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# Competition commission: Power, duty and functions

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**Abstract**
The post 1991 Indian economy has chartered the course of liberalisation which has provided for a larger role for the private players. However, the government did not lose the sight of the fact that in order to protect the rights of the citizens the reins over the economic functions of the said private players cannot be set loose. It was found necessary that the practices of the business houses be controlled to ensure an environment of fair competition. This paper is an attempt to understand the journey of the Indian legislative process regarding the regulation of the market practices.

**Keywords:** competition act, competition commission, MRTP act, sherman act, raghavan committee

## Introduction

### Competition Defined
The term 'competition' is not defined in law but is generally understood to mean the process of rivalry to attract more customers or enhance profit or both. Competition law deals with market failures on account of restrictive business practices in the market. Restrictive business practices can be of many kinds and include inter-alia agreements to restrict competition, cartelization, predatory pricing, tie-in sales, re-sale price maintenance, abuse of dominance etc.

### Need for regulating competition
Governments should regulate competition to prevent unfair competition that might lead to an oligopoly or a monopoly which might reduce competition. Thus, regulating competition is necessary to maintain an environment wherein the situation is conducive for protection and promotion of healthy competition in the market.

### History of competition regulation

### Roman legislation
An early example of competition law can be found in Roman law. The *Lex Julia de Annona* was enacted during the Roman Republic around 50 BC. To protect the grain trade, heavy fines were imposed on anyone directly, deliberately and insidiously stopping supply ships. Under Diocletian in 301 AD an edict imposed the death penalty for anyone violating a tariff system, for example by buying up, concealing or contriving the scarcity of everyday goods. More legislation came under the Constitution of Zeno of 483 AD, which can be traced into Florentine Municipal laws of 1322 and 1325. This provided for confiscation of property and banishment for any trade combination or joint action of monopolies private *or* granted by the Emperor. Zeno rescinded all previously granted exclusive rights. Justinian I subsequently introduced legislation to pay officials to manage state monopolies.

### Middle ages
Legislation in England to control monopolies and restrictive practices were in force well before the Norman Conquest.
[1] The Domesday Book recorded that "foresteel" (i.e. forestalling, the practice of buying up goods before they reach market and then inflating the prices) was one of three forfeitures that King Edward the Confessor could carry out through England [2]. But concern for fair prices also led to attempts to directly regulate the market. Under Henry III an act was passed in 1266 [3] to fix bread and ale prices in correspondence with grain prices laid down by the assizes. On top of existing penalties, the statute stated that overcharging merchants must pay the injured party double the sum he received, an idea that has been replicated in punitive treble damages under US antitrust law.
In continental Europe too there were several statutes and administrative guidelines to regulate competitive practices.
Around this time organizations representing various tradesmen and handicrafts people, known as guilds had been developing, and enjoyed many concessions and exemptions from the laws against monopolies. The privileges conferred were not abolished until the Municipal Corporations Act 1835.

### Early competition law in Europe
The English common law of restraint of trade is the direct predecessor to modern competition law later developed in the US. It is based on the prohibition of agreements that ran counter to public policy, unless the reasonableness of an agreement could be shown. It effectively prohibited agreements designed to restrain another's trade. The 1414 *Dyer's* is the first known restrictive trade agreement to be examined under English common law. A dyer had given a bond not to exercise his trade in the same town as the plaintiff for six months but the plaintiff had promised nothing in return. On hearing the plaintiff's attempt to enforce this restraint, Hull J exclaimed, "per Dieu, if the plaintiff were here, he should go to prison until he had paid a fine to the King." The court denied the collection of a bond for the dyer's breach of agreement because the agreement was held to be a restriction on trade [4]. English courts subsequently decided a range of cases which gradually developed competition related case law, which eventually were transformed into statute law [5].
Considering that the political system as prevailing then in

England is incapable and also unwilling to regulate a healthy competition, English courts developed case law on restrictive business practices. The statute followed the unanimous decision in *Darcy v. Allein* 1602, also known as the Case of Monopolies [6], of the King's bench to declare void the sole right that Queen Elizabeth I had granted to Darcy to impost playing cards into England. Darcy, an officer of the Queen's household, claimed damages for the defendant's infringement of this right. The court found the grant void and that three characteristics of monopoly were (1) price increases (2) quality decrease (3) the tendency to reduce artificers to idleness and beggary. This put an end to granted monopolies until King James I began to grant them again. In 1623 Parliament passed the Statute of Monopolies, which for the most part excluded patent rights from its prohibitions, as well as guilds. From King Charles I, through the civil war and to King Charles II, monopolies continued, especially useful for raising revenue. Then in 1684, in *East India Company v. Sandys* [7] it was decided that exclusive rights to trade only outside the realm were legitimate, on the grounds that only large and powerful concerns could trade in the conditions prevailing overseas.

**Modern competition law**

While the development of competition law stalled in Europe during the late 19th century, Canada in 1889 enacted what is considered the first competition statute of modern times. The *Act for the Prevention and Suppression of Combinations formed in restrained of Trade* was based one year before the United States enacted the most famous legal statute on competition law, the Sherman Act of 1890. It was named after Senator John Sherman who argued that the Act "does not announce a new principle of law, but applies old and well recognised principles of common law".

