

COMPETITION LAW AND POLICY IN INDIA: THE JOURNEY IN A DECADE

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With the notification of §§43A and 44 of the Competition Act, 2002 the competition law of India comes into full force nearly a decade after its inception. Within this decade of evolution, competition law and policy in India has seen an active interpretational exercise. This paper seeks to summarize the evolution of competition law and policy in India, discusses the main issues involved in this area of law, and opens up issues for discussion in this evolving area of law in the country

I. INTRODUCTION

“Increased competition- internal and external- helps those who are strong enough to benefit from the new opportunities. However, it can hurt those who are ill-equipped to face the challenges of competition. We must adopt concerted measures, both at the national and the international level [*sic*], for an equitable management of increased global interdependence of nations. At the national level, the state must be modernized to create an environment conducive to creativity and growth and also to ensure that the fruits of growth are fairly and equitably distributed.”¹

Competition is an evasive term, and its understanding differs depending on the context.² This may be the reason that the Competition Act, 2002 (‘the Act’) does not contain any definition of the term competition. Competition means a struggle or contention for superiority, and in the commercial world,

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¹ Dr. Manmohan Singh, *Statement at the Asian African Conference* (April, 2005) available at <http://pmindia.nic.in/speech/content4print.asp?id=113> (Last visited on August 13, 2011).

² Department-Related Parliamentary Standing Committee on Home Affairs, NINETY-THIRD REPORT ON THE COMPETITION BILL, 2001, ¶3.0 (A concept Bill was drafted by the Department of Company Affairs and was put on the website of www.nic.in/dca on November 13, 2000 to elicit public opinion thereon. In pursuance of the rules relating to the Department-related Parliamentary Standing Committees, the Chairman, Rajya Sabha in consultation with the Speaker, Lok Sabha referred the Competition Bill, 2001, as introduced in the Lok Sabha on August 6, 2001 and pending therein. This report was presented to Rajya Sabha Chairman on August 23, 2002 and laid before the Lok Sabha on November 21, 2002). This is available at http://164.100.24.167/book2/reports/home_aff/93rdreport.htm (Last visited on July 30, 2011).

this means striving for customers and businesses in the marketplace.³ This is the first stage at which confusion over the terms, ‘competition law’ and ‘competition policy’ appears. Although finding a way out of this problem is beyond the scope of this paper, a preliminary discussion is needed to set the tone.

Massimo Motta defines of the term ‘competition policy’ as “the set of policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society”⁴ A central concern of competition policy is that firms with market power are able to harm consumer welfare in various ways, for example, by reducing output, raising prices, degrading the quality of products on the market, suppressing innovation and depriving consumers of choice.⁵ Competition policy is defined as “those Government measures that directly affect the behaviour of the enterprise and the structure of the industry”⁶ Thus, competition policy is a comprehensive term and it is difficult to draw a boundary around it.⁷

As a general proposition, competition law consists of rules that are intended to protect the process of competition in order to maximise consumer welfare.⁸ The basic purpose of competition law is to promote competition through the control of restrictive business practices. It is assumed that competition between firms will enhance the overall efficiency of the economy, *first*, by encouraging price competition, resulting in lower prices for consumers, and *second*, by forcing firms to produce more efficiently so as to compete

³ RICHARD WHISH, *COMPETITION LAW* 3 (2009) (the UK Competition Commission has described competition as ‘a process of rivalry between firms... seeking to win customers’ business over time.’ – *Merger References: Competition Commission Guidelines – June 2003, CC 2*). See also OLIVER BLACK, *CONCEPTUAL FOUNDATIONS OF ANTITRUST*, (2005) (This discusses the concept in detail in light of Bork’s five definitions- “It is a scandal of antitrust that neither its practitioners nor its theorists agree – in so far as they consider the question at all – on what competition is.”).

⁴ MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 30 (2004).

⁵ WHISH, *supra* note 3, 1.

⁶ Khemani R.S. & Mark A. Dutz, *The Instruments of Competition Policy and their Relevance for Economic Policy* (PSD Occasional Paper No. 26, World Bank, Washington DC, 1996).

⁷ Rakesh Basant and Sebastian Morris, *Competition Policy in India: Issues for a Globalising Economy*, *ECONOMIC & POLITICAL WEEKLY*, July 29, 2000, 2735. (The paper is based on a Report submitted by the authors to Ministry of Industry in March 2000. The authors opine that the formulation and implementation of an effective competition policy in the current context is a difficult task as it needs to be consistent with other policies which are transforming India into a liberal open economy).

⁸ *Id.*, See also Terry Winslow, *Competition Law and Policy: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity*, *OECD JOURNAL OF COMPETITION LAW AND POLICY* 7, 42 (2004) (This defines competition law in these terms- “In general, competition laws prohibit or provide a means to address conduct that is ‘anticompetitive’ – that is, conduct that does or is likely to restrict output and increase price, impede market expansion or new entry, reduce product or service quality, or stifle innovation. They also prohibit firms from obtaining market power by merger or by any means other than skill, foresight, and industry.”).

on price with their rivals.⁹ The systems of competition law are concerned with practices that are harmful to the competitive process.¹⁰

While competition laws vary from nation to nation, there are certain core provisions underpinning nearly all competition law regimes.¹¹ These may be classified into three broad categories. The first consists of agreements or concerted practices between otherwise independent competitors that serve to reduce competition between them. The second group of anti-competitive practices stem from the acquisition of a dominant position in a market by a single enterprise. The third group of regulated anti-competitive conduct relates to mergers and acquisitions.¹²

This leads to a chicken-and-egg situation as to what comes first, competition law or competition policy. It may be noted that although both terms are often used synonymously, they can be distinguished.¹³ The distinction between these two terms as per the Tariff Commission of the Republic of Philippines is as follows:¹⁴

“Competition law refers to the framework of rules and regulations designed to foster the competitive environment in a national economy. It consists of measures intended to promote a more competitive environment as well as enactments designed to prevent a reduction in competition. Competition policy, on the other hand, broadly refers to all laws, government policies and regulations aimed at establishing competition and maintaining the same. It includes measures intended to promote, advance and ensure competitive market conditions by the removal of control, as well as to redress anti-competitive results of public and private restrictive practices.”

⁹ PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES & THE LAW* 385-86 (2007).

¹⁰ WHISH, *supra* note 3, 2. *See also* BRENDAN J. SWEENEY, *THE INTERNATIONALISATION OF COMPETITION RULES* 11 (2010) – Competition law (or antitrust law) is generally taken to refer to the laws that regulate private anticompetitive conduct. Although, it is commonly said that competition laws are directed at private commercial activities, a number of states including India apply the same rules to government-owned business enterprises. This, however, is by no means a universal practice. Additionally, competition law does not normally have constitutional status and hence its content is not insulated from government interference.

¹¹ American Bar Association Sections of Antitrust Law and International Law and Practice, *REPORT ON THE INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE* 4 (1999).

¹² MUCHLINSKI, *supra* note 9, 386-87.

¹³ ALISON JONES AND BRENDA SURFIN, *EU COMPETITION LAW: TEXT, CASES, AND MATERIALS* 1 (2011). (There are, however, contrary views which say competition law and policy are not synonymous – *see* BRENDAN SWEENEY, *supra* note 10).

¹⁴ Republic of the Philippines, Tariff Commission, *Competition Law and Policy* available at <http://www.tariffcommission.gov.ph/competit.html> (Last visited on July 30, 2011).

As per the Raghavan Committee,¹⁵ there are two elements of such a policy. The first involves putting in place a set of policies that enhance competition in local and national markets. This would include a liberalised trade policy, relaxed foreign investment and ownership requirements and economic deregulation. The second is competition law legislation designed to prevent anti-competitive business practices and unnecessary government intervention. In this way, competition policy describes the way in which governments take measures to promote competitive market structures and behaviour. Competition policy therefore normally encompasses within itself a system of competition law. The law will seek to implement the policy by ensuring that firms operating in the marketplace do not act in a way that harms competition.¹⁶

It is, however, important to note that the adoption of competition laws has sometimes pre-dated the adoption of a discernible policy.¹⁷ A perfect example would be India, where at the time of penning down this paper, the Ministry of Corporate Affairs ('MCA') has requested comments on a draft National Competition Policy though the competition law has been in place since 2002.¹⁸ The policy is aimed at laying down an overarching framework for infusing competition principles into various policies, statutes and regulations, and promoting a competitive market structure in the economy, thereby striving to achieve maximum economic efficiency and public welfare.¹⁹

II. HISTORICAL OVERVIEW

“The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. [The] government has decided to appoint

¹⁵ REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW (Chairman S.V.S. Raghavan) 2000, ¶2.1.2.

¹⁶ JONES AND SURFIN, *supra* note 13, 2.

¹⁷ *Id.* See also SWEENEY, *supra* note 10, 13. (A country may be said to have a competition policy even if it has no competition law. Where a country does have a competition law, its competition policy includes not only that law, but also government policy towards enforcement of the law. A number of states have facially strong competition laws, which are in practice weakly enforced).

¹⁸ Draft National Competition Policy of the Government of India (version July 27, 2011) available at http://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th_July2011.pdf (Last visited on August 15, 2011). This draft is submitted by a Committee under the Chairmanship of Shri Dhanendra Kumar, former Chairman, CCI constituted by MCA *vide* its order F. No. 5/15/2005/IGC/CS dated June 8, 2011, available at <http://www.taxmann.com/taxmannflashes/whatsnew.aspx?styp=1&sid=6091> (Last visited on August 15, 2011). Version II of the Draft National Competition Policy 2011 was put up on the website of MCA for comments until September 19, 2011, available at http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf (Last visited on October 8, 2011).

¹⁹ *Id.*

a Committee to examine this range of issues and propose a modern competition law suitable for our conditions.”²⁰

The decision to enact a new law on competition policy was announced by the Union Finance Minister in his budget speech on February 27, 1999. This was followed by the constitution of a high level committee consisting of experts under the chairmanship of Shri S.V.S. Raghavan to examine the provisions of the Monopolies and Restrictive Trade Practices Act, 1969 (‘MRTP Act’), and propose a modern competition law in view of the liberalisation of the Indian economy.²¹ India adopted a planned model of economic development after its independence. The ghost of British rule had a great influence on the policy framework of the government, and thus, the system of controls restricted freedom of entry into industry and led to concentration of economic power in the hands of a few individuals and business groups.²² It is pertinent to note that Arts. 38 and 39 of the Constitution already provided the guiding light for regulating this concentration of economic power.²³

In 1951, the Hazari Committee undertook the first study in this area. It studied the industrial licensing procedure under the Industries (Development and Regulation) Act, 1951.²⁴ In October 1960, the government appointed the Mahalanobis Committee on the Distribution of Income and Levels of Living,²⁵ which noted that the top 10 percent of the population had cornered as much as 40 percent of the income.²⁶ Seventeen years after independence, the Monopolies Inquiry Commission (‘MIC’) was set up in 1964.²⁷ It reported that there was high concentration of economic power in over 85

²⁰ Yashvant Sinha, Finance Minister, Budget Speech (1999-2000) (February 27, 1999).

²¹ *Supra* note 2, ¶ 2.0.

²² S. CHAKRAVARTY, *EVOLUTION OF COMPETITION POLICY AND LAW IN INDIA* (Pradeep S. Mehta ed., 2005).

²³ Art. 38 of the Constitution provides for the Directive Principles of State Policy, which mandates the State to secure a social order for the promotion and welfare of the people. This provision recognised the need to eliminate and minimise the inequalities in income, which applied not only to the individuals but also to the groups in different areas. The MRTP Act owes its existence to the provision provided under Art. 39(c) of the Constitution of India, which provided that the States shall strive to secure *that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment*. The preamble to the MRTP Act rests on this very provision of the Constitution of India.

²⁴ The Hazari Committee emphasized that the industrial policy had been effectively checkmated by big business to meet its own end. There was best only peripheral growth in regional or sectoral development of entrepreneurship. This was followed by Subimal Dutt Committee which studied the institutional design of Indian economy and found in 1969 that 73 big houses controlled 55.5 percent of programmed capital investment.

²⁵ The main task at hand for this Committee was identifying the pattern of work of large business houses under the ‘planned economy’ regime and whether there was any concentration of economic power.

²⁶ S. CHAKRAVARTY, *supra* note 22, 44.

²⁷ The MIC was set up under the Chairmanship of Justice K.C. Das Gupta, a Judge of Supreme Court, to enquire into the extent and effect of concentration of economic power in private hands and the prevalence of monopolistic and restrictive trade practices in important sectors

percent of industries in India at that time. This led the MIC to draft a bill that provided for the control of monopolies and the prohibition of monopolistic and restrictive trade practices, when prejudicial to public interest.²⁸

The new MRTP Act drew heavily upon the Sherman Act and the Clayton Act of the United States, the Monopolies and Restrictive Trade Practices (Inquiry and Control) Act, 1948, the Resale Prices Act, 1964 and the Restrictive Trade Practices Act, 1964 of the United Kingdom and also laws enacted in Japan, Canada and Germany. The US Federal Trade Commission Act, 1914 as amended in 1938 and the Canadian Combines Investigation Act, 1910 also influenced the drafting of the MRTP Act.²⁹

A. MRTP – THE PRECURSOR

The MRTP Act is regarded as the extant competition law of India.³⁰ The MRTP Act came into existence on December 27, 1969.³¹ The principal objectives sought to be achieved by its enactment were: (1) prevention of concentration of economic power to the common detriment; (2) control of monopolies; (3) prohibition of monopolistic trade practices ('MTPs'); (4) prohibition of restrictive trade practices ('RTPs'); and (5) prohibition of unfair trade practices ('UTPs').

