



Competition Commission of India

निर्मला सीतारामन
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भारत सरकार



Nirmala Sitharaman
Minister of Finance and Corporate Affairs
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MESSAGE

Happy to note that the Competition Commission of India is bringing out *Competition Law Module for Administrative and Judicial Training Academies*.

Competition Law is one of the important tools for bringing and ensuring fairness in market driven economy. It ensures level playing field in the market, provides choices to customer and creates an eco-system of innovation, which ultimately helps in economic development.

It is important that the administrative and judicial officers be sensitised about this law. Congratulate the Competition Commission of India for having taken this initiative of preparation of a separate module on competition law which can be used for imparting knowledge about competition law to public officers.

Wish all the best to CCI in its endeavour to create awareness and imparting training on competition issues.

(Nirmala Sitharaman)

Date: 8th August, 2019

अनुराग सिंह ठाकुर
Anurag Singh Thakur



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MESSAGE

It gives me immense pleasure to know that Competition Law Module for Administrative & Judicial Training Academies is being brought out by the Competition Commission of India as a part of its advocacy measures.

A robust competition regime is always desirable for a healthy growth of the economy and to ensure fair play in the market. Competition brings efficiency, choices and promotes innovation and thereby ultimately serves the end consumers.

Administrative & Judicial Officials, being the important stakeholders of well-functioning markets need to be sensitized about the competition Law and its benefits to the society. I hope this module will serve as a key tool in educating public officials.

I wish all the best to CCI for promoting a culture of competition in the economy.

(Anurag Singh Thakur)

New Delhi
29.07.2019

Ashok Kumar Gupta

Chairperson

Competition Commission of India



अशोक कुमार गुप्ता

अध्यक्ष

भारतीय प्रतिस्पर्धा आयोग

FOREWORD

New economic policy based on the principles of privatization, globalization and liberalization necessitated the establishment of a robust market regulator. In this backdrop, the Competition Commission of India (**the Commission/CCI**) was established by the Competition Act, 2002 (Act) with primary objectives of preventing practices having adverse effect on competition, promoting and sustaining competition in markets, protecting interests of consumers and ensuring freedom of trade.

The Competition Law has become increasingly important for promoting fair practices in conducting businesses activities and eliminating practices, such as anti-competitive agreements and abuse of dominance that have adverse effect on competition. Besides, the Commission is also mandated with the task of regulating all the combinations (acquisitions, control, mergers and amalgamations), meeting the thresholds prescribed in the Act.

The implementation of the Act rests on two complementary and supplementary pillars of enforcement and advocacy. While penalizing the violators of competition law is important to create a deterrence against anti-competitive behaviour, moulding behaviour through training and awareness is equally essential to achieve the desired outcome. Section 49(3) of the Act mandates the Commission to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about sector/industry specific competition issues.

The Indian Competition Act is based on the principles of competitive neutrality, making no distinction between a private entity and a Government Department engaged in the

economic activities. Government being one of the important actors in the economy, the Officers acting in various administrative capacities, have to formulate and implement various socio-economic policies. It is incumbent upon them to ensure that they are competition compliant. Judicial Officers, too have to adjudicate cases relating to issues having bearing on competition. Considering the crucial role of the Administrative and Judicial Officers in implementation of competition law, it was felt by the Commission to design and prepare a module on competition law for their training and ready reference. Keeping in view these objectives, the Commission engaged National Academy of Legal Studies and Research (**NALSAR**), Hyderabad to assist the Commission in coming out with such a module.

I am elated to share the Module prepared by NALSAR in collaboration with the Commission, which will not only help all stakeholders in understanding the nuances of competition laws and policies but will also help them to implement the same. I am hopeful that the Module will create awareness about competition law amongst the Administrative and Judicial officers.

I congratulate Prof. Faizan Mustafa, Vice-Chancellor, NALSAR, Hyderabad and his team consisting of Mr. Sudhanshu Kumar, Ms. Malvika Tyagi, Mr. Gautam Shahi and Ms. Lagna Panda for preparing this well researched and lucidly written Module on competition law. I also compliment officials of Advocacy Division and all other officials of the Commission who contributed towards bringing out this Module.