The Sherman Act of 1890 attempted to outlaw the restriction of competition by large companies, who co-operated with rivals to fix outputs, prices and market shares, initially through *pools* and later through *trusts*. Section 1 of the Sherman Act declared illegal "every contract, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". Section 2 prohibits monopolies, or attempts and conspiracies to monopolize. Courts applied the Act without consistent economic analysis until 1914, when it was complemented the Clayton Act which specifically prohibiting exclusive dealing agreements, particularly tying agreements and interlocking directorates, and mergers achieved by purchasing stock. From 1915 onwards the *rule of reason* analysis was frequently applied by courts to competition cases.

**The history of the Indian competitive legislation**

The present economic thinkers do not blindly believe in the self-correcting virtues of the invisible hand of market mechanism; but a system of institutional regulations guarded interventions to keep the market on the right track for the common good. Keeping this in mind, India adopted the mixed pattern of economy which combines the pros of free interplay of market forces and reasonable state controls all in one package.

The history of the Indian competitive legislation goes back to the Monopolies Enquiry Commission. In 1964, when the Indian democracy was in its nascent state – barely 17 years old – the Government of India appointed the Monopolies Enquiry Commission to enquire into the effect and extent of concentration of economic power in private hands and prevalence of monopolistic and restrictive trade practices in important economic activity other than agriculture. The Commission submitted its report along with the Monopolies and Restrictive Trade Practices (MRTP) Bill, 1965 and on June 1st, 1970 the MRTP Act came into force as the MRTP Act, 1969.

The MRTP Act gave new dimensions to the economic legislation of the post – independence era. This enactment imbibed the social and economic philosophy enshrined in the Constitution.

The principle objectives sought to be achieved through the Act, as stated in the Preamble to the Act are as follows:

1. Prevention of concentration of economic power to the common detriment
2. Control of monopolies
3. Prohibition of monopolistic trade practices, and
4. Prohibition of restrictive trade practices

The model of the Act was given by the Monopolies Inquiry Commissionset up by the Government of India in 1964 under the Commissionof Inquiry Act of 1952. Substantial departure was, however, made at the time of its enactment retaining only the skeleton. The provisions on restrictive trade practices, including the resale maintenance are substantially based on the UK legislations and particularly Restrictive Trade Practices Act, 1956 and the Resale Price Act, 1964. Likewise the provisions on unfair trade practices are influenced by the UK Fair Trading Act, 1973, the anti trust legislations in USA; notably the Sherman Act, the Clayton Act and the Federal Trade Commission Act, as also the Australian and Canadian legislations have also been a guide in framing the provisions relating to monopolistic, restrictive and unfair trade practices.

However, the MRTP Act was unable to deliver as expected partly because of the inherent weaknesses in its own structure and the composition of the MRTP Commission, and partly due to the fact that the attributes of competition (entry, price, scale, location etc) were regulated by separate set of policies. Although the country did witness industrial growth and diversification during this period, the complex network of controls and regulations fettered the freedom of enterprises. Administrative delays and rent seeking opportunities spawned an inefficient industrial structure, which was beset with problems of sub-optimal scales of operation, capacity under-utilization, lack of technological upgradation and high levels of industry concentration.

The Industrial Policy Statement of 1980 focused attention on the need for promoting competition in the domestic market, technological upgradation and modernization. Far reaching changes were made by the MRTP (Amendment) Act, 1991. The Reforms covered a broad spectrum such as further liberalization of industrial licensing dispensing with the requirement of prior government approval before affecting expansion by undertakings, registered under the MRTP Act, 1969 progressively diluting the monopoly of the public sector industries, except where security and strategic concerns still dominate, abolition of levy and non-levy price system, and reducing purchase preference for public sector enterprises. The Industrial policy statement of 1991 also emphasized the attainment of technological dynamism and international

competitiveness. It noted that the Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over-regulated environment. The main thrust, as it stood before the Reforms of 1991, to prevent concentration of economic power to the common detriment, has now shifted to effectively curb monopolistic, restrictive and unfair trade practices.

**The need for a new competition law**

The reforms of 1991 were considered inadequate, accentuating the need for a new competition law. This led to the constitution of a High Level Committee on Competition Policy and Law in October, 1999 also known as the "Raghavan Committee". The terms of reference of the Committee inter alia included recommending a suitable legislative framework relating to competition law, changes relating to legal provisions in respect of restrictive trade practices and suitable administrative measures required to implement the proposed recommendations. This committee went into the modalities of bringing into a law and a law enforcement authority in the form of the Competition Act and the Competition Commission of India respectively. The Raghavan Committee Report states that the essence and spirit of competition should be preserved as it encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. The Parliamentary Standing Committee on Home Affairs to which the Competition Bill, 2001 was referred for examination, concluded that the rigidly structured MRTP Act necessitated its repeal in view of the Government's policy of being facilitator rather than regulator. Keeping in view the economic developments that have resulted in opening up of the Indian economy, removal of controls and consequent economic liberalization which required that the Indian market be geared to face competition within the country and outside, the Competition Act, 2002 was enacted pursuant to Raghavan Committee's Report.

