, benefit of the security of supply, providing information about the use of highly technical products, providing additional services etc.

4.9.1 TYING ARRANGEMENTS[244]

Tie-in arrangements' has been defined in Explanation (a) to sub-section (4). A tying arrangement is one, under which a seller agrees to sell a product or service (the tying item) only on the condition that the buyer agrees (i) to buy a second (tied) product from the seller, or (ii) not to buy the tied product from any other supplier. The effect of the arrangement is that a manufacturer or supplier of goods makes the buyer of goods to buy some goods or services, which he does not want, along with the goods which he wants for use or for re-sale. An extreme version of tying arrangement is 'Full-line forcing', where the buyer of a product is coerced by his supplier to buy the complete range of his products, though not desired to be so bought. Such practices,

[243] *Id.*
[244] Section (3)(4)(a) of Competition Act 2002

though widespread in trade, are *prima facie* reprehensible, as they force the buyers to forego their choice among products which compete with the tied product. They also deny competitors free access to the market for the tied product.[245]

Tying arrangements are generally to be found where the tying product is either more popular or is in short supply and the tied product is slow-moving and less in demand. By such an arrangement, the manufacturer or supplier can increase and expand the share of the tied product in the market. Such practice may also be resorted to when a manufacturer or supplier of a popular and established product introduces a new product in the market and wants its sale to be pushed up, and in which case he ties-up the new product with the established product. If the new product is not bought in a specified quantity, the buyer's order for the popular product is likely to be refused.[246]

A tying arrangement cannot be defended on the plea that the number of units (or quantity) of the two products—the tied and the tying one sought to be sold, are not identical.[247] The value of the tied product is also immaterial: it may have more or less value, in terms of money, in relation to the tying product. What is important is the desire, the intensity of demand at the particular point of time and keenness of the buyer to purchase or possess the tying product. As the average buyer is more or less helpless in the market, the supplier does everything to increase his sales and aggregate profits, which he would not be able to achieve if the two products were sold separately. By tying the two products, he succeeds not only in reducing or eliminating competition, but also removes buyer's resistance to the tied product.

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[245] *Supra note*, 13, at p. 715

[246] *Id.*

[247] *In re Anand Gas*, RTP Enquiry No. 43/ 1983. Order dated 7-6-1984.

4.9.2 EXCLUSIVE SUPPLY AND DISTRIBUTION AGREEMENT[248]

The exclusive supply and distribution agreement has been defined in Explanations (b) and (c) to sub-section (4). An exclusive dealing arrangement is one, where two or more enterprises agree that one or both will deal exclusively with the other and refuse to deal with third parties in respect of a commodity or class of commodities, a specified service or class of services. In its report on collective discrimination, the U.K. Monopolies Commission classified exclusive dealing agreements into three categories;

(i) the sellers agree to sell only to certain buyers;

(ii) the sellers agree to sell to only certain buyers in exchange for agreements by those buyers to buy only from those sellers;

(iii) agreement among buyers to buy only from certain sellers.[249]

Exclusive dealing agreements originate principally to cater to the manufacturer's need to promote his branded products at all stages of distribution, down to the consumer. When a manufacturer indulges in the practice of exclusive dealing, his competitors are prevented access to that market and the dealers are denied the freedom to handle competing products. In this process, the consumer is also restricted in his choice among the number of competing products.[250]

Exclusive dealing arrangement may be resorted for maintaining or strengthening the already established monopolistic position. Also, when a cartel manages to include a high proportion of the important distributors/dealers within such arrangement, the entry of a newcomer may be effectively blocked. Such trade practice

[248] Section (3)(4)(b)/(c) of Competition Act, 2002
[249] *Id.* at Pp. 726-727
[250] *Id.* at p. 727

may, then, substantially lessen competition, by limiting the channels of distribution for the independent competitors, and it may tend to create a monopoly in that line of business. [251]

Exclusive dealing arrangements, which, by and large, are bilateral and are linked up with territorial restriction, are mostly prevalent in India. This practice is resorted to, in one or more, of the following ways:

(i) Manufacturer may require his dealers or distributors to purchase goods exclusively from him, and restrain them from dealing in competitors' products.

(ii) Manufacturer may agree not to sell the goods to other buyers, or if sold to other buyers it will be only on terms and conditions which will be favourable to the exclusive buyer; the exclusive buyer, in turn, may promise not to deal in competitors products.

(iii) Under a reciprocal arrangement, the exclusive buyer may agree to buy certain goods from the manufacturer on the condition that the latter would also buy certain other goods only from the former.[252]

In *Telco* v. *RRTA,*[253] exclusive dealing and territorial restriction imposed on the dealers came up for consideration by the Supreme Court. The Supreme Court held that, in the circumstances of that particular case, where the dealers are required to make a heavy investment in the stocking of commercial vehicles and spare parts and in the maintenance of service stations to provide after-sale service to the buyers of commercial vehicles, exclusive dealership, did not impede competition, but promoted it. The Court further observed that exclusive dealings led to specialization and im-

[251] *Id.*
[252] *Id.*
[253] AIR 1977 SC 973

provement in after-sale service, and by specializing in each make of vehicle and providing the best possible service, the competition between the various makes was enhanced.