With subsequent developments in the Indian economy, there were nine amendments³² to the MRTP Act before it was finally repealed by the Act. Of these, the amendments of 1984 and 1991 are significant. Prior to 1984, the MRTP Act contained no provisions for the protection of consumers against false or misleading advertisements and other similar UTPs. It was felt necessary to protect them from such practices resorted to within trade and industry to mislead or dupe them.³³ The Sachar Committee therefore recommended that a separate chapter be added to the MRTP Act defining the various UTPs so that consumers, manufacturers, suppliers, traders and others in the market could conveniently identify practices that are prohibited. The provision as to UTPs in the MRTP Act was introduced in 1984.³⁴

of economic activity other than agriculture. The MIC submitted its report to the Government of India on October 31, 1965.

²⁸ CHAKRAVARTHY, *supra* note 22, 44.

²⁹ S. Chakravarty, *MRTP Act Metamorphoses into Competition Act*, available at <http://www.cuts-international.org/doc01.doc> (Last visited on August 15, 2011); S. Chakravarty, *Metamorphosis of Indian Competition Law* in *THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES* 109 (2010).

³⁰ *Supra* note 2, ¶6.0.

³¹ It came into force w.e.f. June 1, 1970.

³² These amendments occurred in 1974, 1980, 1982, 1983, 1984, 1985, 1986, 1988, and 1991.

³³ Ministry of Law, Justice and Company Affairs, Government of India, *REPORT OF THE HIGH-POWERED EXPERT COMMITTEE ON COMPANIES AND MRTP ACTS*, New Delhi, August, 1978 ('Sachar Committee, 1978').

³⁴ Chakravarty, *supra* note 29.

With the restructuring of the MRTP Act through the 1991 amendments, the thrust shifted to curbing MTPs, RTPs and UTPs with a view to preserve competition in the economy and safeguard the interests of consumers by providing them protection against false or misleading advertisements and/or deceptive trade practices. Size as a factor to discourage concentration of economic power was, in a manner of speaking, given up.³⁵

The Raghavan Committee observed that the MRTP Act was limited in its sweep and failed to fulfil the needs of competition law in the present competitive milieu. A key reason for the ineffectiveness of the MRTP Act was that it was poorly resourced.³⁶ Some of the lacunae under the MRTP Act which were sought to be remedied by the new competition law were:

1. The basic philosophy of the Act, being based on a post-reform scenario, is different. It seeks to replace the rigidity under the MRTP Act with proactiveness and flexibility. The new law is simply arranged and easily comprehensible, categorising the areas of concern into three, *i.e.*, prohibition of anti-competitive agreements, prohibition of abuse of dominance and regulation of combinations.
2. The control of the government over the regulatory body, the Competition Commission of India ('CCI'), is minimal as compared to the MRTP Commission, as is evident from the provisions regarding selection of members and the chairman of the CCI and further autonomy granted under the Act.
3. Holding of dominant position is no longer a concern so long as it is not abused under the new law.
4. Concepts like cartels, collusion and price fixing, bid rigging, boycotts and refusal to deal, and predatory pricing have been introduced which were not present in the MRTP Act.
5. Provisions relating to mergers were repealed from the MRTP Act in 1991, thus leading many cases of mergers to escape from the clutches of the law. The new law provides for regulation of combinations beyond a particular threshold.³⁷

³⁵ *Id.*

³⁶ See TOWARDS A FUNCTIONAL COMPETITION POLICY FOR INDIA: AN OVERVIEW (Pradeep S. Mehta ed., 2005).

³⁷ HLL TOMCO merger is not an example wherein the Supreme Court observed "Nor do we think that 'public interest' which is to be taken into account as an element against approval of amalgamation would include a mere future possibility of merger resulting in a situation where the interests of the consumer might be adversely affected - Hindustan Lever Employees' Union v. Hindustan Lever Ltd., 1994 (4) SCALE 642, ¶78.

6. Competition advocacy has been introduced for creating awareness and imparting training about competition issues. This is with the aim to introduce a competition culture in the country.
7. The new law has moved from the earlier 'cease and desist' regime to stricter penalties and even jail terms for non-compliance of the orders of the Commission.
8. The Act has an extra-territorial reach based on the 'effects doctrine'. This lacuna was identified by the Supreme Court in the *ANSAC case*,³⁸ in which it was held that under the MRTP Act, 1969, the MRTP Commission could take action only against the Indian leg of a restrictive trade practice.

B. COMMITTEES ON COMPETITION POLICY

The economic milieu, which led to the enactment of the Act, was characterized by multiple factors, the major ones being the obligations cast on India by the World Trade Organization ('WTO') agreements³⁹ and the entry of large multinational companies consequent to India's measures liberalizing trade.⁴⁰ The government also argued that the MRTP Act was enacted to contain concentration of economic power and was not the right mechanism suited to deal with issues relating to preservation and protection of competition, especially in the new business environment.⁴¹ This led to the setting up of a high level committee on competition policy and law in 1999.

1. Report of Expert Group constituted by Ministry of Commerce (1999)

Before the high level committee was constituted, the Ministry of Commerce, had set up an expert group, headed by Dr. S. Chakravarthy, former Member, MRTP Commission to study the interaction between trade and competition policy, as an offshoot of the Singapore Ministerial Declaration of

³⁸ See Aditya Bhattacharjee, *India's Competition Policy: An Assessment*, available at http://www.competitionlaw.cn/upload/temp_08033019381892.pdf (Last visited on August 15, 2011). (The Supreme Court in its judgment in *Haridas Exports v. All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600, which also subsumed the *ANSAC v. AMAI* case (Civil Appeal No. 3562 of 2000 – ¶¶ 62 to 79), set aside both the injunctions on the grounds that the MRTP Commission lacked jurisdiction).

³⁹ See e.g., General Agreement on Trade in Services, 1995 (GATS); Agreement on Trade-Related Aspects of Intellectual Property Rights, 1996 (TRIPS).

⁴⁰ T. Ramappa, *Competition Law In India: Policy, Issues, And Developments* 6 (2009).

⁴¹ *Id.*

1996. The Expert Group presented its report⁴² to the Ministry of Commerce in January, 1999.⁴³

The expert group addressed competition issues *qua* mergers, amalgamations, acquisitions and takeovers, intellectual property rights, foreign investment, anti-dumping measures, subsidies, countervailing measures and safeguard measures, state monopolies, exclusive rights and regulatory policies, sanitary and phytosanitary measures, technical barriers to trade, professional services, government procurement, and WTO provisions. It is apparent that the emphasis of the expert group was an aligned response to questions posed by the new WTO regime.⁴⁴

The common thread that ran through the expert group's report and recommendations was that there should be a regulatory agency to control and eliminate anti-competition practices that may surface during the operation of international trade and during the implementation of the WTO agreements. Accordingly, the Expert Group, in paragraph 1.5.1 of its report, suggested that "a new Competition Law... be designed and drafted incorporating the suggestions made" in the report and that the "new Competition Law should declare the competition principles and should be an effective instrument for engendering and protecting competition in the market in the interests of the consumers and the general public".⁴⁵

2. High Level Committee on Competition Policy and Law (1999)

In October, 1999, the Government of India appointed a high level committee on competition policy and competition law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework which may entail a new law or appropriate amendments to the MRTP Act.⁴⁶ The Committee presented its competition policy report to the government on May 22, 2000. The competition law was drafted and presented to the government in November, 2000.

⁴² The Expert Group was constituted as an off-shoot of the first WTO Ministerial Conference held at Singapore in December 1996 for the implementation of WTO agreement. It submitted its Report in January, 1999. The Working Group presented its report also to the General Council of the WTO.

⁴³ S. Chakravarthy, *New Indian Competition Law on the Anvil* (RGICS Working Paper Series No. 22, 2001) available at <http://www.rgics.org/pdf1/wpn-22.pdf> (Last visited on August 5, 2011).

⁴⁴ S. Chakravarthy, *Competition Policy and the WTO Implications for Developing Countries* (RGICS Working Paper Series No. 4, 1999) available at <http://rgics.org/pdf1/wpn-4.pdf> (Last visited on August 15, 2011).

⁴⁵ hakravarthy, *supra* note 43.

⁴⁶ Order dated October 25, 1999 issued by the Department of Company Affairs. Nine members High Level Committee submitted its Report in two volumes. Volume-I of the Report was on Competition Policy and Law; Volume-II contained the concept Bill on Competition policy christened as 'Indian Competition Act –Draft Bill'.

The Report of the Raghavan Committee on Competition Policy was discussed at length with the stakeholders by the Standing Committee on the Competition Bill.⁴⁷ It is important to note that the report invited no less than four dissents or supplementary notes.⁴⁸ The strongest of dissent came from Sudhir Mulji:⁴⁹

“... the Law and Policy that must emerge from the proposals of this Commission are wholly inappropriate for India at this present juncture of her development. What we should be promoting is freedom of the markets and we should even tolerate excesses. The release of what economists call animal spirits among Indian businessmen is the first and the most difficult task of policy makers. It is for me sad that after two hundred years of colonial rule, we have been emasculated from thinking about issues on first principles and continue to imitate the ideas of others.”

3. Working Group on Competition Policy (2007)

The Planning Commission constituted a Working Group on Competition Policy in the context of formulation of the 11th five-year plan in 2006.⁵⁰ Its terms of reference were as follows:

- a. To recommend, taking into account the best international practices, a set of comprehensive policy instruments and strategic interventions to effectively generate a culture of competition to enhance competition in the domestic markets, with the involvement of all stakeholders.
- b. To recommend ways of enhancing the role of competition and competitive markets in government policymaking at the Central and State levels.
- c. To advise on the most effective and workable institutional mechanism for a synergized relationship between sectoral regulators and the CCI.

⁴⁷ *Supra* note 2.

⁴⁸ T. T. Ram Mohan, *Competition Policy Dilemmas*, ECONOMIC & POLITICAL WEEKLY (July 15, 2000).

⁴⁹ Other dissents came from P.M. Narielvala (on pre-merger notification); Dr. Rakesh Mohan (supplementary note indicating a public discussion on the Report, phased implementation of the law focusing on advocacy in initial 3-5 years).

⁵⁰ *Vide* order no. I& M-3(32)/2006 dated June 5, 2006 under the Chairmanship of Shri Vinod Dhall, available at http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wrk11_10b.htm (Last visited on August 15, 2011).

Prior to this, in 2005-06, the MCA had asked the CCI to draft a Consultation Paper on Competition Policy. Accordingly, an Advisory Committee under the chairmanship of Dr. Vijay Kelkar was set up by the CCI wherein a sub-committee, under the chairmanship of P.G. Mankad was also set up to finalize a draft consultation paper. Meanwhile, the Working Group submitted its report to the Planning Commission in 2007. In September, 2007, the CCI Advisory Committee decided to adopt the report of the Working Group of Planning Commission as the Final Draft Consultation Paper on Competition Policy.⁵¹

The Report of the Working Group comprises eight chapters focusing specifically on National Competition Policy, competition advocacy and coordination between the CCI and sectoral regulators. It is important to mention here that when this report was submitted, the substantive provisions of the Act (§§3, 4, 5 and 6) were still not into force (they effectively came into force from May 20, 2009), and hence the observations and recommendations of the Working Group was based on discussions mainly of academic in nature.

4. Committee on National Competition Policy and Related Matters (2011)

Recently, the MCA has constituted a Committee to frame the National Competition Policy and look into other related matters.⁵² The terms of reference of the said Committee are as follows:

- a. Framing of a National Competition Policy;
- b. Strategy for competition advocacy with government and private sector;
- c. Changes required in the Competition Act for fine-tuning it; and
- d. Any other matter related to competition issues.

A draft National Competition Policy prepared by the aforesaid Committee was put up on the website,⁵³ inviting comments from stakeholders by August 20, 2011. Although it is beyond the scope of this paper to discuss this draft, it may be noted that as a preliminary comment, the draft appears to be modelled on the lines of recommendations of Working Group Report on Competition Policy of 2007 and the emphasis is upon establishment of a National Competition Policy Council ('NCPC') as an oversight institution to

⁵¹ *Supra* note 18.

⁵² *Id.*

⁵³ *Id.* See also Version II of the Draft NCP 2011, *supra* note 18.

enforce National Competition Policy.⁵⁴ The outcome of this Committee's work, in particular, the recommendations on the changes required in the Act, the suggested framework of coherence between various government policies and the competition policy,⁵⁵ the proposed methodology and the strategy for competition advocacy- a function of the Commission under the Act, are still awaited.

5. Other References

'Competition' was discussed in the context of corruption in public enterprises and government departments by the Second Administrative Reforms Commission, which recommended that:⁵⁶

- a. Each Ministry/Department may undertake an immediate exercise to identify areas where the existing 'monopoly of functions' can be tempered with competition. A similar exercise may be done at the level of State Governments and local bodies. This exercise may be carried out in a time bound manner, say in one year, and a road map laid down to reduce 'monopoly' of functions. The approach should be to introduce competition along with a mechanism for regulation to ensure performance as per prescribed standards so that public interest is not compromised.
- b. Some Centrally sponsored schemes could be restructured so as to provide incentives to states that take steps to promote competition in service delivery.
- c. All new national policies on subjects having large public interface (and amendments to existing policies on such subjects) should invariably address the issue of engendering competition.