My best wishes to all the stakeholders who shall benefit from the module, and help the nation achieve new heights.



(Ashok Kumar Gupta)

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INTRODUCTION

CHAPTER-1

CHAPTER COVERAGE

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1.1 Genesis and scope of the Indian Competition Act, 2002

Competition law focuses on preserving competition in the market. It is a tool to ensure fair competition in the market in order to protect the interests of consumers and to ensure freedom of trade. Competition Law is one of the most dynamic areas of law and has seen an exponential growth throughout the world. There are currently more than 130 jurisdictions across the globe that has some form of competition law.

The term 'competition' has not been defined in the Indian Competition Act, 2002 (the Act). A broad definition of

Competition is "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share".¹ The legislative enforcement of healthy trade practices necessitated the promulgation of the Competition Law. Free competition means total freedom to develop optimum size of business without any restrictions. The limitation, if at all necessary, is not limitation of size but that of competitive constraints. The ultimate *raison d'être* of competition is the interest of the consumer.

Government of India liberalized the economy in the early 1990s, which

¹ World Bank, 1999: A Framework for the Design and Implementation of Competition Law and Policy.

led to both the emergence of new market players as well as entry of foreign players in the Indian market. The earlier Monopolies and Restrictive Trade Practices Act, 1969 was found to be inadequate in handling the changed market scenario. Thus, High Level Committee on Competition Policy and Law was constituted to examine its various aspects and make suggestions. This Committee submitted its report and through a process of consultation, the Competition Act, 2002 (Act 12 of 2003) was enacted. The Act was passed by the Parliament in the year 2002, to which the President accorded assent on 13th January, 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. As per the statement of objects and reasons, enactment of the Competition Act was India's response to the opening up of its economy, removing controls and resorting to liberalization.

Though the Competition Act is of the year 2002, as per the provisions of Section 1(3), the Act was to come into force from the date to be notified by the Central Government in the Official Gazette. Notification was issued by the Central Government wherein 31st March, 2003 was specified as the appointed date. However, vide this notification, only some of the provisions

of the Act, and not all the provisions, were enforced. Many other provisions came into force vide notification dated 19th June, 2003 and thereafter vide notification dated 20th December, 2007 some more provisions were notified. Section 3 of the Act along with many other provisions came into force on 20th May, 2009 vide S.O. 1241(E) dated 15th May, 2009. Provisions related to Combinations were notified in 2011. Thus, the entire Act was not enforced by one single notification but different provisions of the Act were enforced by issuing various notifications over a span of time.

1.2 Objectives of Competition Law

The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.² As per the Preamble, the Act is aimed at preventing practices having adverse

² *Competition Commission of India vs. Steel Authority of India Ltd. and Anr.*, (2010)4CompLJ1(SC)

effect on competition, protecting the interest of the consumers, ensuring fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

The Indian Competition Act seeks to ensure fair competition in India by prohibiting trade practices, which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of an expert body was considered essential. Thus, the 'Competition Commission of India' (herein after 'Commission' or 'CCI') having the powers to curb anti-competitive practices was established. The Director General appointed under Section 16(1) of the Act is an investigating arm of the Commission. The Competition Act of India, basically, prohibits anti-competitive agreement and abuse of dominant position.

1.2.1 Anti-competitive Agreements

Section 3 of the Act states that enterprises, persons or associations of enterprises or persons shall not enter into agreements in respect of 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. Such agreements would consequently be considered void. The species of agreement, which would be presumed to have an 'appreciable adverse effect on competition' would be those agreements, which, directly or indirectly determine sale or purchase prices; limit or control production, supply, markets, technical development, investment or provision of services; directly or indirectly result in bid rigging or collusive bidding, share 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 or any other similar way.



Figure 1.2.1 : Pictorial depiction of anti-competitive agreement

Further, 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 tie-in arrangement; exclusive supply agreement; exclusive distribution agreement; refusal to deal; resale price maintenance, shall be an agreement in contravention of section 3(1) if such an agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Chapter 3 of this module discusses this aspect in greater detail.