In *RRTA* v. *Centron Industrial Alliance Pvt. Ltd.*,[254] agreements entered into by Centron, a manufacturer of safety razor blades, with (i) Home Products Marketing Agency and (ii) R.C.H. Barar & Co., for sale of former's products came up before the Commission. The agreement with Home Products was found to be an agency agreement and the Commission held that clause (c) of section 33(1) was, therefore, not attracted. However, while holding it to be restrictive under clause (a) of section 33(1), the Commission observed that exclusivity of the respondent's agent did not affect competition considering the basic feature of the industry, i.e., the respondent's market share was 10% as against Malhotra's dominant position with more than 75% market share and giant conglomerate Hindustan Lever having as much share as the respondent. The exclusive arrangement was, therefore, imperative for the survival of the respondent and for competition. However, its agreement with Barar & Co. relating to exclusive dealing was held to be restrictive in nature as the same was on principal-to-principal basis.

In *RRTA* v. *Usha Sales Pvt. Ltd.*,[255] the Commission, while holding that the stipulation regarding exclusive dealing in agreements with its dealers amounted to restrictive trade practice, allowed gateways under clauses (b) and (h) of section 38(1) in respect of sewing machines and diesel engines in view of nature of the products, and the need for after-sale service. Regarding water coolers the Commission held that exclusive dealership would hardly have any impact on the competitive situation, as only a small market was covered by the exclusive dealers of Usha Sales. Rejecting the

[254] RTP Enquiry No. 10/1974, Order dated 6-1-1976
[255] RTP Enquiry No. 8/1974, Order dated 27-11-1975

claim of gateway under clause (b), the gateway under clause (h) of section 38(1) was, however, allowed. In respect of fans, the Commission observed that sales of Usha fans through its exclusive dealers were only 1/5th of its total sales while the remaining 4/5th sales were through dealers who were dealing in competing brands also. The Commission held that exclusive dealership in fans also passed through gateway (h) under section 38(1), as not affecting competition to a material degree. The respondent undertook to discontinue the system of exclusive dealers in fans in all towns with a population of one lakh or less. The Commission held that this safeguard would remove any impediment to competition which exclusive dealings in fans was likely to create.

4.9.3 REFUSAL TO DEAL[256]

The term "refusal to deal' has been defined in Explanation (d) to sub-section (4) of section 3, as to include 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.[257] It covers bi-lateral (vertical) agreements between a manufacturer/seller and the buyer stipulating that (a) the buyer shall not sell the goods obtained from the seller to a particular person (or class of persons), or (b) the manufacturer/seller shall not sell his goods to anyone else, except the buyer (or a class of buyers). This provision also seeks to cover concerted and conspiratorial refusals to deal, group boycott of dealers or suppliers and combinations for covering others' business policies. It is not the purpose of this provision to deny the right of a manu-

[256] Section (3)(4)(d) of Competition Act, 2002
[257] *Supra note,* 11 at p. 257

facturer or a supplier, to decide about his network of dealers or choose his customers.[258]

Mere non- supply of goods to a dealer does not amount to refusal to deal, unless it is the outcome of non-adherence to some restrictive covenant, e.g., tie-up sales, re-sale price maintenance, area restriction etc. What is required to be seen in these cases is the effect of such practice on competition and whether it results in, or is likely to result in, foreclosing markets to competitors and/ or to coerce the dealers to adopt trade practices which they might not otherwise adopt.[259] It is open to a manufacturer to devise its market policy in such a way as to be able to compete effectively with other manufacturers.[260] The policy of a manufacturer for appointing a limited number of dealers, distributors or wholesalers in a particular area for marketing the goods is not refusal to deal so long as there is nothing in the agreement with them precluding appointment of other dealers.[261]

In other words, to suit one's own business requirements, such number of dealers, as deemed expedient, may be appointed or dealers may not be appointed for certain areas at all, wherein marketing of goods may be undertaken by the manufacturer himself. Such a measure would not amount to refusal to deal with any dealer who is not appointed for distribution of products or supply of services. Likewise, termination of dealership on ground of poor performance of a dealer,[262] or because of shady dealing or improper conduct of a dealer,[263] would not tantamount to refusal to deal. Termination of the distributorship, as a punitive action by the

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[258] *Supra note*, 13 at p. 734

[259] *Hemraj Electronics* v. *Monika Electronics Private Limited*, RTP Enquiry No. 93/1985, Order dated 9- 1-1986

[260] *In re Bombay Footwear Private Ltd & Another*, RTP Enquiry No. 1/1984, order dated 19-3-1985

[261] *Gulshan Rai Jain & Sons* v. *Rohtas Industries Ltd.* RTP Enquiry No. 86/1984, Order dated, 23-8-1984

[262] *In re Usha International Limited.* RTP Enquiry No 15/1984, Order dated 1-4-1986

[263] *In re Voltas Limited*, RTP Enquiry No. 14/1987. Order dated 22-7-1987

manufacturer for distributor's failure to comply with the condition of minimum off-take, contained in the distributorship agreement, does not amount to refusal to deal.[264]

4.9.4 RESALE PRICE MAINTENANCE[265]

The term has been defined in Explanation (e) to sub-section (4), which includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. Resale Price Maintenance (RPM) is a form of price- fixing. Whenever a manufacturer sets the price at which a retail shop, which he does not own, must re-sell his products to the public, or at which a wholesale business, he does not own, must resell that product to a retailer, the practice is known as re-sale price maintenance.[266] RPM may be resorted to either individually or collectively. Under individual-RPM, the supplier prescribes the wholesale and/or the retail prices for the resale of goods and takes action to enforce the same. Collective-RPM is an arrangement whereby suppliers of goods decide among themselves the wholesale and/or retail prices for resale of goods by the buyer(s). When RPM is enforced, the price of goods becomes the same at all points of resale irrespective of the differences in location, the character and quality of the services provided with the goods, and the different demands on the resources of the wholesalers or retailers, as the case may be.[267]

RPM has to be distinguished from direct price maintenance by a manufacturer, who owns a chain of retail stores and stipulates the price at which each of these must sell his products. Such direct price maintenance is prevalent in India in a number of