**The Competition Act, 2002**

The Competition Act has been designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies. Its objects are lofty, and include the promotion and sustenance of competition in markets, protection of consumer interests and freedom of trade of other participants in the market, all against the backdrop of the economic development of the country. It is compact, composed of 66 sections. The legislation is procedure-intensive and is structured in an uncomplicated manner. The initial part contains the definition clause. The first part also includes a description of activities prohibited under the Competition Act. This is crucial to our understanding of the letter and spirit of the Competition Act, as all principles enunciated subsequently flow from these provisions. Structurally this is followed by a description of the Competition Commission of India (CCI). Quite logically, a significant portion of the Competition Act has been devoted to the CCI and the executive powers granted to this statutory body since it is ultimately the decision taken by the Commission which would provide both direction to the Act as well as the trends displayed in enforcement of the various provisions of the Act. Similar to most legislations the Competition Act is concluded by a chapter discussing the miscellaneous aspects of the legislation and generally applicable principles.

The rubric of the Act has essentially four compartments:

1. Anti- Competition Agreements
2. Abuse of Dominance
3. Combination Regulations
4. Competition Advocacy

**Powers duties and functions of the Competition Commission of India**

Chapter IV of the Competition Act, 2002 deals with the duties, powers and functions of the Competition Commission of India. The said chapter comprised of 23 Sections originally out of which 6 have been omitted by the Competition (Amendment) Act, 2007.

Section 18 of the Act deals with the duties of the commission. It provides that subject to the provisions of the Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.

Thus, it can be said that the Act mandates the Commission to do all what is necessary to carry out the purposes of the Act stated in the Preamble of the Act.

While performing its aforesaid duties the Commission may, with the prior approval of the Central Government and for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with any agency of any foreign country.

It may be further said that the purpose of this section is to carry out the objectives of the Article 38 i.e State to secure a social order for the promotion of welfare of the people and Article 39 of The Constitution of India i.e certain principles of policy to be followed by the State, of the Constitution of India.

For the sake of convenience the Sections under this chapter is divided under four groups in this term paper-

1. Section 19, 26, 27 and 28
2. Section 20, 29,30 and 31
3. Section 32
4. Miscellaneous Section

**Provisions Related to Steps Taken by Commission if there is Anti-Competitive Agreement or Abuse of Dominant Power -Sections 19, 26-28**

Section 19 of the Act empowers the Commission to inquire into certain agreements and dominant position of enterprise if in view of the Commission there is an alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 of the Act. The initiation of the inquiry by the Commission can be done either on its own motion or on receipt of a complaint made by any person, consumer or their association or trade association. Thus the Act empowers the Commission to initiate an inquiry into any alleged contravention of the provision prohibiting the entering into by the persons into anti-competitive agreements or into the cases of alleged abuse of dominant position by a trader or the business man.

The Commission can also inquire into the aforesaid alleged contravention on the basis of a reference made to it by the

Central Government or a State Government or by a statutory authority.

The aforesaid Section further provides the factors which the Commission must consider while inquiring into any alleged violation of the provisions of the Act prohibiting the anti-competitive agreements by a business enterprise. Following are the factors which are to be taken into regard by the Commission while holding such inquiries:

a) creation of barriers to new entrants in the market;
b) driving existing competitors out of the market;
c) foreclosure of competition by hindering entry into the market;
d) accrual of benefits to consumers;
e) improvements in production or distribution of goods or provision of services;
f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

The Section 19 further provides the factors which the Commission must take into consideration while inquiring into any alleged case of abuse of dominant position by a business enterprise and the factors which are to be considered by the Commission shall be as follows:

a) market share of the enterprise;
b) size and resources of the enterprise;
c) size and importance of the competitors;
d) economic power of the enterprise including commercial advantages over competitors;
e) vertical integration of the enterprises or sale or service network of such enterprises;
f) dependence of consumers on the enterprise;
g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
i) countervailing buying power;
j) market structure and size of market;
k) social obligations and social costs;
l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
m) Any other factor which the Commission may consider relevant for the inquiry.

Section 19 further lays down the consideration to be regarded by the Commission for determining whether a market constitutes a "relevant market" for the purposes of this Act. It says that for determining whether the market constitutes a relevant market the Commission shall have due regard to the "relevant geographic market" and "relevant product market".

The term 'relevant market' is defined under Section 2(r) of the Act. It provides that relevant market is a market which may be determined by the commission with reference to the relevant product market or the relevant geographical market or with reference to both the markets.

Section 2(s) of the Act defines relevant geographic market. It provides that "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

Section 2(t) of the Act defines relevant product market. It provides that "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Section 19 further says that the Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:-

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

The Commission shall, have due regard to all or any of the following factors, while determining the "relevant product market" for the purpose of the present Act, viz.

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

The perusal of Section 19 of the Competition Act, 2002 reveals that the legislature has tried to give a comprehensive blueprint to the Commission while conducting an inquiry into alleged practices of entering into anti-competitive agreements and abuse of dominant position by a business enterprises. For analysing this Section we have to read it with Section 26 and 27 of this Act.

Section 26 provides for the procedure for inquiry on complaints under section 19.It provides that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under Section 19,if the commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter. But if there is no prima facie case, it shall close the matter as it deems fit and give the copy of the order to the concerned authority.