1.2.2 Abuse of dominant position

As per Section 4, no 'enterprise' or 'group' shall abuse its dominant position. Dominant position is the position of strength enjoyed by an enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing in the market, or affect its competitors or consumers or the relevant market in its favour. There shall be an abuse of dominant position if an enterprise indulges into directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of

goods or services; or setting prices in the purchase or sale (including predatory pricing) of goods or services; or limiting or restricting the production of goods or provision of services or market; or limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers; or indulging in practice or practices resulting in the denial of market access in any manner; or making 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 uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Abuse of Dominance forms the subject matter of Chapter 4 of this module.



Figure 1.2.2 : Pictorial depiction of abuse of dominant position

1.2.3 Regulation of Combinations

Combination (acquisitions, mergers or amalgamations) that exceeds the threshold limits specified in the Act in terms of assets or turnover, in India, are to be reported and scrutinised by the Commission.

Chapter 5 of this module discusses 'combinations' in greater detail.

1.3 Procedure prescribed under the Act

The informant, i.e. the person who wishes to furnish information to the Commission constituted under Section 7 of the Act, would make such information available in writing to the Commission. Such information could also be received from the Central Government, State Government or Statutory Authority. The Commission has also the powers to initiate inquiries on its own knowledge under Section 19(1) of the Act. When an information is received, the Commission is expected to satisfy itself and express its opinion that a prima facie case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. The provisions of Section 19 do not suggest that any

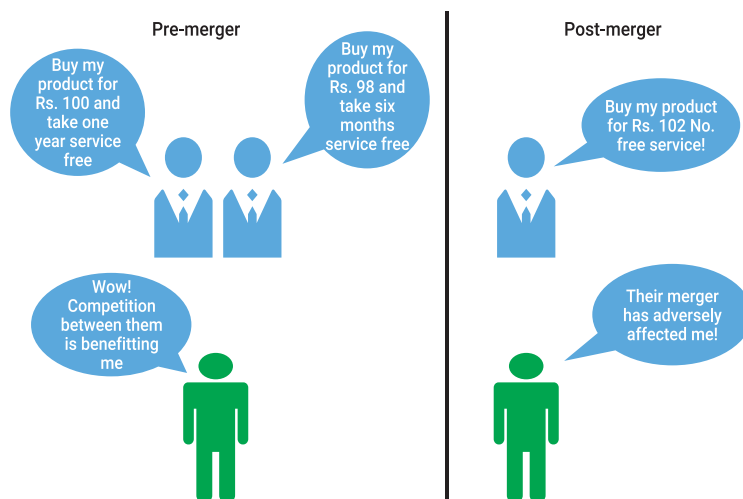


Figure 1.2.3 : Pictorial depiction of pre and post merges

notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any 'such person', for rendering assistance or produce such records, as the Commission may consider appropriate.

The Commission, wherever, is of the opinion that no prima facie case exists justifying issuance of a direction under Section 26(1) of the Act, can close the case and send a copy of that order to the parties concerned in terms of Section 26(2) of the Act.

In terms of Section 26(3), the Director General is required to cause an investigation and submit a report containing his findings in accordance with law and within the time stated by the Commission in the direction issued under Section 26(1). After the report is submitted, there is a requirement to issue notice to the

affected parties by the Commission to reply with regard to the details of the information and the report submitted by the Director General and thereafter permit the parties to submit objections and suggestions to such documents. After consideration of objections and suggestions, if the Commission agrees with the recommendations of the Director General that there is no contravention, it shall close the matter forthwith, communicating the said order to the person/authority as specified in terms of Section 26(6) of the Act. In terms of Section 26(7), after consideration of the objections or suggestions of the parties, if the Commission is of the opinion that further investigation is called for, it may refer the matter to the Director General for further investigation, or even conduct further inquiry itself, if it so chooses. If the report of the Director General recommends that there is contravention of any of the provisions of the Act and in the opinion of the Commission, further inquiry is needed, then it shall inquire into such contravention in accordance with the provisions of the Act.