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[264] *In re Tata Iron & Steel Co. Ltd. and Indian Tube Co. Ltd.*, RTP Enquiry No. 39/1984. Order dated 23-9-1987

[265] Section (3)(4)(e) of Competition Act, 2002

[266] *Supra note*, 13, at p. 753

[267] *Supra note*, 13 at p. 754

industries, e.g., footwear (by Bata, Carona Sahu etc.), textiles (by Gwalior Rayon, Reliance Textiles, etc.). Likewise, there may be 'agency' arrangement where the wholesaler or the distributor may be a mere agent of the manufacturer and he sells on behalf, and on the account, of the manufacturer. Such cases fall outside the scope of RPM, as the ownership of goods continues with the manufacturer who sells through the media of such wholesale or retail outlets.[268]

The resale price may take any of the following three forms:

(a) A fixed price at which the product is to be sold;

(b) A maximum price, above which the product may not be sold;

(c) A minimum price, below which the product may not be sold;[269]

The wholesaler or retailer has no discretion to deviate from the price stipulation as aforesaid while reselling the goods. Not infrequently, a 'suggested' or 'list' price is issued by the manufacturer (or the supplier), or the price is printed on the container. Whether or not the suggested price is, indeed, only a suggestion may not be easily clear; it may also be not clear whether it will be enforced by the manufacturer concerned. This may become ascertainable from the understanding between the manufacturer and the wholesaler or the conditions surrounding the transaction.[270]

Clause (e) of section 3(4) has two ingredients, viz., (i) the sale of goods, which is made by the manufacturer/supplier in the wholesale or retail outlets, is preconditioned to the effect that resale thereof should be on stipulated price, and (ii) the agreement therefore should not have clearly provided that prices lower than the stipulated price may be charged. In other words, where an agreement to sell goods, which is entered into on principal to principal basis, contains a provision about resale price

[268] *Id.*
[269] *Id.*
[270] *Id.*

by way of recommended price or maximum (ceiling) price, there should be freedom to charge lower price and it should be so stated in unequivocal words. This clause covers vertical agreements in the marketing channel, in contrast to the horizontal price maintenance arrangement. Such vertical agreements are frowned upon because it prevents price competition amongst wholesalers, distributors or dealers, which ultimately affects the consumers adversely.[271]

In *re Mohan Meakins Limited*[272] a stipulation in the franchise agreement entered into by it with the bottlers for bottling and selling its soft drinks, which the latter shall sell the products only at prices fixed in consultation with the former was held to be resale price maintenance. Commission, while observing that although consultation did not necessarily bestow any right of veto, the inherent nature of parties to the agreement provided a significant measure of superiority to *Mohan Meakin vis-a-vis* the bottlers, and in such circumstances 'consultation' could, in effect, amount to directive. A 'cease and desist' order was passed by the Commission, *inter alia*, with the usual direction to provide in the agreement that the bottlers are free to sell the products at prices lower than the recommended prices.

[271] *Id.*
[272] RTP Enquiry No. 65/1984, Order dated 11-4-1986

CHAPTER FIVE

ANALYSIS TO CCI'S APPROACH TOWARDS ANTI-COMPETITIVE AGREEMENTS

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ANALYSIS TO CCI'S APPROACH TOWARDS ANTI-COMPETITIVE AGREEMENTS

5.1 POLICY FAVOURABLE APPROACH

In the case of *M/S Royal Energy Ltd.* v. *M/S Indian Oil Corporation Ltd. & Anr*[273], the informant had submitted that it was the largest manufacturer of bio diesel, having its plant in Maharashtra. It was earlier associate with organizations like Indian Railways, BEST, Essar Steels, Kirioskar etc; as a vendor of bio-diesel. In addition, it was having its own retail bio-diesel pumps in Maharashtra.

The Informant alleged that since its product was causing a threat to diesel supplied by IOCL, BPCL & HPCL (hereinafter collectively called public sector Oil Marketing Companies (OMCs)), they started informing their clients that they would be supplying bio-diesel blended petro-diesel to them directly. It has also been stated that as per purchase policy of OMCs, they were supposed to purchase bio diesel at a pre-determined rate, which at the time of filing the information was Rs.26.50/-per litre, while price of bio-diesel sold independently by the informant was Rs.31/-per litre. Since the consumers were bound to purchase blended bio-diesel only from the OMCs, the bio-diesel manufacturers were force to sell their product to OMCs at a rate lower than the cost of manufacturing.

According to the informant, this act of OMCs constituted 'Monopolistic Trade Practice' prohibited under MRTP Act. The informant had also submitted a letter dated 15.06.2009 addressed to DGI&R, MRTPC informing that Ministry of Petroleum & Natural Gas issued a letter requesting the State Government to ensure elimination of

[273] MRTP No. 1/23 (C-97/2009/3IR) Order dated, 09-05-2012

sale and possession of bio-diesel in the market. The informant contended that this letter was issued on the complaints of the OMCs who did not want to face competition. Further, while on the one side the government was promoting the usage of promoting the green fuel and by such a letter, it intended to kill the green fuel industry.

Meanwhile, due to the repeal of MRTP Act, the case was transferred to the Competition Commission of India (the Commission) under section 66(6) of the Competition Act, 2002 (the Act).

ORDER

The Commission being of the opinion that there exist *prima facie* case, directed the Director General (DG) to investing in the matter, the DG conducted the investigation in the matter and submitted his report to the Commission.