Provided that if there is previous information on that subject matter then new information will be clubbed with the previous information.

The Director General shall, on receipt of direction under above provision, submit a report on his findings within such period as may be specified by the commission Thereafter the Commission shall forward a copy of the report referred to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.

If the report of the Director General relates on a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director

General. If, after consideration of the objections or suggetions, the Commission agrees with the recommendation of the Director General, it shall close the matter. But if the commission is of the opinion that further investigation is called for, it may direct for investigation in the matter by Director General.
If the report of the Director General recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.
Section 27 of the Act provides about the orders by Commission after inquiry into agreements or abuse of dominant position. It states that where after inquiry the Commission finds that any agreement referred to in section 3 [8] or action of an enterprise in a dominant position, is in contravention of section or section 4 [9], as the case may be, it may pass all or any of the following orders, namely:-

a) Direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
c) Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten percent of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher.
d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
f) pass such other order or issue such directions as it may deem fit.
   Section 28 of the act lays down division of enterprise enjoying dominant position. It provides that the Central Government, on recommendation under clause (f) of section 27, may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

2. In particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely:-

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

It further provides that notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.
This Section empowers the Central Government on the recommendation of the Commission to order division of an enterprise enjoying dominant position so as to ensure that it does not abuse its dominant position. Sub Section (2) of the said clause enumerates the various matters relating to such division in respect of which the Central Government may pass the order for division of such enterprise.

**What is an anti-competitive agreement?**
An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:-

- Agreement to limit production and/or supply;
- Agreement to allocate markets;
- Agreement to fix price;
- Bid rigging or collusive bidding;
- Conditional purchase/sale (tie-in-arrangement);
- Exclusive supply/distribution arrangement;
- Resale price maintenance; and
- Refusal to deal.

**What constitutes abuse of dominance?**
Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumer or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes imposing unfair conditions or price, predatory pricing, limiting production /market or technical development, creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access and using dominant position in one market to gain advantages in another market.

**When the Commission may initiate inquiry?**

a) On Its own on the basis of information and knowledge in its possession, if there is prima facie case or
b) On receipt of an information, or
c) On receipt of a reference from the Central Government or a State Government or a statutory authority.

**Who can provide the information?**
Any person, consumer, consumer association or trade association can provide information relating to anticompetitive agreements and abuse of dominant position.

a) A person includes an individual, Hindu undivided family

(HUF), company, firm, association of persons (AOP), body of individuals (BOI), statutory corporation statutory authority, artificial judicial person, local authority and body incorporated outside India.
b) A consumer is a person who buys products (goods and services) for personal use or for other purposes.
c) Intermediate customers can also provide information.

**Types of the orders the Commission is empowered to pass?**

a) During the course of inquiry, the Commission can pass interim order [10] restraining a party from continuing with anti-competitive agreement or abuse of dominant position.
b) The Commission can impose a penalty of not more than 10% of the average turnover of the last 3 preceding financial years of the enterprise. In case of a cartel [11], the Commission can impose on each member of the cartel, a penalty of up to 3 times its profit for each year of the continuance of such agreement or upto 10% of its turnover for each year of continuance of such agreement, whichever is higher.

**After the Inquiry?**

a) The Commission may direct a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement or abuse its dominant position (cease and desist order). The Commission may also direct modification of such agreement.
b) The Commission may direct division of enterprise in case it enjoys dominant position.

**Some of the important cases decided by the Commission under this Section**

Competition Commission of India (CCI) in its judgment under Competition Act, 2002 [12], has imposed a penalty of US$ 140 million (INR 630 Crores) on DLF Limited (DLF), one of the largest real estate Developers in India for abuse of dominance and unfair trade practices.

In addition to the monetary penalty, CCI has ordered DLF to cease and desist from imposing and formulating such unfair conditions. Further, DLF has also been ordered to modify such conditions within 3 months.

CCI while deciding in favour of consumers (allottees of the apartments), Belaire Owner's Association, held that DLF by placing discriminatory and abusive clauses in the Apartment Agreements is guilty of abusing its dominant position. The Apartment Agreements impose conditions unfair and to the detriment of the consumers and which are altered or included unilaterally by DLF for its own benefit and to the detriment of the allottees.

Earlier, the CCI in its Order dated 20th May, 2010, had concluded that a prima facie case existed against DLF and had ordered the investigation into the matter by Director General (DG). After due investigation and submission of report by DG and hearing all the parties in the matter, the final order holding DLF liable under the Competition Act, 2002 for abusing its dominance was passed by CCI.

The consumers/allottees of apartments had approached CCI when DLF extended the deadline by which the possession of the apartments was to be given to the consumers. Further, DLF also increased the number of proposed floors to be constructed in the apartment complex from 19 to 29. The consumers/allottees of the apartment were aggrieved by the increased number of floors as it would affect their use and enjoyment of the common facilities which would now be utilized by more flat owners. The allottees claimed that DLF includes and imposes unfair and discriminatory conditions in the apartment agreements which unilaterally favour DLF to the detriment of the allottees.