The Commission, depending upon the nature of the contravention, shall, after inquiry, adopt the course specified under Sections 27 and 28 of the Act in the case of anti-competitive agreements and abuse of dominant position and the procedure under Section 31 of the Act in the case of combinations. The Commission is

vested with powers of wide magnitude as is evident from the provisions of Sections 27(d), 28 and 31(3) of the Act. The Commission is empowered to direct modification of agreements insofar as they are in contravention of Section 3, division of an enterprise enjoying dominant position and modification of combinations wherever it deems necessary.

For conducting inquiry and passing orders, as contemplated under the provisions of the Act, the Commission is entitled to regulate its own procedure under Section 36(1) of the Act. However, the Commission is also vested with the powers of a Civil Court in terms of Section 36(2) of the Act, though for a limited purpose.

Procedural Aspects of Competition Law have been discussed under chapter 6 of this module.

1.4 Competition Advocacy

Successful implementation of competition policy and law largely depends upon the willingness of the people to accept these. Competition Advocacy plays a vital role in making stakeholders aware and thereby securing suo-moto acceptance of competition compliant behaviour. It reinforces the value of competition by educating citizens, business and policy makers.

Chapter 7 throws light on the steps taken by the Competition Commission of India towards competition advocacy.

Understanding Markets and Competition

CHAPTER-2

CHAPTER COVERAGE

2.1 What is a Market?

2.2 Why do we need to understand Markets?

2.3 Market Structures

2.3.1 Perfectly Competitive Market

2.3.2 Monopoly

2.3.3 Monopolistic Competition

2.3.4 Oligopoly

2.4 Ensuring Competition

2.5 Conclusion

2.1 What is a Market?

We have all heard the term “market” being used rather loosely by businessmen or the consumers in the form of common usage like “stock market has fallen” or “housing market is stagnating” etc., but in Economics, market has a more specific meaning.

Before we define Market, let us talk about the two broad groups of economic agents based on their functions. One group is comprised of buyers, which include consumers, who buy goods and services as well as firms, who buy raw materials for producing goods and services. The other group is that of sellers, which include firms, which sell their products or services,

workers who sell their labour services and owners of resources such as land or minerals, which are sold to firms. When these two groups functioning as buyers or sellers interact with each other for exchange, a market comes into being.

A market is a collection of buyers and sellers, the interaction between whom, determine the price of a product or a set of products.

2.2 Why do we need to understand Markets?

The world is one of scarcity, which is why, decisions by consumers, producers and governments involve trade-offs, that is, in order to have more of one good or service, less of others

must one have. This, in turn, leads to the idea of opportunity costs, that is, in choosing one good or service over another, how much of the other will an economic agent be giving up. Every economy, comprising of producers, consumers and the government must decide as a whole:

- What to produce? *For example*, Apple needs to decide whether to produce more i-pads or i-phones.
- How to produce? i.e., whether a country should use more capital or labour for production.
- Who will receive the products? i.e., should the government actively intervene to ensure that all its citizens can buy certain goods and services?

As we will see in this chapter, in the process of making these decisions, when these economic agents interact and make choices, it is observed that they are rational, that is, they gauge the expected costs and benefits of an action and only undertake it if the benefits exceed the costs. They respond to economic incentives and they make decisions at the margin, that is, whether to consume or produce a little more or less, rather than deciding the total to be consumed or produced. But, if each economic agent is left free to take decisions or actions based solely on his/her own costs and benefits, then there might

arise a situation wherein an action or decision on the part of the producer might end up harming the consumer. This is where the government needs to step in, say, in the form of a regulatory body like the Competition Commission of India.

2.3 Market Structures

It is important to point out the distinction between a market and an industry. Recall that a Market is a collection of buyers and sellers, the interaction between whom, determine the price of a product or a set of products. An industry is a collection of firms that sell the same or closely related products. So, a market includes more than an industry. In effect, an industry is the supply side of the market.