Based upon replies received from various parties, DG reported that almost every facet of the bio-diesel industry was governed in the country by various policy decisions of the government. On the issue of the methodology to arrive at the purchase price of bio-diesel, it has been observed that OMCs adopted fundamentally the same pricing formulation as was adopted by the Ministry of Petroleum and Natural Gas (MoPNG) and they did not take into account the cost of production of bio-diesel to the manufacturers. According to DG, it was therefore evident that the OMCs were not free in determining the prices of bio-diesel as the prices were essentially to be fixed on the basis of guidelines and policies of the government of India.

According to DG, mere fact of fixation of uniform prices does not amount to the formation of cartel within the meaning of sub-section (3) of section 3 of the Competition Act, 2002. DG has stated that cartelization can occur only in a context

where two or more parties acting independently strive to secure business for earning profits or reducing their losses. No such conduct of anti-competitiveness has been found to exist in the uniform fixation of price of bio-diesel by the OMCs.

DG concluded that there was no evidence to suggest existence of an anti-competitive agreement between PSU OMCs in violation to section 3 of the Act. Similarly, PSU OMCs were not found to be in contravention of section 4 of the Act.

Commission while agreeing on the DG's findings held that there was no evidence to suggest an anti-competitive agreement among PSU OMCs in violation of Section 3 of the Act.

ANALYSIS

CCI cleared OMC's of charges that they formed a cartel and fixed the price of bio-diesel on the basis that since the price of diesel was under the control of the Government, PSU OMC's were not allowed to fix, determine and enhance the retail selling price of diesel on their own. The OMC's cannot be forced to buy bio-diesel at a price which is higher than the price of end product, that is, HSD in the case, as it would not be commercially viable.[274]

CCI decision was fundamentally based on DG's observation that mostly the bio-diesel industry was governed in the country by different price determination policies of the Government and the OMC's have adopted the same pricing formulation as was adopted by the MoPNG. Lastly, CCI also observed that even if an anti-competitive conduct flows from any policy of the Government, "*the Commission will still have jurisdiction to examine the impugned conduct any violation is found,*

[274] "CCI clears state oil firms of cartelisation charges", Press Trust of India, New Delhi, 20-05-2012; available at, http://smartinvestor.business-standard.com/market/Compnews-117449-Compnewsdet-CCI_clears_state_oil_firms_of_cartelisation_charges.htm; last visited on 22-05-2012

suitable orders can be passed under Section 27 and 28 of the Act. The Competition Act, 2002 has not made any exemption in this regard".[275]

5.2 MARKET ORIENTED APPROACH

In *Consumer Guidance Society* v. *Hindustan Coca Cola Beverages Pvt. Ltd. & Anr.*[276], the case was transferred from MRTPC to CCI under S. 66(6) of Competition Act, 2002. The complaint in the present case was filed before the MRTPC by the Consumer Guidance Society, Vijayawada (hereinafter referred to as "informant") against Hindustan Coca Cola Beverages Pvt. Ltd (hereinafter referred to as "HCCBPL") and INOX Leisure Private Limited (hereinafter referred to as "ILPL") for their alleged restrictive and unfair trade practices.

The informant, Consumers' Guidance Society, is a registered voluntary consumers' organization formed by a group of professionals of Vijaywada, with the objective of espousing the cause of consumers' welfare and justice in the state of Andhra Pradesh. The opposite party, HCCBPL, is a registered company and a leading producer of bottled water and soft drinks in India as well as across the globe and opposite party, ILPL, is a company which operates many multiplexes across various locations in India.

The informant alleged that the opposite parties have entered into an agreement and in pursuance of that agreement HCCBPL has been supplying its products *i.e.,* packaged water and soft drinks, at an inflated and exorbitant price which is in sharp variance with normal price of same products in open market. Thus, the HCCBPL and ILPL are indulging into discriminatory pricing policy by selling products with same

[275] *Supra note*, 143
[276] Case No. UTPE 99/2009, Order dated, 23-5-2011

quality, quantity, standard and package at different prices to different buyers' i.e. higher prices from the buyers at ILPL complex and lower prices from the buyers in open market. The HCCBPL has been printing inflated MRP on the products supplied to ILPL so as to deceive and induce the consumers.

It was alleged that the trade practices adopted by HCCBPL imposes unjustified cost on the consumers and at the same time it also stifles competition as ILPL is selling the product of HCCBPL only. Thus, the consumers' right to have access to a variety of goods at a competitive price is infringed by the vertical restrictive trade agreement entered into between HCCBPL and ILPL.

ORDER

The Commission after concluding, there exist a *prima facie* case, directed DG for the investigation. DG identified two issues, but the relevant here to discuss is "*Whether HCCBPL and ILPL have entered into any agreement in contravention of Section 3 of the Act*". After analyzing the factors set out in section 19(4) of the Act the DG came to the conclusion that HCCBPL enjoys complete dominance as a supplier of the relevant product to ILPL by virtue of its agreement with ILPL which allows it unfettered rights to supply the bottled water and other cold drinks within the multiplexes of ILPL. Further, the agreement violates the provision of section 3(4)(b) and 3(4)(d) read with section 3(1) of the Act by entering into anticompetitive agreement and confers the status of preferred beverage provider on HCCBPL which forecloses the competition by not allowing the competitors of HCCBPL to enter the relevant market.

The Commission observed that the whole story in this matter is woven around the 'exclusive supply agreement' entered between HCCBPL and ILPL. Perusal of this agreement discloses that it was entered between HCCBPL and ILPL for four months

unless renewed by both the parties. It stipulates that during the currency of agreement, HCCBPL will act as 'preferred beverage provider' for supply of non-alcoholic beverages to ILPL owned multiplex cinema theatres located in various cities in India. Further, under the agreement both HCCBPL and ILPL have been given right to terminate it in the event of breach of any terms and conditions by other party. It is also noted that HCCBPL in its reply has submitted that there is intense competition between suppliers of non-alcoholic beverages to compete for obtaining such contract with multiplexes and Cinemas have been switching over their suppliers periodically.