**Combined effect of Sections 20, 29-31**

Section 20 of the act deals with Inquiry into combination by Commission. The inquiry in to combinations can be done by commission under two circumstances-

1. Pre-combination enquiry under Section 6(2) of the Act.
2. Post combination under this section.

This Section provides that the Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:

Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect. The effect of this provision is that even if a combination has very serious appreciable adverse effect on competition, an enquiry cannot be instituted if such combination does not come to the knowledge of the commission within one year. Even the central government has no power to move the commission against such a combination. It is submitted that this provision is against the public interest.

It further provides that the Commission shall, on receipt of a notice under sub-section (2) of section 6 inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.

It further provides that notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover, for the purposes of that section.

It is also provided that for the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:-

a) actual and potential level of competition through imports in the market;
b) extent of barriers to entry into the market;
c) level of combination in the market;
d) degree of countervailing power in the market;
e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f) extent of effective competition likely to sustain in a market;
g) extent to which substitutes are available or are likely to be available in the market;

h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
j) nature and extent of vertical integration in the market;
k) possibility of a failing business;
l) nature and extent of innovation;
m) elative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

This sub section can be compared with Section 19(4). This can be divided into two parts-

1. from clause (a) to (l).
2. from clause (m) to (n).

Only if after considering the factors given under Clause (a) to (l) the commission will enquire further to find out that whether the combination is having or likely to have adverse effect on competition, after taking into consideration the relative advantage, by way of contribution to the economic development, by such combination. So, even if a combination has appreciable adverse effect on combination it will be permitted to function provided there is relative advantage by way of contribution to economic development.

It is to be noted that clause (m) provides exception to the general rule that a combination having appreciable adverse effect is not allowed to function.

Clause (n) of this sub Section is further exception to clause (m). Under this clause exemption can be granted to any combination having adverse effect on the competition if benefits of the combination outweigh the adverse effect. However, this clause is vaguely drafted as it does not mention in relation to whom the benefit of the combinations are to be considered.

Section 29 of the Act provides the procedure for investigation of combinations. This Section is enacted to carry out the purposes of Section 6.It states that where the Commission is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

After receipt of the response of the parties to the combination, the Commission may call for a report from the Director General and such report shall be submitted by the Director – General within such time as the Commission may direct.

Thereafter if the Commission, is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination or the receipt of the report from the Director-General, direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

The Commission may also invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published.

The Commission may, within fifteen working days from the expiry of the period specified in above paragraph call for such additional or other information as it may deem fit from the parties to the said combination. This additional or other information called for by the Commission shall be furnished by the parties within fifteen days from the expiry of the abovesaid period. Then after receipt of all information and within a period of forty-five working days from the expiry of the period specified in above paragraph the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.

Section 30 deals with the procedure in case of notice under Inquiry into disclosures under sub-section (2) of section 6 [14]. Where any person or enterprise has given a notice under sub-section (2) of section 6, the Commission shall examine such notice and form its prima facie opinion and proceed according the procedure given under Section 29 of the Act.

Section 31 of the Act deals with orders of Commission on certain combinations. Broadly, combination includes acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in similar businesses, or mergers and amalgamations between or amongst enterprises where the total assets or turnover of the combined entity exceed the thresholds specified in the Act in terms of assets or turnover. If a combination causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, it is prohibited and can be scrutinized by the Commission.

It provides that where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.But if the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.

It further provides that if the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination; it may propose appropriate modification to the combination, to the parties to such combination. The parties, who accept the modification proposed by the Commission shall carry out such modification within the period specified by the Commission. But If the parties to the combination, who have accepted the modification fail to carry out the modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and the Commission shall deal with such combination in accordance with the provisions of this Act.

On the other hand If the parties to the combination do not

accept the modification proposed by the Commission such parties may, within thirty working days of the modification proposed by the Commission, submit amendment to the modification proposed by the Commission and if the Commission agrees with the amendment submitted by the parties it shall, by order, approve the combination. But if the Commission does not accept the amendment submitted then, the parties shall be allowed a further period of thirty working days within which such parties shall accept the modification proposed by the Commission.

If the parties fail to accept the modification proposed by the Commission within thirty working days or within a further period of thirty working days the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.

It further provides that where the Commission has directed that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that-

a) the acquisition referred to in clause (a) of section 5 [15]; or
b) the acquiring of control referred to in clause (b) of section 5 [16]; or
c) the merger or amalgamation referred to in clause (c) of section 5 [17], shall not be given effect to:

Provided that the Commission may, if it considers appropriate, frame a scheme to implement its order under this sub-section.

If the Commission does not, on the expiry of a period of ninety working days from the date of publication pass an order or issue direction in accordance with the provisions of above paragraphs of this Section the combination shall be deemed to have been approved by the Commission. Explanation.-For the purposes of determining the period of ninety working days specified in this Section, the period of thirty working days specified and a further period of thirty working days specified in above paragraphs shall be excluded.

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

It further states that where the Commission has ordered a combination to be void, the acquisition or acquiring of control or merger or amalgamation referred to in section 5, shall be dealt with by the authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly.

**Note-** Nothing contained in this Chapter shall affect any proceeding initiated or which may be initiated under any other law for the time being in force.