These recommendations emphasise the need to promote competition to enhance efficiency in the functioning of government departments, which have been brought under the definition of 'enterprise' under the Act.

⁵⁴ Kumkum Sen, *Old Wine in New Bottle – 2011 Competition Policy*, BUSINESS STANDARD (New Delhi) August 29, 2011.

⁵⁵ See also SWEENEY, *supra* note 10, 14. (This brings us back again to the debate on the scope of competition policy. As the term has no precise meaning, in its broadest sense, it may include government policies on deregulation, privatization, foreign direct investment and government procurement practices or one can say it refer to all those factors which influence the nation's conditions of competition. Generally, however, these areas are treated as discrete (but overlapping) policy domains).

⁵⁶ FOURTH REPORT, SECOND ADMINISTRATIVE REFORMS COMMISSION ON ETHICS IN GOVERNANCE under the Chairmanship of Shri M Veerappa Moily (January 2007), ¶6.2.5 available at http://darpn.nic.in/darpgwebsite_cms/Document/file/ethics4.pdf (Last visited on August 15, 2011).

It may be noted that in the last decade, the role of the CCI has been emphasised by the Finance Minister in his budget speech for the financial year 2009-10 in following words:

“The Government has established Competition Commission of India, an autonomous regulatory body to promote and sustain competition in markets, protect interests of consumers and to prevent practices having adverse effect on competition. An appellate body headed by a retired judge of the Supreme Court has also been constituted. The benefits of competition should now come to more sectors and their users and consumers. Now is the time for us to work on these aspects to eliminate supply bottlenecks, enhance productivity, reduce costs, and improve quality of goods and services supplied to consumers.”

This was the first explicit reference to the role of the CCI after the budget speech of 1999. The word competition, however, has been referred to in the context of protecting small-scale industries and public sector enterprises from international competition⁵⁷ and strengthening the Export Credit Guarantee Corporation of India (ECGC) in a few budget speeches.⁵⁸

III. CHANGE IN STRUCTURE OF CCI – AMENDMENT OF 2007

The setting up of a competition regime in India has so far proved to be a much more difficult task than initially envisaged.⁵⁹ In the last decade, the competition law in India saw a lot of twists and turns. The Competition Bill, 2002 (‘the Bill’) received Presidential assent on January 13, 2003. The first provisions of the Act were notified on March 31, 2003, while other provisions were notified subsequently.⁶⁰ The provision establishing the CCI and other

⁵⁷ P. Chidambaram, Union Budget Speech 2003-04.

⁵⁸ Export Credit Guarantee Corporation of India Ltd. (ECGC) has been playing a crucial role by providing credit insurance cover for exports. There is great potential for project exports from India with our exporters winning bids against intense international competition (*See* Yashvant Sinha, Union Budget Speech, 2003-04, *supra* note 20). One can see §3(5)(ii) wherein the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services of such export is not restricted.

⁵⁹ Anurag K. Agarwal, *Competition Law in India: Need to Go Slow and Steady* (IIM Ahmedabad, Working Paper No. 2005-10-05) available at <http://www.iimahd.ernet.in/publications/data/2005-10-05anurag.pdf> (Last visited on August 7, 2011).

⁶⁰ S.O. 340(E) dated 31.03.2003 notifying §§1, 2(d), (g), (k), (l) and (n), 8, 9, 10, 14, 16, 17, 63(1), and 63(2)(a), (b), (d), (e), (f) and (g); S.O. 715(E) dated 19.06.2003 notifying §2 except clauses (d), (g), (j), (k), (l) and (n); 7, 11, 12, 13, 15, 22, 23, 36, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 except clause (a), (b), (d), (e), (f), (g), and (n) of sub-section 2, 64, and 65; S.O. 2167(E) dated 20.12.2007 notifying §§ 53C, 53D, 53E, 53F, 53G, 53H, 53I, 53J, 53K, 53L, 53M

provisions relating to competition advocacy, finance, accounts and audits, and miscellaneous provisions were notified on June 19, 2003. On May 20, 2009, the working provisions, *i.e.*, provisions relating to anti-competitive practice and abuse of dominance were brought into force.⁶¹

In exercise of the power conferred upon it under the Act, the Central Government established the CCI having its head office at New Delhi⁶² with effect from October 14, 2003. As per the discussions in Parliament on the Bill, the Act has to be implemented in a phased manner, as follows:⁶³

First year – Competition advocacy and training for officers and staff of CCI.

Second year – Provisions relating to anti-competitive practice and abuse of dominance to be brought into force.⁶⁴

Third year – Provisions relating to combination to be brought into force.⁶⁵

There were two basic views regarding the implementation of competition law in India. A shade of opinion in the Committee contended that by enacting the Bill at this stage, India would lose its bargaining power at WTO negotiations. It was suggested that the Bill should not be enacted till January 1, 2005 by which time decisions on issues like competition policy, trade and investment and related matters would be taken. Therefore, it was suggested that there was no hurry in passing the Bill and that the MRTP Act could be suitably amended to meet the requirements of the present time. The other shade of opinion favoured the passage of the Bill. It was of the view that the MRTP Act was based on old economic theory, which was no longer efficacious enough to check the onslaught of foreign companies against Indian companies. This transition would help the Indian economy to adapt to the changing environment as well as result in wealth and employment.⁶⁶

of Competition (Amendment) Act of 2007; S.O. 1747(E) dated 12.10.2007 notifying 2, 6, 7, 8, 9, 11, 12, 17, 18, 27, 29, 30, 32, 40, 41, 42, 43 except 53B, 53C, 53D, 53E, 53F, 53G, 53H, 53L, 53I, 53K, 53L, 53M, 53N, 53O, 53P, 53Q, 53R, 53S, 53T, 53U, 44, 45, 46, 47, 48, and 49 of Competition (Amendment) Act of 2007.

⁶¹ S.O. 1242(E) dated 15.05.2009 notifying §§3, 10, 13, 15, 16, 19, 20, 21, 25, 26, 28, 31, 33, 34, 35, 36, 38, 39, and 43 (53B, 53N, 53O, 53P, 53Q, 53R, 53S, 53T, and 53U of Competition (Amendment) Act of 2007.

⁶² S.O. 1198(E) dated 14.10.2003.

⁶³ *Supra* note 2, ¶ 8.1.1.

⁶⁴ Notified on May 20, 2009 (approximately six years from the notification of the Act – Much of this delay has to be attributed to the judicial challenge to the powers of the Chairman of CCI which led to a major amendment in 2007).

⁶⁵ Notified on June 1, 2011 (approximately eight years from the notification of the Act).

⁶⁶ *Supra* note 2, ¶¶7.22, 7.23 and 7.24.

A. CCI – JUDICIAL, QUASI-JUDICIAL, ADMINISTRATIVE TRIBUNAL OR EXPERT BODY?

The competition law authority under the new competition law, the CCI, was set up for the purposes of administration and enforcement of competition law in India. Though the CCI was a completely new body, its initial structure could not depart from that of its predecessor, the MRTP Commission. The difference contemplated was that unlike the MRTP Commission, which was a unitary tribunal, the CCI would have benches, among which its powers would be distributed.⁶⁷ The Bill described the CCI as a body corporate⁶⁸ and as a quasi-judicial body⁶⁹ whereas it has the pre-requisites of a full-fledged judicial body.⁷⁰

The Chairperson of the CCI was empowered to constitute benches (additional/merger) consisting of two members (one of them being a judicial member). The principal bench and additional benches would deal with competition matters whereas the merger benches would exclusively handle merger/amalgamation cases. Anyone aggrieved by the decision of the principal bench or additional benches could appeal directly to the Supreme Court.⁷¹

There was also the concept of Member Administration designated by the Central Government to exercise financial and administrative power as per the rules. This has now been substituted with the powers of general superintendence, direction and control in respect of all administrative matters of the Commission by the Chairperson, CCI.⁷²

Coming back to the question of the CCI being a judicial, quasi-judicial or expert body, the Ministry was of the opinion that it is a judicial body. The rationale for this argument was that the CCI had a specific adjudicatory function in relation to abuse of dominance and anti-competitive agreement and on combinations; the decision of CCI had extra-territorial reach; and Cl. 36(3) prior to amendment stated that the proceedings before the CCI would be judicial

⁶⁷ *Id.* ¶4.4.5.

⁶⁸ Competition Act, 2002, §7(2).

⁶⁹ Statement of Objects and Reasons (July 24, 2001) (...provides for the establishment of a quasi-judicial body to be called the Competition Commission of India (hereinafter referred to as CCI) which shall also undertake competition advocacy for creating awareness and imparting training on competition issues).

⁷⁰ Competition Act, 2002, §36(3).

⁷¹ This was the status prior to the Amendment Act of 2007.

⁷² See *Organogram of CCI* available at <http://www.cci.gov.in/May2011/Organogram/Organogram200911.pdf> (Last visited October 9, 2011); Competition Act, 2002, §13. (At present, the Commission has eight administrative divisions (Administration & Coordination, Investigation, Legal, Advocacy & InfoTech, Economic, Capacity Building, Combination and Antitrust Division) with respective Members having administrative supervision over each division with an overall power of general superintendence with Chairperson.).

proceedings.⁷³ Accordingly, the Committee⁷⁴ desired that the Chairperson of the CCI should be a person from the judiciary, *i.e.*, a serving/retired Judge of a High Court. The Act, however, prescribed the qualifications of the Chairperson and Members as “person of ability, integrity and standing and who has been, or is qualified to be a judge of a High Court, or, 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, administration or in any other matter which, in the opinion of the Central Government may be useful to the Commission”,⁷⁵ making no distinction between the qualification of Chairperson and Members.

Consequent to the notification of the aforesaid provision, on October 14, 2003, the Central Government appointed the first Chairperson and Member of the CCI.⁷⁶ Before the Chairperson could take charge, however, a Public Interest Litigation was filed on October 30, 2003 before the Supreme Court,⁷⁷ challenging, the appointment on the ground that the Chairman had

⁷³ *Supra* note 70. (“Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of §§193 and 228 and for the purposes of §196 of the Indian Penal Code.”).

⁷⁴ *Supra* note 2, ¶ 9.4.1.

⁷⁵ Competition Act, 2002, §8 – this was substituted by Competition (Amendment) Act, 2007 with a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

⁷⁶ *Vide* S.O. 1200(E) dated 14.10.2003, Dipak Chatterji (former Commerce Secretary) as Chairperson of the CCI for a period of five years from the date on which he entered upon his office, or till he attained the age of 67 years, whichever is earlier. He did not take charge as he was content to await the orders of this Court in view of the filing of the writ petition before the Supreme Court. *Vide* S.O. 1199(E) dated 14.10.2003, Shri. Vinod K. Dhall as Member CCI. Mr. Dhall was posted initially as Officer on Special Duty to CCI and later became Member (Administration) under the Act of 2002. Mr. Dhall left the office few months before his term to give way to the new arrangement after Amendment Act of 2007.

⁷⁷ Writ Petition 490 of 2003 challenging the validity of Rules 3 and 4(3) of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 whereon, the judgment was pronounced on 20th January, 2005 cited as *Brahm Dutt v. Union of India*, (2005) 2 SCC 431. There was also a WP filed by Shri. R. Gandhi before Madras High Court (*Thiru. R. Gandhi President, Madras Bar Association v. Union of India*, [2004] 1 20 CompCas 510 (Mad) decided on 30.03.2004) challenging validity of setting up of NCLT wherein issue of separation of powers were involved as in *Brahm Dutt*. Though the judgment was in relation to Companies Act, the Court observed in ¶120 that “the constitution of the National Company Law Tribunal and the Appellate Tribunal in the manner now provided, when considered along with the provisions concerning the Competition Commission under the Competition Act 2002, seems to indicate a pattern of an aggressive executive seeking to take over gradually the judicial power traditionally exercised by the Courts under safeguards which ensure the competence, independence and impartiality of the Judges, and replacing them by persons who have neither a judicial background nor specialised knowledge of the subject for which the Tribunal is created, and by persons now serving the executive who will continue to retain their lien and loyalty to the executive branch, and be amenable to the influence of executive superiors and their political masters.”

to be a person connected with the judiciary, picked for the job by the head of the judiciary and not a bureaucrat or other person appointed by the executive without reference to the head of the judiciary.⁷⁸

One of the Government's arguments was 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. Since the main functions of the expert body were regulatory in nature, there was no merit in the challenge raised in the Writ Petition." Chief Justice V.N. Khare observed, "The Government at this rate may even replace the Supreme Court judges with bureaucrats."⁷⁹ During the pendency of the writ petition, however, it was proposed that certain amendments be made to the Act and Rules⁸⁰ by the Government. Accordingly, the Supreme Court closed the writ petition leaving open all questions regarding the validity of the enactment, including the validity of the Rules. While disposing of the petition, the Supreme Court observed that:

"if an expert body is to be created as submitted on behalf of the Union of India consistent with what is said to be the international practice, it might be appropriate for the respondents to consider the creation of two separate bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way in meeting the challenge sought to be raised in this Writ Petition based on the doctrine of separation of powers recognised by the Constitution. Anyway, it is for those who are concerned with the process of amendment to consider that aspect. It cannot be gainsaid that the Commission as now contemplated, has a number of adjudicatory functions as well."⁸¹

This led to the Competition (Amendment) Act, 2007 and consequent changes in the structure and working of the CCI.⁸² The so-called adjudicatory body saw a transformation to an expert body⁸³ in the true sense having

⁷⁸ Brahm Dutt v. Union of India, (2005) 2 SCC 431, ¶3.