After taking into consideration the facts and circumstances Commission found DG's findings to be based on flawed delineation of relevant market. Further, the conclusion of the DG that both the parties have contravened section 3(4) of the Act by entering into 'exclusive supply agreement' cannot be accepted in the absence of proper assessment of AAEC in the present case by the DG. If the reasoning advanced by the DG in his report is accepted then every exclusive supply agreement will become per se anti-competitive. It has been brought by the HCCBPL in its reply that the supply of products made to multiplexes constitute less than 0.3% of the total supply of such products sold in India. Taking into account the volume of business of total beverages market in India, there can be hardly any appreciable adverse effect on competition because of exclusive supply agreement between HCCBPL and ILPL, thereby no violation of provision of section 3 was established.

ANALYSIS

CCI found DG's investigation report erroneous and unacceptable because DG failed to provide any objective or rational basis and has reached erroneous conclusions as to i) definition of relevant market, ii) position of HCCBPL in that

relevant market, and iii) effect on competition because of the alleged practices of HCCBPL.

CCI also observed that there is intense competition in the beverage industry throughout India and a large number of competitors in the market are vigorously competing with each other for sale of their respective products. In respect of certain outlets buyers enter into agreement with the suppliers on 'preferred beverage supplier' or even 'exclusive supply agreement'. But there is intense competition amongst suppliers for obtaining such contracts so as to sell their products. Every competitor has full opportunity to negotiate and obtained such contracts. PEPSICO one of the largest competitor of HCCBPL has also entered similar agreements. These facts clearly shows that neither there can be any AAEC in India as a result of alleged agreement between HCCBPL and ILPL, nor any refusal to deal or denial of market access.

Then furthermore the sale of bottled water, beverages as well as food items within multiplexes are ancillary part of their main business, *i.e*, exhibition of motion picture films and sale of these products in multiplexes cannot be compared to the sale of these products in retail outlets. DG also failed to take into account the significant overhead costs incurred by multiplexes.

5.3 ENTRY BARRIER APPROACH

In *Re: Glass Manufacturers Of India*[277] MRTPC took *suo-motu* cognizance on the basis of an article published in the magazine 'The Outlook Business' dated 16th-19th April, 2008 alleging cartel like practices of leading Indian manufacturers of float

[277] MRTP Case no. 161/2008, Order dated, 24-01-2012

glass. Subsequently the matter was transferred to CCI under section 66(6) of the Competition Act, 2002.

The article brings out the competing claims of Indian float glass manufacturers and float glass importers. In the said article manufacturers have projected their concerns regarding cheaper imports from China and rising cost of inputs, which allegedly eroding their competitiveness. Further, it has also been alleged that the float glass manufacturers have been operating as a cartel since the mid 90s and have been increasing prices and controlling supplies in the domestic market. Further their constant concerns over cheaper Chinese imports are just part of the strategies to ensure that imports do not impair their ability to control the domestic prices.

The article also reported that according to 'Glass yug' a leading magazine of Glass Industry, the prices of float glass increased from Rs. 40/- per meter to Rs. 50 per meter during the period between April to December, 2007 which was a result of the cartel like practices of leading Indian glass manufacturers.

ORDER

DG while investigating collected information from leading processors and sources like 'Glass Yug Magzine' and called for information from various other glass manufacturers. DG found that the cost of inputs had gone up which might have contributed to the price rise of float glass. DG also found the successful entry of new players which reveal that there are no barriers to entry as new manufacturing firms have entered the market successfully increasing the additional capacity. DG came to the conclusion that float glass production has increased considerably and glass industry is witnessing impressive positive growth rate. DG concluded that the price of float glass appears to be determined by the dynamics of the market and do not appear

to have been fixed by the float glass manufacturers. Lastly DG concluded that the allegation of cartelization against the three major companies *i.e.,* M/s Saint Gobain, Asahi India and Gujarat Guardian, does not stand established and evidences on record do not indicate contravention of the section 3.

The Commission observed that DG after conducting extensive investigation and analysis has concluded that no evidence of cartelization among these glass manufacturers could be found which may be said to have contributed to the price rise during the period under investigation. It has also been concluded that increase in prices during the period was due to increase in cost of inputs rather than due to an anti-competitive agreement among the glass manufacturing companies. The Commission also observed that another reason for increase in price of float glass was also due to the increase in cost of raw materials and not due to any cartelization.

The Commission also observed that while the price of all float glass manufacturing companies behaved together in a band and there was a case of price parallelism, especially among established players, but merely instance of price parallelism cannot be said to be an evidence of any cartel agreement. In order to determine the existence of a cartel, price parallelism must be supported by an evidence of an agreement or collusion or action in concert, therefore, Commission held that the manufacturers cannot be charged of cartelization under the provisions of the Act.

The Commission further observed that in span of last three years there were new entrants in the market besides the established players. The share of the new entrants had been considerably increasing and gained substantial market share. The Commission felt that if there had been any cartelization, any new player would have found it difficult to enter the market and successfully capture good market share. So,

there was no indicating evidence to establish any appreciable adverse effect on competition due to any anti-competitive agreement among the Indian float glass manufacturers. The Commission therefore agreeing by the findings of DG held that there was no case of violation of provisions of section 3 of the Act.