**The practical procedure for applicability of this Section is as follows [19];-**

**a) Filing of proposal with the Commission**

An entity proposing to enter into a combination, shall notify the Commission in the specified form disclosing the detail of the proposed combination within 30 days of the approval of such proposal by the Board of Directors or execution of any agreement or other document.

**b) Post file waiting period**

The Commission now provides for a post-filing review period of 210 days, during which the merger cannot be consummated and within which the Competition Commission is required to pass its order with respect to the notice received. If the commission fails to pass an order within the time limit, the proposed combination will be deemed to be approved. The 210-day period applies in case of cross border transactions outside India where one of the contracting parties has a substantial presence in India. Regardless of the size of the transaction, notification is required where the combined asset value or turnover in India exceeds a certain value. This means that it is mandatory for a foreign company with assets of more than $500 million that has a subsidiary or joint venture in India with a substantial investment (above $125 million) to notify the Competition Commission before acquiring a company outside India.

**c) Deposit of fee**

The notice must be accompanied by a fee of approximately $50,000, which may increase to $100,000 in certain cases. Further, the Competition Commission will issue a showcase notice if it is of a prima facie opinion that the combination is likely to cause an appreciable adverse effect on competition in India. A fee of $40,000 is to be filed along with the response to the show-cause notice. In addition, the Competition Commission has the power to compel parties to publish the details of a proposed combination to enable any person from the public to raise objections to such Competition laws in India. Such publication burdens parties with an additional sum of $40,000.

**Combination Investigation Procedure**

If the Commission is of the opinion that a combination is likely to cause or has caused adverse effect on competition, it shall issue a show cause notice to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the prima facie opinion that the combination has or is likely to have appreciable adverse effect on competition, it may direct publication of details, inviting objections from the public and hear them, if considered appropriate. It may invite any person, likely to be affected by the combination, to file his objections. The Commission may also inquire whether the disclosure made in the notice is correct and combination is likely to have an adverse effect on competition.

**Impact on M&A, takeovers, J.V. etc.**

Competition Act governs anti-competitive agreements and prohibits agreements involving production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an 'appreciable adverse effect on competition' in India. Competition Act prohibits the abuse of a dominant position by an enterprise. Under the Monopolies Act, a threshold of 25% constituted a position of strength. However, this limit has been eliminated under the Competition Act. The Competition Act prohibits enterprises from entering into agreements that cause or are likely to cause an ‘appreciable adverse effect on competition within the relevant market in

India'. Under the new regime, the Competition Commission has investigative powers in relation to combinations. Various factors are provided for determining whether a combination will or is likely to have an appreciable adverse effect on competition in India, and penalties are provided for such violations. At present, any acquisition, merger or amalgamation falling within the ambit of the thresholds constitutes a combination. Essentially, a transaction must satisfy two conditions

1. it must involve total assets or turnover, with separate criteria for domestic and international entities [20]; and
2. It must have a territorial nexus with India. Under the originally enacted Competition Act 2002, the reporting of a combination was optional. However, the act now mandates notification within 30 days of the decision of the parties' boards of directors or of execution of any agreement or other document for effecting the combination. The general industry perception is that a memorandum of understanding or a letter of intent will qualify as an 'agreement'. However, these are generally executed to spell out a basic understanding among the transacting parties and to enable the acquirer to conduct due diligence, based on which further negotiations are carried out. Going forward, execution of such a document shall trigger merger filings. This will increase compliance costs at a premature stage when it is uncertain whether the transaction will close. It will also add to the bulk of notification applications submitted to the Competition Commission.

**Filings by the foreign companies (in or outside of India)**

- If a foreign entity, operating in or outside India, desires to enter into a combination in or outside India which adversely affects the relevant market in India, then it has to give a notice to the CCI in the prescribed form by submitting the prescribed fee and disclosing the details of such combination within seven days of-
  a) approval of the proposal relating to such merger or amalgamation from the Board of Directors of such enterprise;
  b) execution of any agreement of such acquisition.
- If the CCI is of the opinion that such combination has caused or is likely to cause an appreciable adverse effect on competition in the relevant market in India then-
  a) it shall issue a show cause notice to the parties to such combination to respond within 30 days as to why investigation shall not take place against them;
  b) it shall direct the parties to such combination within seven working days after receiving response from the parties as to publish details of such combination to the knowledge of the affected persons;
  c) it shall direct for suitable modifications in such combination if such adverse effect can be eliminated;
  d) it shall direct that the combination shall not take effect.

**Comparison of the Indian and Foreign Laws**

**a) United States Anti-Trust Laws**

Antitrust law was enacted in the U.S. in 1890 primarily to control the concentration of economic and industrial power. However, Section 7 of the Clayton Act is the primary legislation in the U.S. governing mergers and acquisitions, but limits itself to the territory of the United States. The Clayton Act applies to both mergers with immediate anticompetitive effects and those that have a future probability of substantially reducing competition. In addition, the principal legislation Sherman Act broadly states that every contract, combination, or conspiracy that restrains trade or commerce among the states, or with foreign nations, is illegal and that every person who monopolizes, or attempts to monopolize is guilty of a felony.