⁷⁹ Manoj Mitta, *Govt. soothes ruffled judiciary by offering it a place in panel above Competition Commission*, INDIAN EXPRESS (New Delhi), October 26, 2004.

⁸⁰ Competition Commission of India (Selection of Chairperson and Members of the Commission) Rules, 2003.

⁸¹ Brahm Dutt v. Union of India, (2005) 2 SCC 431, ¶6.

⁸² Competition (Amendment) Bill, 2006 was introduced in Lok Sabha on March 9, 2006 and was referred to the Forty-Fourth Standing Committee on Finance (2006-07) under the Chairmanship of Maj. Gen. (Retd.) B.C. Khanduri on April 17, 2006, which submitted its report on December 7, 2006.

⁸³ Competition Act, 2002, §8, *supra* note 75.

advisory and regulatory functions. Another adjudicatory body by the name of Competition Appellate Tribunal ('CompAT') came into existence to sit in appeal from orders of the Commission.⁸⁴ Accordingly, changes were made to have a 'Secretary' for the CCI instead of the 'Registrar' under the original Act.⁸⁵

Consequent to the aforesaid changes being brought under the Competition Act in 2007, the first Chairman and a Member of the CCI⁸⁶ were appointed with effect from February 28, 2009, subsequently followed by the other five Members of the CCI.⁸⁷ §§43A and 44 of the Competition Act, 2002 have also been notified with effect from June 1, 2011, empowering the CCI to impose penalty for non-furnishing of information on combination and also in case of making false statement. With these notifications, the Act is fully notified.⁸⁸

B. ROLE OF THE DIRECTOR GENERAL

Prior to the 2007 amendment, the Act provided that the CCI would be assisted by a Director-General ('DG') and a host of Additional, Joint, Deputy and Assistant DGs appointed by the Central Government in conducting inquiries into contravention of the provisions of the Act. Post-amendment, however, a separate office of the DG has been created for the purposes of assisting the CCI in conducting inquiries and a number of other Additional, Joint, Deputy and Assistant DGs or "such officers or other employees."⁸⁹

The DG has no *suo motu* power of investigation as in the case of Director-General of Investigation and Registration of the Monopolies and Restrictive Trade Practices Commission ('MRTPC'). The DG in the present scheme would investigate cases referred to it by the CCI and would report its findings to the CCI. In the *SAIL case*,⁹⁰ the Supreme Court has further clarified

⁸⁴ Competition (Amendment) Act, 2007, §43 (This section inserted a new Chapter VIIIA to the Competition Act relating to establishment of Competition Appellate Tribunal).

⁸⁵ Competition Act, 2002, §17.

⁸⁶ Dhanendra Kumar as Chairperson *vide* S.O. 870(E) dated 27.03.2009; H.C. Gupta as Member *vide* S.O. 869(E) dated 27.03.2009. Kumar demitted the office on June 6, 2011 to become Chairman of the Committee on National Competition Policy and Shri. H.C. Gupta is the Acting Chairperson of the Commission.

⁸⁷ Ratneshwar Prasad as Member (R) *vide* S.O. 868(E) dated 27.03.2009 w.e.f. 01.03.2009; Dr. Geeta Gouri as Member (GG) *vide* S.O. 1238 dated 15.05.2009 w.e.f. 16.04.2009; P.N. Parashar as Member (P) *vide* S.O. 1239(E) dated 15.05.2009 w.e.f. 14.04.2009 (*Mr. Parashar demitted his office on July 27, 2011*); Anurag Goel as Member (AG) w.e.f. 02.09.2009 and Shri. M.L. Tayal as Member (T) w.e.f. 3.11.2009.

⁸⁸ Monthly Summary for the Council of Ministers for the month of May, 2011, Ministry of Corporate Affairs, No.I-27011/2/2011-Coord (June 17, 2011) available at http://www.mca.gov.in/Ministry/pdf/Monthly_Summary_May_2011.pdf (Last visited on August 16, 2011).

⁸⁹ Substituted by "such other advisers, consultants and officers" *vide* Amendment of 2007.

⁹⁰ Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 744. *See also* Steel Authority of India Limited v. Jindal Steel and Power Limited, 2010 Comp LR 22 (CompAT).

the position of DG appointed under §16(1) of the Act as a specialized investigating wing of the CCI.⁹¹ It may, however, be noted that there is a distinction maintained between the office of the DG and the CCI in terms of appointment, with the MCA having a greater say in appointments to the DG's office.⁹²

C. THE COMPETITION APPELLATE TRIBUNAL

As noted above, the Amendment Act of 2007 established the CompAT through the introduction of a new chapter with 21 sections in the Act.⁹³ The CompAT is headed by a Chairperson who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court and two members with professional expertise.⁹⁴ The CompAT is empowered to hear appeals against any direction issued or decision made or order passed by the CCI as well as to adjudicate upon claims for compensation that may arise from the violation of the provisions of the Act. The CompAT has the power to punish for contempt.⁹⁵ It is interesting to note that this change in the structure led to overall savings worth Rs. 112.78 lakh per annum to the consolidated fund of India.⁹⁶

IV. FUNCTIONAL AREAS OF THE CCI

The Act gives a specific mandate to the CCI, highlighted in the preamble and echoed under §18. The preamble to the Act runs thus:

“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried

⁹¹ The DG, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself.

⁹² As per rules of appointment of DG, Additional, Joint and Deputy DG, Secretary MCA is the Chairman of the Selection Committee. *See* GSR 934(E) dated December 31, 2009; whereas in case of officers and employees of the Commission, CCI is the Chairman of the Selection Committee. It may further be noted that DG office so far have only officers appointed on deputation from other government departments, no direct recruitment has been made.

⁹³ The Competition Appellate Tribunal was established with effect from May 15, 2009 *vide* S.O. 1240(E) dated 15.05.2009.

⁹⁴ Dr. Justice Arijit Pasayat is the Chairman and Rahul Sarin and Pravin Tripathi are Members of the CompAT.

⁹⁵ Competition Act, 2002, §53U.

⁹⁶ Financial Memorandum to the Competition (Amendment) Act of 2007 – The expenditure to be incurred on creation of the Competition Appellate Tribunal would be Rs. 109.61 lakh per annum. However, there would be a decrease in expenditure up to an extent of Rs. 222.39 lakh in a year due to reduction of strength of Competition Commission of India from ten additional members to six additional members, and by removal of the concept of Benches functioning at different locations, and their associated Director General subordinate offices.

on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”

Further, subject to the provisions of the Act, §18 provides that the functions of the CCI include the following:⁹⁷

1. To eliminate practices having an adverse effect on competition;
2. To promote and sustain competition;
3. To protect the interests of consumers; and
4. To ensure freedom of trade carried on by other participants in Indian markets.

Thus, the CCI has a very broad mandate to not only eliminate practices having an adverse effect on competition thereby protecting the interests of consumers, but also to promote and sustain competition and ensure freedom of trade. In other words, the function of the CCI is to play an active role in promoting competition in markets in India. Despite this broad mandate, the CCI focuses on the following five specific areas of functionality under the Act:

A. REGULATING (PROHIBITING) ANTI-COMPETITIVE AGREEMENTS

§3 of the Act states that agreements entered into by an enterprise or association of enterprises or person or association of persons, in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India shall be void.

1. Horizontal Agreements and ‘Cartels’

Horizontal agreements refer to agreements among competitors, *i.e.*, agreements between two or more enterprises that are at the same stage of the production chain and in the same market. A distinction is also made between cartels – a special type of horizontal agreement – and other horizontal agreements.⁹⁸ The Act provides for the following four kinds of horizontal agreements, which are presumed to be anticompetitive.⁹⁹

⁹⁷ Competition Act, 2002, §18.

⁹⁸ *Supra* note 15, ¶4.3.1.

⁹⁹ *Supra* note 2, ¶4.3.2.

- a. Agreements regarding prices: Agreements that directly/indirectly fix purchase/sale price;
- b. Agreements regarding quantities: Agreements aimed at limiting/controlling production, supply, markets, technical development and investment;
- c. Agreements regarding market sharing: Agreements for sharing of markets by geographical area, types of goods/services and number of customers; and
- d. Agreements regarding bids (collusive tendering and bid rigging): Tenders submitted as a result of joint activity or agreement.

Such agreement may lead to a cartel, which is pernicious.¹⁰⁰ The Act defines ‘cartel’ as including “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.”¹⁰¹

The aforesaid agreements are, therefore, considered to be illegal *per se* and do not require to be tested under the ‘rule of reason’.¹⁰² The CCI in the *FICCI Multiplex case*¹⁰³ has observed that, “with reference to the horizontal agreements specified in Section 3(3) of the Act, the rule of presumption of appreciable adverse effect on competition contained therein shall apply. In fact, this rule of presumption shifts the onus on the opposite party to rebut the said presumption by adducing evidence and in that context the factors mentioned above may be considered by the Commission. Moreover, if a horizontal agreement is not covered by Section 3(3) of the Act, even then the factors contained in Section 19(3) may be relevant and can be considered.”

The observations of Supreme Court on the term ‘cartel’,¹⁰⁴ which have been cited on various occasions by High Courts in different cases, are

¹⁰⁰ *Id.* ¶4.3.3.

¹⁰¹ Competition Act, 2002, §2(c). (The definition of the term ‘cartel’ poses the problem of bringing the alleged violation under the four corners of the definition. No major jurisdiction has defined the term ‘cartel’ in their laws, though recognizing that it is pernicious through judgments.)

¹⁰² The MRTP Act had 14 types of agreements *per-se* illegal under §33. *See also infra* note 201 for a discussion on ‘*per se*’ and ‘rule of reason’.

¹⁰³ Case No. 1/2009 – against *United Producers/Distributors Forum*, decided on 25.05.2011; 2011CompLR0079(CCI) (The case related to alleged cartelization of producers/distributors of films and giving a boycott call against Multiplexes Association of India.)

¹⁰⁴ *See Union of India v. Hindustan Development Corporation* (1993) 3 SCC 499 – defined cartel as “...an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. It amounts to an unfair trade practice which is not in the public interest.” *B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548 – Court referred to the

notable. Recently, the Orissa High Court in *Jagdamba Packaging*¹⁰⁵ found that observations of the ACAG that petitioner had formed and indulged in cartel formation were irrelevant in the context of a tender floated by the Ordinance Factory. The tender had to be considered on the basis of tender conditions and until the price bid was opened, the mere use of the letterhead of another company participating in the tender by petitioner, could not substantiate the ground that they had entered into a cartel.¹⁰⁶

2. Vertical Agreements

Vertical agreements are agreements between enterprises at different stages or levels of the production chain and, therefore, in different markets. Generally, vertical agreements are treated more leniently than horizontal agreements as, *prima facie*, a horizontal agreement is more likely to reduce competition than an agreement between firms in a buyer-seller relationship. Therefore, in these cases there is no presumption available as in cases of horizontal agreements, which means a higher level of proof and analysis is required.¹⁰⁷

The Act is more closely in tune with the competition law of the European Commission.¹⁰⁸ It may, however, be noted that the Act somewhat followed US law on vertical agreements. In fact, the law has summarised the major findings of the US Supreme Court¹⁰⁹ to provide for the following kinds of agreements under this category:

- a. Tie-in arrangement
- b. Exclusive supply agreement
- c. Exclusive distribution agreement
- d. Resale price maintenance

definition in P. RAMANATHA AIYAR, *ADVANCED LAW LEXICON* 693 (3rd ed.) – “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 of price of, or, trade in goods or provision of services.”

¹⁰⁵ *Jagdamba Packaging Pvt. Ltd. v. Union of India*, 2011 CompLR 1 (Orissa).

¹⁰⁶ *Id.* ¶15.

¹⁰⁷ These agreements have to be judged under the rule of reason test deciding the matter on the basis of law, facts, etc. on the basis of any of six factors enlisted under Cl. 19(3) of the Act.

¹⁰⁸ *Supra* note 2, ¶5.1.

¹⁰⁹ The MRTP Act prescribed for registrable agreements relating to restrictive trade practices under §33. The agreements included refusal to deal, tying arrangements, exclusive dealing, and resale price maintenance; and while deciding these cases, MRTPC relied upon the US decisions. *See also, Antitrust Law Developments*, American Bar Association, 131 (2007). EU has framed a new Regulation (No. 330/2010) under which vertical restraints are exempt from the provisions of Article 101 of TFEU. It may be noted that the position in US has also changed post *Continental TV Inc. v. Sylvania Inc.*, 433 US 36 (1977) and *Leegin Creative Leather Products PSKS Inc.*, 127 US 2705 (2007).

It is considered that such agreements often have to perform a pro-competitive function and are considered anti-competitive when one or more firms, which are party to agreement, have market power.¹¹⁰ The CCI has so far not found any vertical agreement restraining competition in its orders.

3. Exempting Intellectual Property

The relationship between intellectual property ('IP') and disciplines regulating competition has attracted growing attention, particularly as a result of the expansion and strengthening of IP protection at the global scale. While IP law deliberately subjects intellectual assets to the exclusive control of right owners, competition law seeks to avoid market barriers and benefit consumers by encouraging competition among a multiplicity of suppliers of goods, services and technologies. Dealing with such a relationship poses unique analytical challenges to policy-makers.¹¹¹

The Act protects rights that have been conferred upon a person under the Copyright Act, 1957, the Patents Act, 1970, the Trade and Merchandise Marks Act, 1958, the Geographical Indications of Goods (Registration and Protection) Act, 1999; and the Semi-Conductor Integrated Circuits Layout and Design Act, 2000.¹¹² The imposition of any unreasonable conditions by the right holders under these IP laws would, however, attract the scrutiny of CCI. It may be noted that no such protection is available under the abuse of dominance provisions.