As we will see later, the extent of market power (ability to charge a price higher than the cost of producing an additional unit of good) that a firm may have, depends on the kind of market structure that it operates in. Industries can be categorized into different market structures on the basis of the following features:

- The number of firms in the industry.
- The degree of similarity of the goods or services being produced by the firms in the industry.
- The ease with which new firms are able to enter the industry.

Table 2.3 (a) demonstrates how these three characteristics vary across different market structures. We will study each of these briefly.

Table 2.3 (a) Market Structures

Characteristics	Perfect Competition	Monopolistic Competition	Oligopoly	Monopoly
Number of firms	Many	Many	Few	One
Type of product	Homogeneous	Differentiated	Homogeneous or differentiated	Unique
Ease of entry	High	Low	Low	No Entry
Examples of industries	Does not exist (agriproducts like wheat- close Example)	Retail Clothing stores, Restaurants	Cement, Airline, automobiles	Train Operations, Local Water supply

2.3.1 Perfectly Competitive Market

Perfectly competitive market is one in which firms are unable to control the prices of the products they sell. This is the case because:

- There are many buyers and sellers in the market for the particular good in question, and each of them are small relative to the size of the market.

- The products sold are identical.
- There are no barriers to entry of new firms in the market.

It is rare for a perfectly competitive market to exist in the real world, except in the market for agricultural goods like wheat. Here, the demand curve facing a firm (or producer) is perfectly elastic and all producers are price takers. In such a scenario, the best it can do

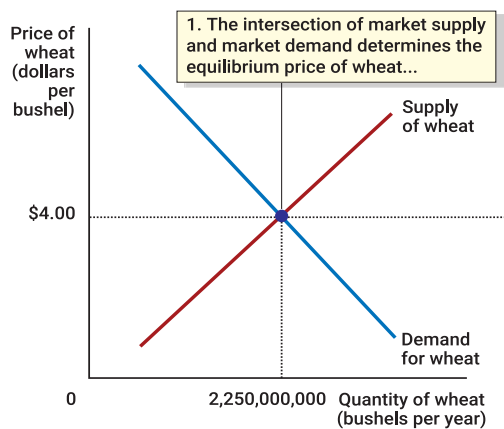


Figure 2.3.1 (a) Market for wheat

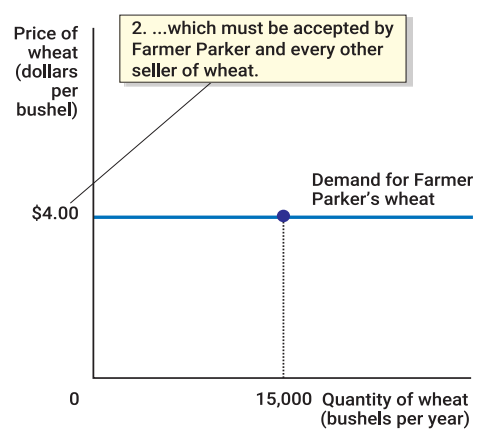


Figure 2.3.1 (b) Demand for Farmer Parker's wheat

Example of Perfectly competitive market

Source: R. Glenn, Anthony, "Microeconomics", Pearson, 4thed

is, to produce at the point where all gains from selling are exhausted. Let us see why. Suppose the quantity of wheat demanded at a price of say, \$ 4, is infinite (by infinite we don't mean infinite literally, but a very high quantity demanded at a price of \$ 4, such that the demand curve for one farmer, say, Parker, becomes horizontal.)

The demand curve represented on a graph will have price on the y-axis and the corresponding quantities demanded will be on the x-axis. As a consumer will be willing to buy more of a good which is cheaper, a demand curve is typically downward sloping. A producer, however, will be willing to sell more of a good as it gets a higher price in return. This is why the supply curve will be upward sloping. The point at which the demand and the supply curve meet is the point of equilibrium price and quantity of the good in question. In a perfectly competitive market, this is attained at the industry level [figure 2.3.1 (a)], but the firm takes this equilibrium price as given (because it is too small relatively), as can be seen in figure 2.3.1 (b) and produces at the point at which its upward sloping supply curve intersects the given demand curve for its own good [figure 2.3.1 (b)].