**b) European Union Competition Laws**

European competition law is governed primarily by Articles 85 and 86 of the Treaty Establishing the European Community. Article 85 is designed primarily to achieve the same goal as the Sherman Act in U.S. legislation insofar as it prohibits all agreements and concerted practices that affect trade among E.U. members and which have as their main objective the prevention, restriction or distortion of competition. Article 86 is designed to meet the policy objectives of the Clayton Act in that it prohibits the abuse of a dominant market position through unfair trading conditions, pricing, limiting production, tying, and dumping. The European Court of Justice (E.C.J.) has also adopted a similar approach to extraterritorial enforcement of competition laws than that of U.S. courts.

From the above analysis we observe that the procedure for pre-filing notification is similar throughout the world. The Competition Act throughout the world has been enacted to protect the consumers, society and the business community. The pre-filing notification is effective in cases where the transaction is going to effect competition beyond one member nation. It proposes whether the proposed transaction violates the Competition law. Each jurisdiction has a mandatory merger notification based on targeting parties to "large transactions" which must notify the agency, supply required information for the review of competition issues and wait for the lapsing of established time periods before they can legally complete the transaction.

**Section 32** of the Act deals with the acts taking place outside India but having an effect on competition in India.

It provides that the Commission shall, notwithstanding that,-

a) an agreement referred to in section 3 has been entered into outside India; or
b) any party to such agreement is outside India; or
c) any enterprise abusing the dominant position is outside India; or
d) a combination has taken place outside India; or
e) any party to combination is outside India; or
f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with provision of this Act.

Before dealing further with the powers, duties and functions of the Commission it is pertinent to deal with the issue of jurisdiction enjoyed by the Commission. The Commission's jurisdiction extends to all sectors of the economy including sectors regulated by sector specific laws, such as telecommunications or electricity or petroleum. Thus, the

Commission can inquire into an anticompetitive activity or combination in any such sector. The Act however contains a provision for consultation between the Commission and a statutory authority (including a sector regulator).

The Act covers enterprises irrespective of their ownership. Thus, private enterprises as well as government owned enterprises, and even government departments are covered by the Act. However, it excludes the sovereign functions of the government as well as activities carried out by the departments of the Central Government dealing with atomic energy, currency, defense, and space [21]. The Act does not elaborate on what constitutes sovereign functions, but there is a substantial body of case law in India on this subject. Functions such as maintenance of law and order, defense of the country and administration of justice have been regarded as sovereign functions.

The Commission can take action with respect to conduct that has occurred outside India and with respect to parties located outside India provided that the conduct had an appreciable adverse effect on competition in the relevant market in India [22]. This provision is similar to the “effects doctrine” in most other jurisdictions.

Due to the overreaching effects of anti-competitive activities of a domestic firm especially in cases of exports, competition rules are applied to the conduct of foreign enterprises occurring in a foreign state but affecting the domestic market of a applying state. In principle, there are two possible approaches to finding a solution to this problem. One is international, the other is national. In the absence of a binding international competition policy, countries‟ generally search for a national solution by applying their domestic laws to the foreign defendants. The rules of establishing jurisdiction and extraterritorial effect of the domestic laws differ from country to country. Sometimes, rules of private international law are also applied to determine the jurisdiction over defendant. “Extraterritoriality” refers to country‟s ability to govern activities in foreign countries. “Territoriality” describes the situation in which a country‟s laws apply only to national activity.

In support of this provision, the Commission has the power to enter into a memorandum or arrangement with any agency of any foreign country with the prior approval of the Central Government +.

The Act also allows the Central Government, not the Commission, to notify three categories of exemptions, these being any class of enterprises in the interest of security of the state or public interest, any contracts or agreements arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention, and any enterprise that performs a sovereign function.

**Exclusions from Jurisdiction [24]**

1. Reasonable Rights under IPRs, etc. protected under Competition Act.
2. Agreements exclusively for exports exempted**.**

**Miscellaneous Sections-**

**Section 21 of the Act deals with reference by statutory authority.**

It provides that where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any o the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

It further provides that on receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit:

Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference.

Judicial authority is different from statutory authority. Section 2(w) of the Act defines statutory authority. It provides that 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 there for or any matter connected therewith or incidental thereto.

Section 22 of the Act deals with the meetings of Commission. It states that the Commission shall meet at such time and places, and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be provided by regulation.

It further provides that the benches shall be constituted by the Chairperson and each bench shall consist of not less than two members and every bench shall consist of at least one Judicial member.

It further provides that if chairman is unable to attend a meeting then senior most member shall preside at the meeting. Every question which come up before any meeting shall be decided by the majority voting of the present members and in the event of a equality of votes, the Chairperson or in his absence, the member presiding, shall have a second or casting vote.

Provided that the quorum for such meeting shall be three members.

Section 33 of the Act lays down power to grant interim relief. It states that where during an inquiry before the Commission, it is proved to the satisfaction of the Commission, by affidavit or otherwise, that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to the opposite party, where it deem it necessary.

The Act further provides under Section 35 for appearance before Commission. It says that a person or an enterprises or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its offices to present his or its case before the Commission.