In the *FICCI Multiplex case*,¹¹³ the CCI was confronted with a situation wherein parties claimed their rights under §3(5) and wanted to be exempted from the application of the Act. The CCI, however, noted that "intellectual property laws do not have any absolute overriding effect on the competition law. The extent of the non-obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights."¹¹⁴

¹¹⁰ *Supra* note 2, ¶4.3.5.

¹¹¹ See Carlos M. Correa, *Intellectual Property and Competition Law: Exploring Some Issues of Relevance to Developing Countries* (International Centre for Trade and Sustainable Development, Issue Paper No. 21, October 2007).

¹¹² The Protection of Plant Varieties and Farmer's Rights Act, 2001 does not feature here.

¹¹³ *Supra* note 103.

¹¹⁴ *Id.*, ¶23.31. In this case it was not found by the Commission that neither any question of infringement of rights of producers/distributors conferred under the Copyright Act, 1957 arises nor does the question of imposing reasonable conditions to protect such right arise.

4. Orders of the CCI

The CCI, despite having received information under the provisions of the Act on several occasions, has had to close a number of cases under §26(2) of the Act on a *prima facie* level¹¹⁵ and some after getting the information investigated,¹¹⁶ due to the nature of information and evidence available. Some important cases decided by the CCI under this section are:

- i. Banks Case – ‘pre-payment penalty case’* – This was the first major decision of the CCI.¹¹⁷ The case involved an allegation of cartelization and abuse of dominance by banks in charging a pre-payment penalty on home loans. The majority view was that there were no violations of either §3 or §4 of the Act.¹¹⁸ A couple of similar matters relating to bank loans were decided by the CCI and found no violation of the provisions of the Act.¹¹⁹

¹¹⁵ 18 transferred MRTP cases, cases in 2009; 6 cases of 2009, 25 cases of 2010 and 11 cases of 2011 (as per the orders displayed on the Commission’s website http://www.cci.gov.in/index.php?option=com_content&task=view&id=150 (Last visited on September 16, 2011).

¹¹⁶ See for example, Case No. 11/2010 (against Ashish Medical), Case No. 23/2010 (against Durga City Cable – decided on 10.08.2011).

¹¹⁷ Case No. 5/2009 – against Sixteen Banks (decided on 02.12.2010).

¹¹⁸ Members (G), (GG), (AG) and (T). Chairperson recused from this case.

“It is evident from our analysis and determination of these issues earlier in the order that there is a vibrant market in provision of home loans, with the number of service providers and the variety in products growing consistently and continuously over a period of years. There is no bank/HFC in the market which can be deemed to be dominant by any of the parameters used for determining dominance. The question of abuse of dominance, therefore, does not arise. It is equally clear that there is no agreement amongst the various service providers, *i.e.*, the banks/HFCs, nor is there any uniform practice being followed by them. They are operating as competitors in a vibrant competitive market. Neither the violation of Section 3 or Section 4 of the Act has been established, nor is there any evidence whatsoever of an appreciable adverse effect on competition in the home loan market in India in this context.”

Two separate dissenting opinions were given in this case by Member (P) and Member (R) finding a cartel among banks charging pre-payment penalty.

It may be noticed that, recently, the Reserve Bank of India has expressed its displeasure with a section of banks levying high prepayment penalty on foreclosure of housing loans. The central bank is also weighing options to tell banks to ease the burden on borrowers willing to prepay the loan fully, even as the Competition Commission of India finds such penalty legally valid. See “Banks face heat over home loan prepayment penalty”, *Economic Times* (February 2, 2011). This area is witnessing a lot of changes, in first week of Sep 2011 RBI said there would be no pre-payment penalty on floating home loan and auto loan, however, the association of bank is lobbying against this and has submitted a representation.

¹¹⁹ Case No. 15/2010 – against HDFC Bank decided on 22.03.2011 (case related to charging of foreclosure charges on prepayment of auto loan); Case No. 12/2010 – against India Bulls Financial Services decided on 23.03.2011 (case related to charging of foreclosure charges on prepayment of mortgage loan); Case No. 28/2010 – against Religare Finevest Ltd., decided on 23.05.2011 (case related to charging of foreclosure charges on prepayment of mortgage loan). It may be noted that Member (P) who gave dissenting opinion in case of home loan went with majority in these cases, however, Member(R) gave a dissenting opinion).

- ii. *Tata Sky – ‘set-top box interoperability case’* – In this case, the challenge was to the anticompetitive practice of DTH operators in restricting interoperability of set-top-boxes. The CCI was of the opinion that there is no violation of §3 or §4 of the Act.¹²⁰
- iii. *Jupiter Gaming – ‘bid-rigging case’* – This case was interesting as it began with the information alleging abuse of dominant position by the Government of Goa in prescribing tender conditions for selecting on-line lottery agents. During investigation, a tacit understanding/collusion was suggested by the DG. The CCI, however, found no violation either under §3 or §4 of the Act.¹²¹
- iv. *Airlines case* – This case related to a proposed alliance between Jet Airways and Kingfisher.¹²² The agreement included code-sharing on both domestic and international flights and joint fuel management with a view to reduce expenses, as well as common ground-handling, cross-selling of flight inventories using a common global distribution system platform and cross-utilisation of crew on similar aircraft types were the other key areas of the proposed agreement. The CCI, however, found that “none of these agreements can be said to have either determining the airfares or limiting the supply or allocating the market” and thus no violation of either §3 or §4 was found to have been established and the matter was closed.

B. REGULATING (PROHIBITING) ABUSE OF DOMINANT POSITION

It is a well recognized principle of modern competition law that holding a dominant position, jointly dominant position, a monopoly, or a position of substantial market power is generally not abusive or illegal. Some behaviour by such firms may nonetheless be seen as anti-competitive.¹²³ The provisions regulating abuse of dominant position reflects the actual change from MRTP Act to competition law. The Act mandates that no enterprise or group shall abuse its dominant position and provides for situations in which the conduct of a dominant firm would be treated as contravention of §4 of the Act.

¹²⁰ Case No. 2/2009 – against Tata Sky Limited, decided on 24.03.2011. Member (R) gave a dissenting opinion in this case and found DTH operators in violation of §§3 and 4 of the Act.

¹²¹ Case No. 15/2010 – against Govt. of Goa decided on 12.05.2011. Member (R) gave a dissenting opinion in this case.

¹²² Case No. 4/2009 – against Jet Airways and Kingfisher Ltd., decided on 11.08.2011. Member (R) gave a dissenting opinion in this case. It may be noted that Commission imposed a penalty of Rs. 1 crore against Kingfisher for not furnishing information it sought during the investigation. This order has, however, been stayed by CompAT.

¹²³ Abuse of Dominance and Monopolisation, 1996, OECD, Paris 1996OCDE/GD(96)131/

1. Determining Relevant Market

Dominance and the alleged abuse have to be established or found in the context of relevant market. The determination of the relevant market is one of the most complex tasks to be accomplished by a competition authority. This involves not only analysis of legal provisions, but also economic analysis of market concerned, determining substitutability, and many such factors.

In the US, monopoly power has been traditionally defined as the power to control prices and exclude competition.¹²⁴ To determine whether a monopoly exists, it is necessary to define the relevant market in which the power over price or competition is to be appraised. Without a definition of that market, there is no way to measure a defendant's ability to lessen or destroy competition.¹²⁵ The determination of the relevant market is, therefore, a key to most abuse of dominant position cases. Now the question arises whether the CCI should itself explore to arrive at the right key or leave it for the DG to explore on its own and open the lock.

In a case before the High Court of Bombay,¹²⁶ the issue was as to the stage at which the relevant market has to be identified by the CCI. It was held that "it was not necessary for the Commission to first find out the relevant geographic market, relevant products market or relevant market. Such things can be found or concluded upon investigation and not necessarily before that."¹²⁷

2. Determining Dominance

'Dominant position' has been defined in the Explanation to the §4, and the definition is similar to the definition given by European Court of Justice in *United Brand's* case,¹²⁸ states:

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

¹²⁴ *United States v. E.I. DuPont de Nemours & Co.*, 351 US 377.

¹²⁵ American Bar Association, *Antitrust Law Developments*, Volume-1 277 (6th ed.).

¹²⁶ *See Kingfisher Airlines Limited v. Competition Commission of India* [2011] 100 CLA 190 (Bom). (This judgment was initially appealed before the Supreme Court, but was withdrawn in view of the SAIL Judgment, *supra* note 90).

¹²⁷ *Id.*, ¶23.

¹²⁸ *Case 27/76, United Brands Co. v. EC Commission* (1978) ECR 207. *See also Hoffmann La Roche v. Commission*, 85/76, [1979] ECR 461 at ¶38.

"a *position of economic strength* enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. In general it derives from a combination of factors which taken separately are not determinative."

it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.”

The CCI shall be guided by the thirteen factors provided under §19(4) in determining the dominant position of an enterprise or group. It may be noted that in a few jurisdictions, dominance is objectively defined in terms of prescribing market share with other conditions.¹²⁹ In India, however, it was felt that specifying a threshold or arithmetical figure (*i.e.*, market share) for defining dominance may either allow the offenders to escape or result in unnecessary litigation.¹³⁰ The provisions under Indian law therefore provide greater flexibility to the CCI in finding market distortions in the context of abuse of dominance provisions. The CCI is not circumscribed by the market share requirement.

3. Establishing the Abuse

Once the relevant market and dominance of an enterprise has been established, evidence has to be found as to the abuse. The Act provides for the following situations, which qualify as abuse by a dominant firm:

- a. Directly or indirectly imposing unfair purchase or selling prices including predatory prices;¹³¹
- b. Limiting production, markets or technical development to the prejudice of the consumers;
- c. Indulging in action resulting in the denial of market access;
- d. Making contracts with obligations which have no connection with the subject of such contracts; or
- e. Using dominance in one market to move into or protect other markets.

¹²⁹ For example South Africa in its Competition Act states (§7) – A firm is dominant in a market if – (a) it has at least 45% of that market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market, but has market power.

¹³⁰ *Supra* note 2, ¶4.3.7.

¹³¹ Predatory price has been defined in explanation (b) of §4 to mean “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.” The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 lay down the parameters for determination of cost.

4. Orders of the CCI

The CCI has given far-reaching orders under this provision of the Act. Some of them are worth mentioning:

- i. *NSE-MCX Case* – ‘*stock-exchange case*’¹³² – This was the first case decided by the CCI in which a penalty of Rs. 55.5 cores was imposed upon NSE for its abuse of dominant position in the stock exchange market by indulging into the practice of predatory pricing and also abusing its dominant position to protecting other relevant market.
- ii. *LF Case* – ‘*real-estate*’¹³³ – In this case, the CCI imposed a penalty of Rs. 630 crores on a real-estate dominant player for abusing its dominant position and imposing unfair conditions on the sale of its service to its consumers. This order highlights the need for regulation in this sector.

These two decisions of the CCI have generated much discussion on the approach of the CCI. The final verdict definitely lies with the Supreme Court, if the cases reach there. The orders of the CCI show that a number of cases have been decided by it under §4 and a significant number have been closed.¹³⁴

C. REGULATING COMBINATIONS

The powers of the CCI to regulate combinations have been a significant point of discussion in business and corporate law circles since the inception of the Act and in fact, even since the constitution of the Raghavan Committee. There were apprehensions in business circles about the process

¹³² Case No. 13/2010 – against National Stock Exchange India Ltd., decided on 25.05.2011 and 23.06.2011 (penalty). In this case Member (GG) and Member (AG) gave a dissenting opinion.

¹³³ Case No. 19/2010 – against DLF Limited, decided on 12.08.2011. Member (R) agreed with majority, however, provided a supplementary note on “after-market abuse” as discussed by US Supreme Court in *Eastman Kodak Co. v. Image Tech*, 504 US 451 (1992).

¹³⁴ Some of the important cases which got media attention were, *HDFC Bank – ‘credit-card case’* Case No. 17/2010 – against HDFC Bank decided on 23.05.2011. Member (R) gave a dissenting opinion (after-market argument) – This case related to allegation of abuse of dominance by HDFC Bank in its credit card services. The Commission agreed with the DG’s finding that since HDFC Bank is not dominant in ‘credit-card service’ market there can be no violation of §4 of the Act; *NDPL – ‘electricity meters/charges case’* Case No. 6/2010 – against NDPL, BSES Rajdhani and Yamuna decided on 11.05.2011. Member (R) gave a dissenting opinion in this case. Also see *UTPE 45/2010* transferred case from MRTP (Case No. DGIR/2008/IP/158 RTPE No. 19/2008) decided on 31.05.2011 – This case was relating to charging of excessive electricity charges by Discoms by discouraging/not allowing the consumers to buy their own meters and calibrating the meters supplied by them to show large electricity bills. Commission found no violation of §4 of the Act; Case No. 4/2010 – against Coal India Limited decided 26.07.2011 – In this case the commission found no violation of either §§ 3 or 4 of the Act; Case No. 10/2010 – against Indian Oil Corporation Ltd., decided on 22.06.2011. Member (R) gave a dissenting opinion in this case.

involved in merger analysis, timelines, confidentiality, overlaps with sectoral regulators, competency, and many other factors in implementation of the provisions. This was the reason for delay in notifying the provisions relating to combinations.