ANALYSIS

In the present matter CCI held that there was no anti-competitive agreement and certainly no evidences were found out for the existence of Cartelization by the float glass manufacturers. This decision was made due to various factors which were analyzed by the DG. The float glass industry had observed both negative and positive growth over a certain period. The negative growth was mainly due the rise in crude prices, soda ash (major raw-material in the glass industry) which caused increased in input cost.

DG noted that the float glass industrial market has gained new entrants and they have substantially acquired around 30% market share in less than two years of their entry. The increase in market share of the new entrants in float glass industries in a relatively very short period is a good indicator of healthy competition in the market. Though increasing prices in basic raw materials, fuel and energy have lead to rising cost of inputs. However, factors like healthy competition and pressure from imports have kept rising prices in check.

In the present case DG and CCI observed price parallelism in the float glass market. It was noted that in terms of average monthly prices, there was very high positive correlation among the prices of clear float glass of established and some of the new players. Even there was certain correlation between the prices and DG also noted that the average monthly prices of some of the players are moving close to each other and there is some degree of price parallelism. But DG couldn't found any

corroborative evidence for establishing the same. In order to determine the existence of a cartel, price parallelism must be supported by the other evidence.

The same conclusion was reached by CCI. Recently in numerous similar orders CCI has been finding the same argument. Though in the present case there is certain other circumstantial evidence which deviates one to come upon the significance of price parallelism. Likewise, the entry of new players and their substantial increase in market share, the reducing profit margins of the established key players, the increasing competition of the float glass industry, the growth in the market, certainly point out the circumstances which deviates one from the price parallelism's issue and make it almost less relevant.

5.4 FREE & FAIR COMPETITION ORIENTED APPROACH

In *UTV Software Communications Ltd., Mumbai* v. *Motion Pictures Association, Delhi*[278] the informant, a company registered under the Companies Act, 1956, is a producer, title holder and distributor of feature films. The informant's portfolio includes Hindi, Regional Animation films. The opposite party is an association registered under section 25 of the Companies Act, 1956. It's a body formed to promote and assist the business of production, distribution, exhibition of films and also to provide a common forum to its members to meet and address their problems.

It was alleged that the opposite party imposes unreasonable terms and conditions vide its Memorandum of Association and Article of Association. The said unreasonable terms and conditions limit the production, supply, distribution and exhibition of films in the areas of operations of the opposite party. The opposite party

[278] Case no. 09/2011, Order dated, 08-05-2012

also forces its members to sign a Producer Distributor Certificate and an Acquiring Form for the purpose of registration of the films. The Acquiring Form contains some conditions as per which the members have to agree for the transfer of all commercial and non-commercial rights of the film including the copyrights plus commercial video rights through any media including video parlour rights and telecasting rights to the distributor and imposes a holdback period of 5 years.

It was alleged that the opposite party through the agreements reflected in its Memorandum & Articles of Association, mandates its members not to deal or to do business with persons engaged in the exhibition and distribution of films (i) who are not members of the opposite party; (ii) whose membership has been suspended or terminated; (iii) members who have distributed a non-registered film. These decisions and actions of opposite party further limits, controls and restricts the distribution, exhibition and exploitation of films in the territory.

Further, the film Acquiring rules prescribes the penalty in case of premature satellite telecast of films in violation of the undertaking given by the producers/distributors. The informant provided sequence of events in connection with registration of films with the opposite party to bring out that its conduct has been anti-competitive. The informant has alleged there were illegal penalties which were imposed in connection with film registration. The informant has also opposed the rules framed by the opposite party as anti-competitive. Such conditions interfere with freedom to contract and are anticompetitive as they limit and control the supply of the films in different formats in the market, contrary to the provisions of the Act. According to the informant, the Memorandum and Articles of Association, the Certificate, the Form are in complete violation of section 3 of the Act.

ORDER

DG in his investigation found that to carry out the business of film distribution in the territory of any association it becomes essential for a distributor to take the membership otherwise one may not be able to do the business smoothly. Without membership its almost impossible to survive in the film distribution business without becoming the member of the association. The association also strictly prohibits members to deal with non-members. DG observed that MPA makes it mandatory for its members to deal with the registered films only, it becomes mandatory for every film producer and distributor to go through the process of registration to release their film in the territory under its control.

DG found out that the opposite party had forced the informant to register the film "*7 Khoon Maaf*" by submitting the Acquiring Form and affidavit in the pro-forma prescribed by MPA. The opposite party issued an internal circular on 14.02.2011 intimating its member to note that the film was unregistered, which itself was an alarm to not to deal with the film to its members. Since the film was due for release the informant had to accept the directions of MPA. DG after considering evidences concluded that the rules and regulation and activities of MPA contravene the provision of section 3 of the Act, such as; (i) the restriction on members to deal with non-members; (ii) compulsory registration; (iii) imposing penalty and taking disciplinary actions; (iv) issuing interim circular among members to not deal with non-members; (v) imposing improper conditions, *etc.*

DG while examining the conduct of the opposite party concluded that MPA is in violation of provisions of section 3(3)(b), since it restricts the supply of services in the market through collective intent of all members of the association. DG also reported that the MPA also infringed provision of section 3(4), as it imposes

conditions on its members to deal only with its members and with films which are registered with it which is in the nature of exclusive distribution agreement.

CCI examined, "*whether the rules and regulations, acts and conduct of MPA are subject matter of examination under section 3 of the Act?*" While dealing with this particular issue CCI observed that the activities carried on or decisions taken by MPA and other associations, are covered with in the scope of section 3(3) since these associations are in fact associations of enterprises who in turn engaged in production, distribution and exhibition of films.

MPA is taking decisions relating to production or distribution or exhibition in the interest of the members who are engaged in similar or identical business of production of films or distribution or exhibition. The commission held that the rules, regulations and byelaws which are in essence of various trade practices carried on by the association and are manifestation of collective decisions of its constituent members is liable for examination under section 3(3) of the Act.