Explanation.-For the purposes of this section,-

a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
b) "company secretary" means a company secretary as defined in clause(c) of sub-section (1) of section 2 of the

Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
"cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act,= 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

a) Section 36 of the Act lays down power of commission to regulate its own procedure. It states that in the discharge of the functions, guided by the principles of natural justice and subject to the other provisions of the Act and of any rules made by the Central Government and it shall have same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of following matters, namely-
(a) summoning and enforcing the attendance of any person and examining him on oath;
b) requiring the discovery and production of documents;
c) receiving evidence on affidavits;
d) issuing commissions for the examination of witnesses or documents;
e) subject to the provisions of sections 123 and 124 of the Indian
Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office

The Commission has also power to call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry or proceeding before it.

The Commission may also direct any person-

a) to produce before the Director General or the Registrar or an officer authorised by it, such books, accounts or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
b) To furnish to the Director General or the Registrar or any officer authorised by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

**Section 38** of the Act deals with the rectification of orders given by Commission. It says that with a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.
It further states that subject to the other provisions of this Act, the Commission may make-

a) an amendment under sub-section (1) of its own motion;
b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

Explanation.- For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

Section 39 of the Act provides that how the orders of the Commission can be enforced. It says that if a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations. In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

It further states that where a reference has been made by the Commission for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 (43 of 1961) and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income–tax Act, 1961 (43 of 1961) and to the Commission instead of the Assessing Officer.

Explanation 1 – Any reference to sub-section (2) or sub-section (6) of section 220 of the income-tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made there under shall be construed as references to sections 43 to 45 of this Act.

Explanation 2 – The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 (43 of 1961) shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

Explanation 3 – Any reference to appeal in Chapter XVIID and the Second Schedule to the Income-tax Act, 1961 (43 of 1961), shall be construed as a reference to appeal before the Competition Appellate Tribunal under section 53B of this Act.

## Conclusion

The Commission needs to swing into action undertaking substantial capacity building to implement the extra territorial jurisdiction that is embodied in the Competition Act, 2002. As India integrates at a fast pace with the global economy there is a need to ensure international co-operation to tackle cross border challenges. Even though the Competition Act embodies the 'effects' doctrine, its implementation has been more or less ineffective.

The Competition Act is yet to fully come into force as a result of which a significant jurisprudence under the legislation is yet to be developed. Moreover, the actual implications in enforcing the rather broad mandate prescribed for the Competition Commission of India are to be fully realized. The difficulties in implementing the provisions are yet to be encountered; they can only be anticipated or predicted based on the analysis of the bare provisions of the enactment.

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10. Anti-competitive agreements.- (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
    a. (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.
    b. (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
    c. directly or indirectly determines purchase or sale prices;
    d. limits or controls production, supply, markets, technical development, investment or provision of services;
    e. shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
    f. directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:
    g. Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.
    h. Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.
    i. (4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
        (a) tie-in arrangement;
        (b) exclusive supply agreement;
        (c) exclusive distribution agreement;
        (d) refusal to deal;
        (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.
    j. Explanation.—For the purposes of this sub-section,—
        (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
        (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
        (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
        (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
        (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.
    k. Nothing contained in this section shall restrict—
        (a) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
        (b) the Copyright Act, 1957 (14 of 1957);
        (c) the Patents Act, 1970 (39 of 1970);
        (d) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
        (e) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
        (f) the Designs Act, 2000 (16 of 2000);
        (g) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
        (h) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.
11. Abuse of dominant position. - (1) No enterprise or group shall abuse its dominant position.
    (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—-
    (a) directly or indirectly, imposes unfair or discriminatory—
    (b) condition in purchase or sale of goods or service; or
    (c) price in purchase or sale (including predatory price) of

goods or service.

b. Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or
c. (b) limits or restricts—
d. production of goods or provision of services or market therefor; or
e. technical or scientific development relating to goods or services to the prejudice of consumers; or
f. (c) indulges in practice or practices resulting in denial of market access in any manner; or
g. makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
h. uses its dominant position in one relevant market to enter into, or protect, other relevant market.
i. Explanation.—For the purposes of this section, the expression—
   (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—
   (b) operate independently of competitive forces prevailing in the relevant market; or
   (c) affect its competitors or consumers or the relevant market in its favour.
   (d) "predatory price" means the sale of goods or provision of services, at a. price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.
j. (c)"group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.

12. Section 33 of the Competition Commission Act, 2002.
13. Section 2(c) of the Competition Commission Act, 2002.
14. [2012] 19 taxmann.com 278 (CCI)
15. Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of—
    (a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
    (b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.
       b. (2A)No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.
16. any acquisition where—
    a. the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or ass ets have been acquired or are being acquired jointly have,—
       (a) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
       (b) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
          b. the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
          c. (A)either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
          d. (B)in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;

    acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
    (a) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—
    (b) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    (c) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
    e. the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—
       (a) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
       (b) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;

    any merger or amalgamation in which—
    the enterprise remaining after merger or the enterprise

created as a result of the amalgamation, as the case may be, have,—

f. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
g. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
    (a) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—
        1. either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
            h. (B)in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, includsing at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;

17. www.indiajuris.com
18. Section 5 of the Competition Commission Act, 2002.
19. Sec. 2(h), The Competition Act, 2002.
20. Sec. 32, The Competition Act, 2002.
21. Sec. 18, The Competition Act, 2002.
22. Sec. 3(5), The Competition Act, 2002.