Ultimately, however, the CCI was able to put its case forward and through a series of stakeholders meetings and discussions, the provisions relating to combinations¹³⁵ were notified on March 4, 2011 to be effective from June 1, 2011.¹³⁶ Accordingly, Regulations were framed detailing the procedure relating to merger filing.¹³⁷

1. Definitions and Thresholds – The term ‘combination’ is defined very broadly¹³⁸ to include any acquisition of shares, voting rights, control or assets, or merger or amalgamation of enterprises, where the parties to the acquisition, merger or amalgamation satisfy the prescribed monetary thresholds in relation to the size of the acquired enterprise and the combined size of the acquiring and acquired enterprises¹³⁹ with regard to the assets and turnover of such enterprises. The threshold under the Act has been revised to increase it 50 percent.¹⁴⁰
2. Exemptions – The Government of India, *vide* a recent notification,¹⁴¹ has exempted an enterprise whose control, shares, voting rights or assets are being acquired and having turnover less than Rs. 750 crore in India or having assets less than Rs. 250 crore in India, from the provisions of §5 of the Act for a period of five years. Further, Regulation 4 read with Schedule I of the regulations contains certain categories of transactions¹⁴² that are not likely to have an appreciable adverse effect on

¹³⁵ Competition Act, 2002, §§5, 6, 20, 29, 30 and 31.

¹³⁶ S.O. 479(E) dated 04.03.2011.

¹³⁷ Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

¹³⁸ Competition Act, 2002, §5.

¹³⁹ An enterprise for the purposes of the Competition Act includes all entities within a ‘group’, defined to mean controlling entities, controlled entities and entities under common control. In this context, ‘control’ means exercising at least 50 percent of voting rights, appointing at least 50 percent of directors or management control.

¹⁴⁰ S.O. 480(E) dated 04.03.2011 – Central Government in consultation with CCI enhanced the value of assets and turnover by 50 percent for the purposes of §5 of the Act, on the basis of Wholesale Price Index. Thus, the revised thresholds for combinations, given under §5 of the Act, are in terms of joint asset base of Rs. 1500 crore* or turnover of Rs. 4500 crore in India; or assets of US \$ 2250 million (including turnover of Rs. 2250 crore in India). If the combined entity belongs to any group, the threshold for combinations are an asset base of Rs. 6000 crore* or turnover of Rs. 18000 crore in India; or assets of US \$ 3 billion (including assets of at least Rs. 750 crore in India) or turnover of US \$9 billion (including turnover of at least Rs. 2250 crore in India) in case of outside and within India both. (*1 crore = 10 million).

¹⁴¹ S.O. 482(E) dated 04.03.2011.

¹⁴² There are ten such categories of combinations: acquisition of stock-in-trade, raw materials, stores and spares in the ordinary course of business, acquisition of shares or voting rights pursuant to a bonus issue or stock splits, etc.

competition ('AAEC') and thus no merger filing is required in these cases, however, the CCI is empowered to enquire into such transactions if it finds AAEC.

3. Timelines – Time is the essence of mergers and acquisitions. The Act provides for an outer limit of 210 days for finalizing a merger case, and if it does not do so, the merger is deemed to be approved.¹⁴³ The CCI, however, endeavours to reduce this period to 180 days.¹⁴⁴ These strict timelines have been tested in four cases¹⁴⁵ in which the CCI has passed the orders in much lesser time than the upper time limit provided. This rules out apprehensions in business circles about delay.

D. PROMOTING COMPETITION ADVOCACY

Competition advocacy has two dimensions. The first reflects the competition agency's role as consultant to the government and to sector regulatory agencies concerning legislation and regulations that implicate competition policy. The second is as a proponent for increased public understanding and acceptance of competition principles.¹⁴⁶

One of the unique features of the Act is that it formally provides for promotion of competition advocacy, creating awareness and imparting training about competition issues.¹⁴⁷ Competition advocacy has been recognised as a tool to promote competition culture in the country¹⁴⁸ and it has been recognised that there is a direct relationship between competition advocacy and

¹⁴³ Competition Act, 2002, §31.

¹⁴⁴ *Supra* note 138, Regulation 28(6).

¹⁴⁵ Combination Registration No. C-2011/07/01 – notice filed on 08.07.2011 and approved on 26.07.2011(RIL and RILIL acquiring Bharti AXA Life Insurance Company); Combination Registration No. C-2011/08/02 – notice filed on 01.08.2011 and approved on 25.08.2011(Walt Disney Company acquiring UTV Software Communication Limited); Combination Registration No. C-2011/08/03 – notice filed on 24.08.2011 and approved on 15.09.2011(G&K Baby Care and Danone Asia Pacific acquiring certain assets of Wockhardt Group); Combination Registration No. C-2011/09/04 – notice filed on 07.09.2011 and approved on 30.09.2011(AICA Japan and AICA India acquiring Laminates division of Bombay Burmah Trading Corporation Limited).

¹⁴⁶ COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW (OECD, 2010).

¹⁴⁷ Competition Act, 2002, §49(3).

¹⁴⁸ See ¶5 WORKING GROUP REPORT, *supra* note 50 (one of the objectives of National Competition Policy is to promote, build and sustain strong competition culture within the country through creating awareness, imparting training and consequently capacity building of stakeholders including law makers, judiciary, policy makers, business, trade associations, consumers and their associations, civil society etc.). Competition culture refers to the socio-economic ideology of a jurisdiction and determines to a large extent the success or failure of a competition law. For e.g., several developing countries have had antitrust laws for many decades, but until recently none appears to have been regularly enforced to further the aims generally associated with competition law – See *Competition, Competitiveness and Development: Lessons from Developing Countries*, UNCTAD/DITC/CLP/2004/1.

enforcement of competition.¹⁴⁹ Competition advocacy has been a major focus area of the CCI in the first seven years of its existence and it would continue to be so in the coming years given the area and population of our country.¹⁵⁰

E. ADVISORY ROLE

Competition authorities around the world also play a significant role as advisers on competition issues to the Government and other stakeholders of the economy.¹⁵¹ The various committees referred to above have recognized this fact.¹⁵² The Act provides for a mechanism wherein while formulating a policy on competition, the central and the state governments may make a reference to the CCI for its opinion on the possible effects of such policy on competition.¹⁵³ The CCI shall give its opinion within 60 days of the reference. The opinion, however, is not binding upon the referee.¹⁵⁴ There is no *suo motu* power to the CCI to review any economic policy, which was recommended by the working group.¹⁵⁵

A 'statutory authority'¹⁵⁶ that has, during the course of a proceeding before it, on an issue raised by a party or taken up *suo motu*, taken or proposes to take a decision which would be contrary to the Act, it may make a reference to CCI in respect of such issue. The CCI would provide an opinion within 60 days of such reference to the concerned authority and the said authority would give its finding recording reasons on the issue concerned.¹⁵⁷

Similarly, during the course of proceedings before the CCI, on an issue raised by a party or taken up *suo motu*, in which the CCI has taken or

¹⁴⁹ ¶6.4.7 RAGHAVAN COMMITTEE REPORT, *See also* chapter VI of Working Group, *supra* note 50.

¹⁵⁰ This is evident from the fact that one of the terms of reference for the Committee on National Competition Policy 2011 is to strategize the competition advocacy with government and private sector. *Supra* note 18.

¹⁵¹ William E. Kovacic, *How Does your Competition Agency Measure Up?*, EUROPEAN COMPETITION JOURNAL, April 2011, 25. "In competition policy, grounding theory in practice is effectively the daily work of competition agencies. In recent years, the global competition community has gained a deeper appreciation of what engineers have understood for ages: brilliant theory without skilful implementation is a bad match. Great ideas from economics, law or other discipline require equally great implementing institutions to move the system of competition policy forward."

¹⁵² *See supra* Part II B.

¹⁵³ Competition Act, 2002, §49(1).

¹⁵⁴ Competition Act, 2002, §49(2).

¹⁵⁵ *Supra* note 50, ¶8.9, "The Competition Act, 2002, should have a provision allowing the CCI to give its opinion *suo motu* to the Government on any economic policy of the Government substantially impacting competition in India."

¹⁵⁶ As per §2(w) the Statutory Authority means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto.

¹⁵⁷ Competition Act, 2002, §21.

proposes to take a decision which would be contrary to any provisions of any Act,¹⁵⁸ a reference may be made to the statutory authority concerned with the implementation of the said Act. The said authority would provide an opinion within 60 days of such reference to the CCI, which would consider the opinion given by statutory authority and give its finding recording reasons on the issue concerned.

It may be noted that the advice given or received by CCI is not binding on either the statutory authority or the CCI while giving its decision, except that reasons have to be recorded on the divergence. The advisory role of the CCI seems to be somewhat academic in nature and as its authority matures, this needs to be strengthened as recommended by the committees on competition law.

V. KEY ISSUES

A. TEETHING PROBLEMS

Every new agency which comes into existence has some teething problems in the days of its infancy. The same was true for the CCI which went through hiccups such as a change in the organisational structure and shortage of staff in its nascent stage.¹⁵⁹ Some of the key problems have been discussed below.

1. Pending cases from MRTTP

Consequent to the dissolution of the MRTTPC, the investigations or proceedings other than those relating to UTPs¹⁶⁰ pending before the DGIR were transferred to the CCI to be dealt with in the manner as it deemed fit.¹⁶¹ There was a twilight period¹⁶² of two years within which the MRTTPC would have disposed of the pending matters, but by an Ordinance this period was curtailed, and with effect from October 14, 2009, the aforesaid matters were

¹⁵⁸ Competition Act, 2002, §21A.

¹⁵⁹ Out of the 156 posts sanctioned for the Competition Commission of India (CCI) and 41 posts sanctioned for Director General, CCI, 77 and 25 posts, respectively, are lying vacant, *see supra* note 115.

¹⁶⁰ Except UTP referred to in clause (x) of sub-section 1 of §36A of MRTTP Act (gives false or misleading facts disparaging goods, services or trade of another person). *See Colgate-Palmolive (India) Ltd. v. Anchor Health and Beauty Care Private Ltd.*, (2008)7MLJ1119, ¶ 55

¹⁶¹ 66(6) and 66(8). Pending cases relating to MTP, RTP and those mentioned in *supra* note 161 were transferred to CompAT, cases pending investigation relating to MTP and RTP were transferred to CCI and cases relating to UTP except those mentioned in *supra* note 161 were transferred to National Commission under the Consumer Protection Act, 1986.

¹⁶² Ramappa, Repeal of the MRTTP Act, 1969 – Reducing the Twilight Period, available at <http://www.lawyersclubindia.com/articles/Repeal-of-the-MRTTP-Act-1969-Reducing-the-Twilight-Period-1409.asp> (Last visited on August 28, 2011).

transferred to the CCI. There was some initial confusion,¹⁶³ which now seems to be settled, as a majority of the cases transferred from the MRTPC are being disposed of by the CCI.¹⁶⁴ Some of the cases which were sent to the DG have also been closed.¹⁶⁵

2. Argument on ‘retrospective’ operation of the Act

This has been one of the celebrated arguments as to the applicability of the Act to agreements that have been entered into prior to the notification of §§3 and 4, *i.e.*, May 20, 2009. One such case was dealt with by the Bombay High Court¹⁶⁶ and the question involved was whether an agreement which was valid until coming into force of the Act would continue to be so valid even after the operation of the law. The Court held that:

“If the law cannot be applied to the existing agreement, the very purpose of the implementation of the public policy would be defeated. Any and every person may set up an agreement said to be entered into prior to the coming into force of the Act and then claim immunity from the application of the Act. Such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements.”¹⁶⁷

¹⁶³ This is evident from a case being transferred from CompAT to CCI for disposal. *See* Order of the Commission in MRTP Case received from CAT dated 12.05.2010. In another case *Interglobe Aviation Ltd. v. The Secretary, Competition Commission of India*, 173 (2010) DLT 581. The order of the Commission was challenged before Delhi High Court on the ground that matter was erroneously transferred to CCI which would have been transferred to CompAT. The Court held in this case that the investigations against petitioners by the DG (I&R) remained incomplete and the matter did not crystallize into a ‘case’ before the MRTP Commission, which could be stated to be pending and thus there is no merit in saying that it was incumbent on the DG(I&R) of the CCI to transfer the cases straight to the CAT and not to the CCI. Observation of court on the changed structure of CCI may also be noted:

The organizational structure which was envisaged under the MRTP Act with the MRTP Commission combining in itself both the inquisitorial and adversarial functions has undergone a significant change in the CA. There is now a two-tier structure with the CCI performing a partly inquisitorial function and a partly quasi-adjudicatory function. The CAT, however, performs an appellate adjudicatory function. The interpretation placed on the provisions by this Court is in light of this altered structure under the CA (¶ 16).

¹⁶⁴ About 34 cases out of 50.

¹⁶⁵ Case No. RTPE 16/2009] *Hindustan Coca Cola Beverages Ltd.* decided on 23.05.2011; Case No. UTPE 99/2009 *Hindustan Coca Cola Beverages Ltd.* decided on 23.05.2011. a common dissenting opinion by Member (R) in this case. CASE REF: Case No. 7/28, 25/28, 8/28, 9/28, 10/28 cases against five banks (charging of differential rate of interest from different set of borrowers) Member (R) gave a dissenting opinion. Case Ref: Case No. 15/28, 06/28, 13/28, 12/28, 02/28, 11/28 – six cases of banks decided on 07.06.2011 –case relates to prepayment/Foreclosure penalty charged by the banks/financial institutions. Member (R) and Member (P) gave a dissenting opinion.