The other issue which CCI examined, "*whether the rules, regulations and byelaws of MPA are anti-competitive?*" CCI observed that rules of MPA and other associations restricting their members not to deal with non-members, making compulsory the registration of each film before release in their territories, restrictions regarding unfair holdback period for exploitation of Satellite, Video, DTH, and other rights and act and rules regarding penalizing members who do not follow the dictates of the association are anti-competitive and violative of provisions of section 3(3) (b) of the Act and have caused appreciable adverse effect on the competition in India in terms of section 19(3) of the Act.

ANALYSIS

The present matter was based on fundamentally one issue which was, "whether the rules, regulation and byelaws of MPA are anti-competitive". The Commission not only relied on DG's investigation but also on a similar order passed previously on the same lines. CCI basically relied on its previous findings to find out whether there was an appreciable adverse effect on the competition due to MPA's rules and byelaws.[279]

In this case CCI observed that it is true that the activities of an association may benefit their members and also play a significant role in encouraging and enforcing code of ethics.[280] These activities may include keeping association members informed of trade developments, improving the quality of products, and working together at improving trade and industry laws.

In the present case the CCI on the lines of the previous case[281] observed that the rules and regulations and conduct of the associations are not making markets perform efficiently. They are in fact restricting and limiting the market in form of limit their supplies of films since without becoming the members, without registering their films with the associations, no producer or distributor or exhibitor can exploit his films and compete with the existing members of the associations. The producers, distributors are obliged to follow the dictates and directions of the associations and if they do not follow them they are punished, or boycotted, thereby, depriving them an opportunity to compete effectively in the area of control of these associations. The conduct of these associations establishes that they have caused restrictions on free and

[279] EROS International Media Ltd *v.* Central Circuit Cine Association, Indore & Ors (Case no. 52 of 2010), Order dated, 16-02-2012
[280] *Id.*
[281] *Id.*

fair competition in the market. It establishes that the conduct of the associations instead of bringing in pro-competitive effects have caused appreciable adverse effect on the competition in the market.

5.5 MARKET DOMINANCE APPROACH

In *M.P. Mehrotra* v. *Kingfisher Airlines Ltd & Anr*[282] the case comes relates to the Anti-Competitive Alliance between Jet Airways and Kingfisher. Information was given under sec. 19 of the Competition Act by an informant. According to the informant, after acquiring Air Sahara by Jet Airways and Kingfisher merged with Air Deccan both became dominant enterprises in the passenger Air transport services and combining together acquired almost 48% of market share in the Aviation Airlines Passenger industry. It's been alleged that both entered into a strategic alliance/arrangement regarding various components/areas of passenger air transport services in 2008, which is anti-competitive as per sec 3.

The alliance includes following issues as per informant:

- Code-sharing on both domestic and international flights
- Joint Fuel Management
- Common ground handling
- Cross selling of flight inventories
- Cross utilization of crew
- Reciprocity in *Jet Privilege* and *King Club* frequent flier program etc.

[282] Case no. 4/2009, Order dated, 11-08-2011

Both have worked out a joint network and route rationalization plan which amounts to agreement to limit supply and allocate market of passenger air services in violation of sec.3 and which may have an appreciable adverse effect on competition (AAEC).

Further, they simultaneously increased fuel surcharge by Rs 400 per ticket in 2009 on all domestic sectors, irrespective of distance. They did not lower the surcharge when fuel prices receded.

ORDER

The main issue which DG framed relating to the anti-competitive agreement was, "*Whether the alleged agreement/alliance violative of sec.3?*" DG observed in relation to the allegation of anti-competitive alliance, both command nearly 48% of the market share together and any agreement or understanding or even intention to reach an understanding would have adverse effect on competition.

After alliance, a MOU, agreements as Interline Traffic Agreements(ITA), Interline E-Ticketing agreements(IET), and Special Re-Protection agreements(SRA) entered and still operational.

Further, DG observed when there was an increase in ATF by 12.25% the fuel surcharge were increased and when ATF prices were reduced the surcharge have not been reduced and has been fixed by both irrespective of distance. In 2009 both met on common platform on call from FIA for strike and any such decision may have serious consequences upon competition as they command majority shares.

DG also discussed factors enumerated under sec. 19(3) –

1. Limited players in the market and both have about 48% of market share; no new player will gainfully enter, so it creates barriers to new entrants.

2. Jet removed Sahara, Kingfisher removed Deccan, and the alleged agreement may drive out existing competitors out.

3. The act of announcing alliance leads to foreclosure.

4. No accrual of benefit to the consumers.

5. The alliance has not led to any improvement in the production or distribution of goods or services.

6. No technical, scientific and economic development.

DG concluded the agreement have implications on reduction in capacity amounting to limiting supply, sharing of markets, synergize on cost, existence of price parallelism. These practices are anti-competitive and violative of sec. 3(3) (a), (b) (c) of the Act.

As regards to Sec.3 CCI agreed with the submissions of Jet and Kingfisher. Further, there was no evidence on record to establish that the alliance as announced was operationalized. CCI examined all the agreements/arrangements and noted none of those agreements can be said to attract Sec. 3(3) (a), (b), (c). CCI also noted that such kind of agreement/ arrangements have not only been entered between these two but they have also entered similar agreements with other large number of airlines. The market share of both remained constant even after two years of the public announcement.