Note that the demand curve represents the consumer's marginal willingness to

pay, which in turn represents his/ her marginal benefit. By marginal benefit we mean the *additional* benefit the consumer enjoys upon demanding an *additional* unit of the good. Similarly, the supply curve represents the marginal cost suffered by the producer, that is the *additional* cost he/she must bear in order to produce and supply an *additional* unit of the good.

Since the producer is profit-maximizing, it ensures that it produces at the point at which the additional benefit to the consumer (which is also the marginal revenue³ that the producer would get when the consumer pays for this additional good) is equal to the additional cost that it bears in producing that additional good. This point is that of the equilibrium price and quantity, that is, the price and quantity which will be sold in a market at a given point. This is because, if this is not the case, and the producer produces at the point at which marginal revenue exceeds marginal cost, then stopping production will mean forgoing *additional* profit (difference between marginal revenue and marginal cost) that could have been earned by increasing production till the point where no more additional profit can be earned. This is the point at which marginal revenue no longer exceeds marginal cost (see figure 2.3.1 (c) & (d). And it is also the point

³ In case of perfect competition, the marginal revenue is the same as price.

at which profit of the firm is maximized (see figure 2.3.1 (c) & (d) and note that

(marginal cost), which can be seen on the supply curve.

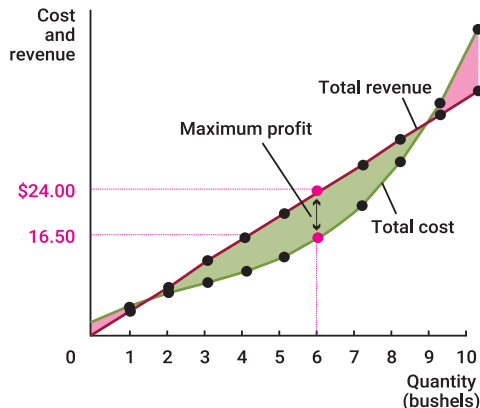


Figure 2.3.1 (c) Total revenue, total cost and profit

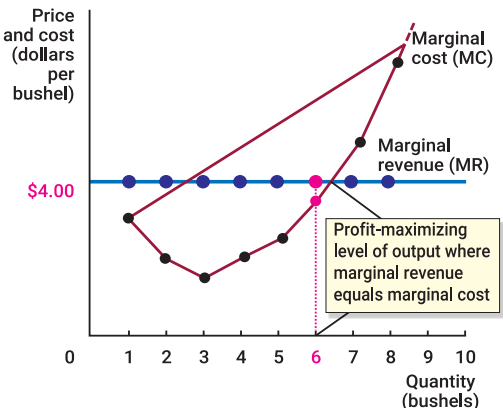


Figure 2.3.1 (d) Marginal revenue and marginal cost

Figure 2.3.1 (c) & (d) Why it is “efficient” to produce at the point where marginal benefit (or marginal revenue) equals marginal cost, where profit is also maximized

Source: R. Glenn, Anthony, “Microeconomics”, Pearson, 4th ed

total profit is the difference between total revenue and total cost).

Further, this is the point of economic efficiency (see figure 2.3.1 (c) & (d) because here, the economic surplus in the industry (which is the sum of consumer surplus and producer surplus) is maximized. This can be seen in figure 2.3.1 (e) .

As can be seen in Figure 3, consumer surplus is simply the difference between the price that the consumers were willing to pay (representing marginal benefits and are the points on the downward sloping demand curve of the industry) and the equilibrium market price.