¹⁶⁶ *Kingfisher*, *supra* note 127.

¹⁶⁷ *Id.* ¶8 (the court gave an illustration as “this can be explained further by quoting the following example: A and B enter into agreement of sale of land on 2/1/2008. It is agreed between

This decision was challenged by way of special leave petition to the Supreme Court¹⁶⁸ although it was subsequently withdrawn by the appellant in view of the judgment in *SAIL*.¹⁶⁹

The CCI has followed this approach in its subsequent orders, for example, in *FICCI Multiplex Case*.¹⁷⁰ The CCI agreed with the DG's findings that there was a continuing effect of the cartel, and concluded that:

“A cartel need not necessarily meet every day or do something daily to be said to exist. Even a single series of meetings or concerted action with the clear intent to limiting output or fixing prices is sufficient condition for a cartel. As long as the reigning prices and market conditions exist due to the actions of the cartel, the cartel itself would be considered to be continuing. Resultantly, it is held that the duration of the cartel like activity, for the purposes of the Act, started from May 20, 2009 and is still continuing.”

3. Procedural Challenges

The CCI is empowered to evolve its own procedure to discharge its functions subject to the guidance of principles of natural justice and other provisions of the Act and rules made by Central Government.¹⁷¹ Accordingly, the CCI has framed certain regulations to regulate its own procedures.¹⁷²

As the CCI started functioning, its orders were challenged before the appellate authority and in various High Courts on procedural grounds. The

them that sale-deed would be executed on or before 2/1/2009. Meanwhile, *i.e.*, on 10/8/2008, the Government decides to impose a ban on transfer of the land and declares that any such transfer, if effected, shall be void. The question is, could the parties say that since their agreement being prior to Government putting a ban on transfer, their case is not covered by the ban? The answer has to be in the negative, as on the day the contract is sought to be completed, it is prohibited. Similar would be the result in the instant case.)

¹⁶⁸ Special Leave to Appeal (Civil) No. 16877/2010 decided on 24.9.2010.

¹⁶⁹ *CCI v. SAIL*, (2010) 10 SCC 744.

¹⁷⁰ *Supra* note 103, ¶¶25.2 and 25.3.

¹⁷¹ Competition Act, 2002, §36.

¹⁷² The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009 (No.1 of 2009); The Competition Commission of India (General) Regulations, 2009 (No. 2 of 2009) with latest amendment on October 20, 2010 vide L-3(2)/Regln-Gen.(Amdt)/2009-10-CCI – Provides for day-to-day procedure regarding filing of information and proceedings before the Commission); The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009 (No. 3 of 2009); The Competition Commission of India (Lesser Penalty) Regulations, 2009 (No. 4 of 2009); The Competition Commission of India (Determination of Cost of Production) Regulations, 2009 (No. 6 of 2009); The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011 (No. 1 of 2011).

procedural challenges faced by the CCI and challenges in store are discussed in the following paragraphs. One of these first challenges came on a decision of the CCI to proceed with the case against SAIL.¹⁷³ In this case, the order of the CCI directing the DG to investigate the matter was challenged before the CompAT. The appellate authority gave its finding on the following issues:¹⁷⁴

- a. The *prima facie* orders of the CCI directing an investigation is subject to appeal before the CompAT.
- b. The CCI cannot be party to an appeal before the CompAT, except in proceedings arising out of proceedings initiated on its own motion.
- c. The principle of natural justice must be followed in real and not illusory terms even at the *prima facie* stage of the case.

These findings of the CompAT were challenged before the Supreme Court, and in its landmark judgment the following points were settled:¹⁷⁵

- a. *Prima facie* orders of the CCI directing an investigation would not be appealable under §53A.¹⁷⁶
- b. The CCI would be a necessary party in *suo motu* cases and would be a proper party in the proceedings in all other cases it before the CompAT.
- c. Neither is any statutory duty cast on the CCI to issue notice or grant hearing nor can any party can claim, as a matter of right, notice and/or hearing at the *prima facie* stage under §26(1) of the Act.¹⁷⁷
 - i. *Power of the CCI to determine questions of jurisdiction* – There were constant challenges over the power of the CCI to determine questions of jurisdictional facts, and the same was challenged in a case before the Bombay High Court.¹⁷⁸ The main challenge was against a show-cause notice issued by the CCI, on the ground that it does not have any jurisdiction to initiate such proceedings in respect of films for which the

¹⁷³ Dated 08.12.2009 in Case No.11 of 2009 (against Steel Authority of India Ltd.).

¹⁷⁴ Steel Authority of India Ltd. v. Jindal Steel and Power Ltd., 2010 Comp LR 22 (CompAT).

¹⁷⁵ Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 744. It may be noted here that the Supreme Court while settling the issues on merits issued certain directions in the larger interest of justice administration interpreting the General Regulations of the Commission, which relate to speedy and expeditious disposal of the matters (¶¶96-97).

¹⁷⁶ *Id.*, ¶¶30-41.

¹⁷⁷ *Id.*, ¶94. See also Steel Authority of India Ltd. v. Competition Commission of India, 2011CompLR0073(Delhi)– the matter relates an application for examination of witnesses and confidentiality treatment to certain documents.

¹⁷⁸ Aamir Khan Productions Pvt. Ltd. v. Union of India, 2010 (112) Bom LR 3778.

Copyright Act, 1957 contains exhaustive provisions. The Bombay High Court held on this point that “The question whether the Competition Commission has jurisdiction to initiate the proceedings in the fact situation of these cases is a mixed question of law and fact which the Competition Commission is competent to decide.”¹⁷⁹ While recognizing the expert composition of the CCI and the CompAT, the court ruled out the possibility that parties would be subject to lengthy proceedings and unnecessary harassments.

On the point of the prejudging of the issue by CCI in issuing a show-cause notice, it was held that “mere issuance of a show cause notice under Section 26(8)/Section 27, like issuance of a charge-sheet in a departmental inquiry, cannot be treated as pre-judging the issue, merely because the petitioners had raised some of the legal contentions in the replies to the notice issued by the Director General of Investigation and thereafter also the Commission has issued show cause notices. That can never mean that the Competition Commission will not consider the petitioners’ objections against maintainability of the proceedings.”¹⁸⁰

- ii. *Interim orders* – §33 of the Act empowers the CCI to pass interim orders. The CCI has done so in a number of cases.¹⁸¹ The principles to be followed in this regard have also been settled in the *SAIL case*,¹⁸² wherein the Supreme Court said that “this power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances.”¹⁸³
- iii. *Remedies* – The CCI has wide powers under the Act to pass orders ranging from penalty to division of enterprises.¹⁸⁴ The challenge, however, is to decide the appropriate remedy in a case. Even in cases of penalty, what should be the amount of penalty is a perennial question to be answered. In the near future, the CCI may frame guidelines on these issues also as followed in matured jurisdictions.¹⁸⁵

¹⁷⁹ *Id.*, ¶15.

¹⁸⁰ *Id.*, ¶18.

¹⁸¹ One of the first orders of the Commission under §33 was in restraining Karnataka Film Chamber of Commerce (KFCC) from preventing exhibition of the film ‘*Raavan*’ – (see <http://www.thehindu.com/news/states/karnataka/article472277.ece> (Last visited September 10, 2011)). Similar orders were passed in relation to other films also. Interim relief has been given in case of DLF (<http://www.business-standard.com/india/news/cci-raps-dlf-says-abused-its-dominant-position/408895/>) as well as against AIOCD (<http://m.mydigitalfc.com/news/cci-grants-interim-relief-drug-stockiest-orissa-santuka-agencies-692>).

¹⁸² See *supra* note 176.

¹⁸³ *Id.*, ¶23.

¹⁸⁴ Competition Act, 2002, §§27, 28, and 31.

¹⁸⁵ For e.g., the EU has framed guidelines for imposition of fines, see Guidelines on the method of setting fines imposed pursuant to Art 23(2)(a) of Regulation No 1/2003.

- iv. *Confidentiality* – Addressing confidentially issues is one of the greatest challenges for any competition agency, and the CCI is no exception. A balance between the disclosure of information and confidentiality requirements in terms of §57 of the Act and Regulation 35 of the Regulations has to be made. This has been emphasized by the Supreme Court in the *SAIL case*.¹⁸⁶

B. 'PROTECTING INTERESTS OF CONSUMERS' – INDIRECTLY

The Planning Commission states that promotion of consumer welfare is the common goal of consumer protection and competition policy. At the root of both is the recognition of an unequal relationship between consumers and producers.¹⁸⁷ There is strong commonality between competition policy and law on the one hand and consumer protection policy and law on the other hand.¹⁸⁸

An analysis of laws in the US and EU shows that the goal of competition law is to protect the freedom of individuals to compete. The goal of competition law is not to promote consumer welfare directly.¹⁸⁹ Rather, this is brought about indirectly by protecting the freedom of actors to compete in markets. The reason for this is that freedom to compete generally leads to competition, and competition leads to an efficient allocation of resources and thus to consumer welfare.¹⁹⁰ Therefore, the goal is to safeguard the competitive process and neither the competitors nor the consumers.

This philosophy of modern competition law differentiates 'competition law' from special consumer protection measures, like the Consumer Protection Act.¹⁹¹ The decisive adjudication principle is undue competition re-

¹⁸⁶ *Competition Commission of India v. Steel Authority of India*, (2010) 10 SCC 744, ¶ 96(E).

¹⁸⁷ See Report of Eleventh Five Year Plan: Inclusive Growth, PLANNING COMMISSION (2007-12), ¶11.1, http://planningcommission.gov.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf (Last visited September 10, 2011). Note that under the proposed 12th Five Year Plan, there is no specific working group on 'Competition Policy'. There is a group on 'consumer' which has a representative from CCI. However, a Task Force on National Competition Policy headed by Pradeep Mehta, under the Steering Committee on Industry chaired by Shri. Arun Maira, Member (Industry), Planning commission, to seek inputs for preparation of the strategy for the XII-Plan to raise contribution of manufacturing in the GDP to 25 percent by 2025. Its purpose is to look at the National Competition Policy as part of the new Business Regulatory Framework being developed by the Planning Commission. See Version II of Draft NCP 2011, *supra* note 18.

¹⁸⁸ *Id.*, ¶11.37.

¹⁸⁹ Roger Zach and Adrian Kunzler, *Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law* in THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES 61, 71 (2010).

¹⁹⁰ *Id.*, 61.

¹⁹¹ Which has a focused mandate "to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other

striction and not consumer welfare. Thus, the expression “*to protect the interest of consumers*” in the Act, must be interpreted broadly in deciding disputes of individual consumers.¹⁹² One should not lose sight of the fact that as a specialised body, the CCI may not have been created to do the same job for which there is a body already in existence in the form of a Consumer Forum/Commission.¹⁹³ The challenge before the CCI is to balance the expectations of consumers in the short term and focus upon prohibiting anti-competitive conduct and abuse of dominance, regulating mergers and forestalling market failures, ultimately protecting the interest of consumers.

C. PRIVATE ENFORCEMENT ISSUES

Private enforcement of competition law primarily serves the restorative-compensatory objective-function, since private actions ensure compensation for those harmed by anti-competitive conduct.¹⁹⁴ The rationale behind such an approach is to better reach consumers and undertakings, and enhance their access to forms of legal action to protect their rights.¹⁹⁵ Enhanced private enforcement will maximize the amount of enforcement as a means additional to public enforcement. Increased enforcement of the law will increase the incentives for compliance.¹⁹⁶

On the other side of the coin, however, the challenge in promoting ‘private enforcement’ would involve questions such as the following- what would be the amount of compensation? At what level would the competition agency share evidence obtained during investigations? What will be the repercussions of this practice on the leniency program of the competition agency? What will the role of the competition agency be in calculating damages?

authorities for the settlement of consumers’ disputes and for matters connected therewith” – Preamble to Consumer Protection Act, 1986.

¹⁹² Note that the Competition Amendment Act of 2007 substituted “receipt of a complaint” in §19 with “receipt of any information, in such manner” to enable the Commission to inquire into any alleged contravention on receipt of any information instead of receipt of a complaint. Thus, the status of the complainant was changed to that of an informant. *See* the Competition (Amendment) Act, 2007, §13.

¹⁹³ This approach is evident from the cases that were closed by the Commission under §26(2) on the ground of individual disputes, not disclosing any AAEC. For example in Case No. 5/2011 (against *UP State Power Corp.*) the Commission found no competition issue involved in the matter. The Commission said,

“the allegations levelled against Opposite Party may amount to deficiency in service but elements of anti-competitive agreement and abuse of dominant position definitely stand on a higher platform than deficiency in services. Therefore, it is abundantly clear that the present case is an individual consumer dispute with the Opposite Party having no bearing on competition in India.

¹⁹⁴ Assimikis P. Komninos, *Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari*, SSRN 1870723 (2011).

¹⁹⁵ Green Paper - Damages actions for breach of the EC antitrust rules {SEC(2005) 1732} EU.

¹⁹⁶ Private enforcement has been particularly strong in US for constitutional reasons. However, the same is not the situation in EU.

The Act provides for private enforcement. The power lies with the CompAT to determine the eligibility and quantum of compensation due to a person applying for the same.¹⁹⁷ Individual applications or even a representative suit may be preferred where any loss or damage is caused to numerous persons having the same interest, with the permission of the CompAT.¹⁹⁸

D. ISSUES IN ENFORCEMENT OF LAW

As the competition law in India is approaching the completion of a decade, the cases before the CCI have brought to light several issues relating to the enforcement of the law. In particular there are issues raised in respect of the interpretation of various provisions of the Act and the approach of the CCI in handling cases under §§ 3 and 4.