CCI scrutinized all the agreements/arrangements entered into between the two airlines: -

- The Special Re-protection agreement can be invoked only when there is disruption in the schedule of either party due to unforeseen reasons. At such time one can transfer its passengers to another airline operating at same route. Clearly such agreement can't determine purchase or sale price, or limits or controls production etc. rather it prevents competitors for taking undue advantage. The SRA is apparent beneficial to the consumers. CCI did not found it to be anti-competitive.

- The Interline Traffic Agreement appears to be common industry practice and does not seem to be violative of section 3.

- The Interline E-Ticketing agreement only facilitates issuance of e-ticket and does not involve any commercial benefits. Both have such arrangement with other airlines also including Air India. CCI also did not found it to be violative.

- Lastly, the MOU as per the parties is nothing but ground handling arrangement and the purpose is to fully utilize manpower resources and enables to cut down their operating costs. This also doesn't attract section 3 of the Act.

CCI in its decision found no violation of section 3 in this particular matter and held that the matter deserves to be closed.

ANALYSIS

In the present case CCI considered only the market share for section 3 and rest of the factors prescribed in section section 19(3) were not even touched. Though DG thoroughly analyzed how the alliance can have an appreciable adverse effect on competition.

CCI in this case also didn't bring out the issue of price parallelism which as in other cases it did the same. It is certain that proving price parallelism is utmost difficult task. But besides collecting records and evidence which could corroborate the same CCI simply admits its incompetency by accepting that there was no evidence on record or it is rather difficult task to achieve.

CCI gave the consumer welfare argument. Whether philosophical justification can override the provision of anti-competitive agreement? Though CCI wants to achieve the objective of consumer welfare but can it really be achieved without even examining the provisions of the Act.

CCI observed in the present case that the agreements which are scrutinized are common practices and these are prevalent in the industry everywhere. But one if asks whether these common industrial practices don't attract section 3 and CCI itself is creating an exception in the statute.

CHAPTER SIX

CONCLUSION

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For sound economic development of the Country it was imperative for the State to have Competition law in force and in order to administer effective Competition in the market there was a need to establish a regulator for the same purpose. The first preamble objective of Competition Act, 2002 states that *"for the establishment of a Commission to prevent practices having adverse effect on competition"*. Therefore, 'Competition Commission of India' is entrusted with the duty of promoting and maintaining a competitive market within the territory of this country by administering and implementing provisions of the act.

As the preamble of the Competition Act seeks to promote and sustain competition in the market for the consumer interest, Commission has been particularly strict towards anti-competitive agreements. Any agreement found to have adverse effect on the competition in the market and restraining free trade for the players CCI has been quite diligent to strike down the same.

In numerous cases one can observe that Commission's approach toward anti-competitive agreement as a regulator has been multidimensional depending on the facts and circumstances of the cases. In some cases strict adherence to policies, rules and regulations of the government was held not to be anticompetitive indicating that adherence to one law cannot violate the other.[283]

The scope of the Competition Act, 2002 is primarily aimed to curb the anti-competitive practices having adverse effect on competition. Though, one of the objectives as mentioned in the preamble of the Competition Act, 2002 states to protect

[283] *M/S Royal Energy Ltd.* v. *M/S Indian Oilcorporation Ltd. & Anr,* MRTP No. 1/23 (C-97/2009/3IR) Order dated, 09-05-2012

interest of consumer which is the outcome of the implementation of the act but have been challenged directly in some cases which was turned down by the regulator stating it to fall within the domain of Consumer protection Act.[284]

Depending on the terms of the agreements Commission has also held that agreements to be *per se* anti-competitive specifically taking care of the exclusionary effects caused as a resultant of such agreement. Entry barrier to new entrants in the market has been a major criteria of the regulators across the globe to evaluate a particular conduct to be anti-competitive or not and Indian regulator is also not an exception to the rule. They have very strictly dealt with the entry barrier criteria and have declared the conduct as an anti-competitive.

In some cases market behavior does indicate that anti-competitive practices may be involved with a very high probability for example, Price parallelism concept wherein due to lack of evidences the Commission had refrained itself to go deep into the subject matter of the dispute, which may cause severe harm in certain cases if remained unattended. Lack of evidence should not be the escape route for the regulator in every case to wash off its hands from the effect if it remained unsolved may have on the market.

Cartels are foremost harmful to competition and their object is to remove the competition in market and increase the prices of products as much as they can. Cartels allocate businesses to attain higher profits for a small effort to the disadvantage of consumers and the economy as a whole, which in consequence directly affect the market of goods and services. Cartels also in turn affect the economy of nation as a whole because they remove the efficiency and innovation of the business. The result of such cartel in the market economy is that the goods and services have higher prices,

[284] *Sanjeev Pandey* v. *Mahendra & Mahendra and ors.* Case No. 17/2012, Order dated 03-05-2012

poorer quality and less or may be no choice there at all. Therefore it is the utmost duty of the Commission to detect and take action against cartels.

To prove cartelization in the market is a very difficult task which is totally circumstantial in nature but the Commission has been very vigilant in evaluating the parameters to declare an act as an anti-competitive conduct. Cartels are formed to make market behave in a certain manner, but if market itself behaves naturally giving rise to a condition deciphering alleged person(s) to have formed a cartel cannot be punishable under the Act has been indicated by the approach of the Commission. Therefore, natural behavior of the market is protected in such a manner to discourage anti-competitive effects naturally.

The regulator has come down to such agreements very heavily limiting the production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Every such agreement which have been found by the Commission either directly or indirectly affecting the production, supply, distribution, storage of goods or services are declared anti-competitive in nature and is struck down. Thus, the concept of free market economy is strived to be substantiated by the Commission as on date but, still a long way to go because India has started implementing its competition law very recently. Still the regulatory pattern and its effect on the market will be seen in near future.

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