Producer surplus is the difference between the price it gets and what it costs it to produce each additional unit

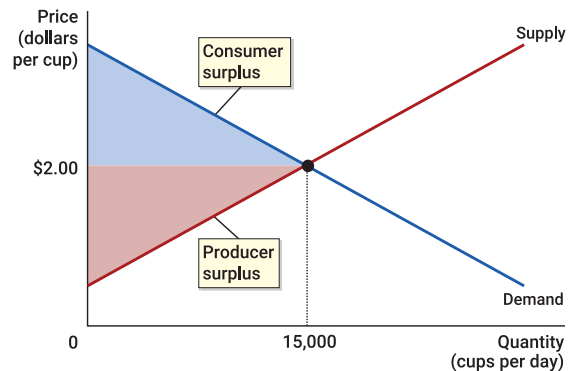


Figure 2.3.1 (e) Consumer Surplus and Producer Surplus and Maximization of Economic Surplus when industry production takes place at the point of efficiency

Source: R. Glenn, Anthony, “Microeconomics”, Pearson, 4th ed

2.3.2 Monopoly

Now, if we look at the other extreme of the spectrum of market structures shown in Table 2.3.2 (a), that is, a monopolistic market, we will see that the conditions here are such that it

enables the producer to set prices, so it is a price maker. This is because, as can be seen in Table 2.3.2 (a), the monopoly has the advantage of being the only producer of a particular good or service, which is unique in nature. It faces a downward sloping demand curve as raising prices would make it lose some consumers and reducing price would increase sales but lead to lower revenue than it would have received at the higher price. It therefore, also faces a downward sloping marginal revenue curve but it lies below the demand curve. This is because, say it was selling 6 units at a price of \$ 42 and by reducing the price to \$ 39, it increases its sales to 7. Total revenue in the first case was \$ 252 and in the second case, it comes to \$ 273. The marginal revenue from selling the seventh good is \$ 21, which is less than the price charged (\$ 39). The supply curve or the marginal cost facing it is upward sloping. Just as any profit maximizing producer, the monopolist will produce at a point and charge a corresponding price where marginal revenue equals marginal cost. This will lead to a situation of a higher equilibrium price (and lower quantity) vis-à-vis a perfectly competitive market [see figure 2.3.1 (e)]. Recall that the latter achieves maximization of economic surplus, which is no longer the case in the case of a monopolistic market. As can be seen in figure 2.3.2 (a), the producer captures part of the consumer surplus by charging a higher price P_M than the competitive price P_C (which was the point of efficiency) and some consumer surplus as well

as producer surplus is lost altogether, the aggregate of which is called deadweight loss.

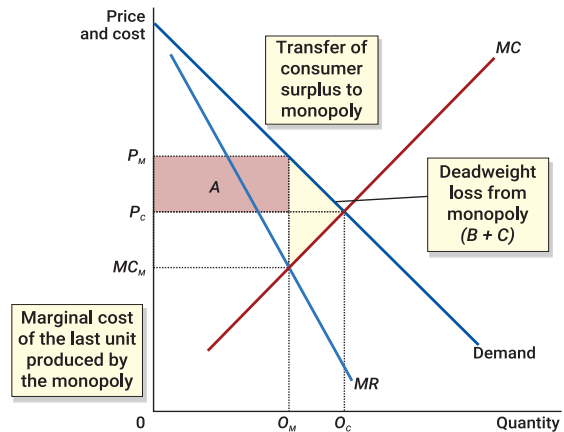


Figure 2.3.2 (a) A monopoly does not produce at the point of efficiency unlike in the perfectly competitive case seen before, leading to Deadweight Loss

Source: R. Glenn, Anthony, "Microeconomics", Pearson, 4th ed

In Figure 2.3.2 (b), we can clearly see loss of efficiency as one moves from the case of perfect competition to monopoly. This loss arises out of the fact that production in the monopolistic firm (or industry, since there is only one firm) faces a downward sloping demand curve which leads to price being higher than marginal revenue. The perfectly competitive firm, however, takes price as given (which is decided at the industry level), and therefore faces a horizontal demand curve which leads to price being the same as marginal revenue. Thus, when monopoly produces at its efficient point (marginal revenue equal to marginal cost), then price exceeds marginal cost while when perfectly competitive firm (and therefore all firms and therefore, industry) produces

at its efficient point, price is equal to marginal cost.