Detecting cartels has been a significant challenge before the CCI. This could be attributed to several reasons: absence of provisions relating to dawn raids, shortage of resources and staff and so on. Leniency provisions have helped various jurisdictions to detect cartels. The Act provides for such a provision,¹⁹⁹ however, no one has approached the CCI under these provisions so far. There appears to be a chicken-and-egg situation. This may be due to the fact that there is no precedent to show the deterrent effect of hiding a cartel. This ring can be broken only if the CCI comes up with stringent orders with high penalties in the near future.

There has been debate over the ‘*per se*’ and ‘rule of reason’ tests under the Act and in particular over the scope of the term AAEC. This debate has to do with ‘burden shifting’ in proving a case.²⁰⁰ In the Indian context, this is again an area which would require time to be settled (after a couple of cases are decided by the Apex Court), although the CCI’s approach can be discerned from decided cases.

There are several issues in relation to the provisions of abuse of dominant position, especially in the context of applicability of ‘collective dominance’, determining predatory pricing, leveraging, and access to ‘essential

¹⁹⁷ The Competition Act, 2002, §53N.

¹⁹⁸ Order 1, Rule 8 of the First Schedule to the Code of Civil Procedure, 1908 applies. Note that provisions relating to compensation also occur at §12B MRTP Act. *See* Ankur Exports Pvt. Ltd. v. Monopolies and Restrictive Trade Practices Commission, 2010 Comp L R 43(Delhi) (Held application for compensation maintainable even if a civil suit is pending).

¹⁹⁹ Under §46 provides for a power to impose lesser penalty and accordingly The Competition Commission of India (Lesser Penalty) Regulations, 2009 have been framed.

²⁰⁰ Rule of reason analysis is fact-based analysis to evaluate whether alleged practices places “unreasonable restraint” on competition. Initially the plaintiff has this burden to show anti-competitive effect which defendant has to discharge by responding with competitive effect. In US the rule of reason approach has undergone changes to include the ‘Quick Look’ and ‘modified rule of reason’ approach. *See Antitrust Law Developments*, American Bar Association, 46-76 (2007).

facilities'.²⁰¹ These issues, again, would require some time to settle in due course of CCI's dealing with cases and subsequent interpretation by the courts.

E. SECTORAL OVERLAPS – WAY TO HARMONIZATION

The Raghavan Committee emphasized that although it does not directly form part of the competition law, legislation regarding various regulatory authorities fell under the larger ambit of competition policy, and that rationalization in this regard was an aspect to be addressed.²⁰² This was reiterated in 2007 by the Working Group tasked with framing a policy for coordination between the CCI and sectoral regulators.²⁰³ While recognizing that the possibility of divergence or even conflict of views between the CCI and sectoral regulators cannot be altogether ruled out, it was recommended that the coordination and cooperation between the CCI and sectoral regulators should be maximized.²⁰⁴

There is possibility for conflict between jurisdictions of the CCI and other sectoral regulators like the Reserve Bank of India (RBI), the Telecom Regulatory Authority of India (TRAI), the Insurance Regulatory and Development Authority (IRDA), the Petroleum and Natural Gas Board (PNGRB)²⁰⁵ and electricity regulators.²⁰⁶ For example, under the Electricity Act, 2003, the power is with the Central Electricity Regulatory Commission to issue directions to a licensee or generating company if it enters into any agreement or abuse of their dominant position or enter into a combination, this is likely to cause an adverse effect on competition in electricity industry.²⁰⁷ Now this poses a question as to who would exercise jurisdiction and opens up the doors for forum shopping.²⁰⁸ This is definitely a challenge, and one which requires answers at a policy level.²⁰⁹

²⁰¹ See Vijay Kumar Singh, *Applying "Essential Facility Doctrine" – What's the Right Approach?*, MANUPATRA COMPETITION LAW REPORTS, (2011), B-151.

²⁰² SVS Raghavan Report on Competition Policy, 2000, ¶4.1.9.

²⁰³ *Supra* note 50, ¶7.2.5.

²⁰⁴ *Id.*, ¶8.6.

²⁰⁵ Through an interim order, the Delhi High Court has stopped the CCI from investigating alleged anti-competitive practices in aviation fuel supply at the behest of state-owned oil marketing companies, stating that the case falls under the remit of the PNGRB.

²⁰⁶ See <http://www.financialexpress.com/news/mca-to-look-into-regulatory-overlap-in-competition-law/806775/0> (Last visited September 10, 2011).

²⁰⁷ Electricity Act, 2003, §60.

²⁰⁸ Competition Law and the Power Sector of India, Foxmandal Little August 2009, available at http://www.foxmandallittle.com/Publications/upload/competition_law_and_the_power_sector_of_india.pdf (Last visited September 10, 2011).

²⁰⁹ Most recently, Version II of the Draft NCP 2011 (*see supra* note 18) reiterates the need for harmonization of CCI and Sectoral regulators

“ In essence a framework for an interface between a competition regulator and a sectoral regulator should deliver the following benefits: a) appropriately identify issues of concern, b) ensure appropriate channelisation of various concerns to the appropriate forum, and obtaining corrective action at the earliest; c) establish a framework that avoids

F. EXTRATERRITORIAL APPLICATION OF THE ACT

The world economy has experienced a progressive international economic integration for the last half century. There has been a marked acceleration in the process of globalisation and liberalisation during the last three decades.²¹⁰ Business in today's context has expanded beyond national boundaries and is obtaining a transnational character. In this background, the Act provides for extraterritorial jurisdiction of the CCI.²¹¹ There appear to be no cases of this nature before the CCI as yet, but keeping in view the number of multinational/transnational companies operating in the country, and cross-border mergers, it would be interesting to track the development of the law on this front.

G. KEEPING UP WITH DEVELOPING COMPETITION LAW JURISPRUDENCE

As noted above, the Act is new to India and it will take time to have settled jurisprudence on principles of competition law. Although the substantive decision in *SAIL*²¹² by the Supreme Court has settled few questions, a lot remains to be settled in the field of law.

It is interesting to note that though the CCI is a specialised body dealing with matters under the Act followed by appeal to the CompAT and ultimately to the Supreme Court, a few High Courts have utilised Art. 226 to express their views on these matters. Most of these opportunities arose in writs in which tender conditions floated by the government were challenged.²¹³

One such recent case was decided by the Gauhati High Court²¹⁴ on January 28, 2011. In this case, despite the objection from the respondents

duplication of effort; d) conserve the Commission's resources and limit its ambit only to matters of competition; and e) promote capacity building and developing expertise both at the level of the competition regulator and the sectoral regulator (¶10.2.5).

²¹⁰ SVS RAGHAWAN REPORT ON COMPETITION POLICY, 2000, ¶ 3.1.1.

²¹¹ Competition Act, 2002, §32.

²¹² *Supra* note 90.

²¹³ *The Indure Private Limited v. Chhattisgarh State Power Generation Company Ltd.*, 2010 Comp LR 1(Chhattisgarh) (This was a case in which a consortium agreement was challenged. The Court opined that bidding must be fair, non-collusive and responsive, and that acts done in the course of bidding which eliminate the element of competitiveness will be unresponsive. Consequently, the Court held that it would amount to cartelization to allow a consortium partner to be a common partner in more than one consortium).

²¹⁴ *See Jai Balaji Industries Ltd. v. Union of India*, AIR 2011 Gau 109, ¶128 onwards (for a discussion on the applicability of the Competition Act); *See also East Line Projects Pvt. Ltd. v. Dr. B. Borooah Cancer Institute Guwahati* AIR 2005 Gau 5 (A condition in a tender to establish a pharmacy was challenged on the ground that "the stockist enjoy a dominant position ... if he is allowed to compete with the distributor or the retailer, it will amount to abuse of dominant position which will be violative of the provisions of Section 4 of the Competition Act, 2002". The court found that "considering the avowed object for which the pharmacy is going to be established, ... the Competition Act, 2002 does not apply in the matter.") *See also Novartis*

that “it would not be proper for the Court to entertain the instant writ petition when the Competition Act itself prescribes an efficacious and adequate alternative remedy for deciding the dispute”, the Court discussed the applicability of the provisions of the Act. Further, the court went on to state §4(1) of the Act is in *pari materia* with Art. 86 of the EC treaty.²¹⁵ The Court made a categorical finding as follows:

“According to this Court, GMDA being neither producing DI Pipes nor in the business, even not involved in any activity in the DI Pipe market, rather a consumer/purchaser, not controlling the price of DI pipes in the market, has no dominant position in the market and unless a dominant position is there question of abusing such position does not arise. When GMDA is not controlling the market, as alleged by the Petitioner, as its monopoly or creating monopoly in favour of anybody, it cannot be said that GMDA even abused its position, hence Sub-section (1) of Section 4 of the Competition Act has no application in the case in hand.”²¹⁶

On the violation of §3(1), the Court relied upon the decision of the Madras High Court in *P.G. Narayanan*,²¹⁷ holding that “entering into an agreement is *sine qua non* for attracting sub-section (1) of §3 of the Competition Act, particularly in contractual matters. In the instant case, the fact remains that neither the GMDA nor the State had entered into any agreement.” Thus, on the rationale above, the matter was ousted from the CCI’s jurisdiction. Keeping track of the findings of the various High Courts of the country and avoiding conflict with any of them is indeed a challenging task for the CCI.

H. INCORPORATING ‘COMPETITION CULTURE’ IN THE ECONOMY

Fali S. Nariman said, “competition law is the handmaiden of modern economics; and economics motivates laws which in turn drive the economy; the bundle of laws that reflect societal values is now known as ‘sociological

Vaccines v. Aventis Pharma, 2010 (2) Bom CR 317 (The case related to a Joint Venture agreement containing a non-compete clause. As the matter came before the Court under §9 of the Arbitration Act, court rejected the submission with regard to the applicability of the provisions of §§3 and 4 of the Competition Act, 2002.)

²¹⁵ *Id.*, ¶131 (As §4(1) is *pari materia* to the provisions of Art. 86 of EEC [Now Art. 101, TEFU], as it appears from *Garden Cottage Foods Ltd v. Milk Marketing Board* (1984) 1 A.C. 130).

²¹⁶ *Id.*, ¶133.

²¹⁷ *P.G. Narayanan v. Union of India* (2005) 3 MLJ 210, ¶14 (This case came up as a PIL against the grant of a DTH license to a relative of a Union Minister. While opining that the Competition Act was not relevant to this case, the Court went on to say that the Competition Act would apply only upon parties entering into the licensing agreement, and that this would occur only after clearances are obtained, the bank guarantee is furnished and the requisite fee is paid).

jurisprudence’.”²¹⁸ Promoting a culture of competition is important. Shri M. Veerappa Moily has aptly said “competition is essential for imbibing the culture of innovation and development of better technology... Competition coupled with expansion is required for realizing true potential of the people.”

There is a need for outreach and training for lawyers, judges²¹⁹ and officers dealing in areas of the economy which share a boundary with competition law and policy, coupled with extensive advocacy efforts.

VI. CONCLUSION

The gains sought through a competition law can only be realised with effective enforcement. Weak enforcement of competition law can be as significant an impediment to consumer interest as the altogether absence of such a law.²²⁰ The CCI has to meet this challenge and prove itself to be an expert body under the Act- something it has been able to do within a short span of two years of its enforcement in spite of the limitations it has.

Competition law and policy in India is in a developmental stage. This is quite evident from the recent policy decisions of the Government in this regard, especially in view of the ongoing work on the National Competition Policy and the consequential changes it would bring to the Act.²²¹

To conclude, over the last decade, a significant path has been travelled by Indian competition law and policy. This, however, is just the beginning, and there are many milestones yet to be achieved in terms of achieving goals of competition law. As was rightly said by Robert Frost:²²²

²¹⁸ FALI S. NARIMAN, ‘LAW AND ECONOMICS’ IN *COMPETITION LAW TODAY: CONCEPTS, ISSUES, AND THE LAW IN PRACTICE* (Vinod Dhall, ed., 2007).

²¹⁹ Judicial Enforcement of Competition Law, OECD POLICY ROUNDTABLE (1997). OCDE/GD(97)200The judiciary has a central role in the implementation of competition policy. Competition laws are written broadly, and judicial precedent is important in interpreting these statutes, even in non-common law countries. Fali S. Nariman has also said on the same lines, “since competition law is about economic behaviour, it is essential that the regulator, the civil servant, the judge, and lawyer be acquainted with, and become proficient in the application of economic concepts to the needs of the society.” *See id.*

²²⁰ S. Chakravarthy, *The Need and Rationale for and the Objectives of Competition Policy and Competition Law*, available at <http://www.circ.in/pdf/CPS06-Rationale-For-Competition-Policy-Law.pdf> (Last visited on September 7, 2011).

²²¹ On this, M. Veerappa Moily, Union Corporate Affairs Minister, has said the enactment of a new national competition policy will be the second biggest reform initiative after the 1991 economic reforms. The Minister has said we need to put in such a system of governance and policy trust that will pave way for the concept of healthy competitive environment. (*during second Consultative Meeting on draft National Competition Policy at FICCI Auditorium September 23, 2011*)

²²² Robert Frost, *Stopping by Woods on a Snowy Evening*, NEW HAMPSHIRE (1928).

The woods are lovely, dark, and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.