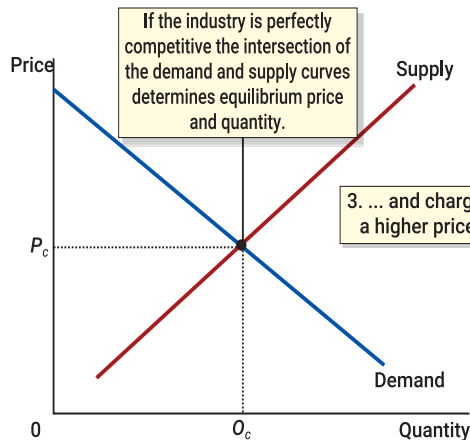


Figure 2.3.2 (b) Perfect competition

a single price of P_4^* , it charges higher prices of P_1 , P_2 and P_3 as well as lower

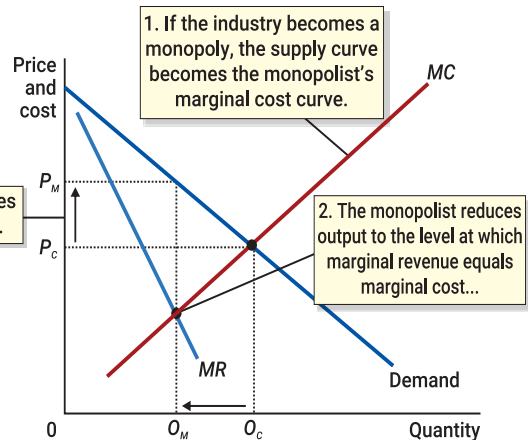


Figure 2.3.2 (c) Monopoly

Figure 2.3.2 (b) & (c) Efficiency loss in Monopoly vis-a-vis Perfect Competition

Source: R. Glenn, Anthony, "Microeconomics", Pearson, 4th ed

However, there are cases wherein a monopoly could actually increase welfare by increasing economic surplus or by achieving efficiency of the sort that a competitive market does. The former is achieved by a practice called price discrimination wherein the monopolist charges different prices to different classes of consumers depending on their respective marginal willingness to pay (see figure 2.3.2 (d)). An example of this is different prices charged for different seats in the same airline depending on business or economy class as well as time of booking. This is the seller's strategy to capture as much consumer surplus as possible, so instead of there being any deadweight loss, there is simply a transfer of consumer surplus to producer surplus. And economic surplus is maximized. For example, in figure 2.3.2 (d), instead of charging

prices of P_5 and P_6 . So, the consumer who was willing to pay P_1 will now be charged exactly that, instead of being charged the lower price P_4^* , and so his consumer surplus is transferred to the producer. The same applies to P_2 and P_3 . Additionally, the consumer who was willing to pay less than P_4^* , is no longer excluded from the market, and is charged a lower price.

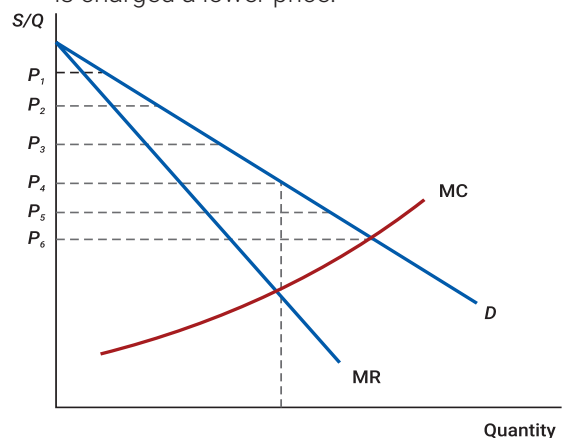


Figure 2.3.2 (d) Price Discrimination by Monopoly

Source: R. Glenn, Anthony, "Microeconomics", Pearson, 4th ed

The latter case, wherein a monopoly achieves the kind of efficiency that a perfectly competitive firm does, is that of a “natural monopoly”. In this case, the nature of the product is such that the marginal and average costs are declining over a large magnitude of production (called economies of scale). An example of this is an electricity utility company, or a large-scale firm like iron and steel. Here, it is actually beneficial to have one company produce at a lower cost instead of more than one firm entering the market and dividing total production into market shares, which would lead to production at a higher cost. Realizing this, the firm would expand to lower the cost of production and drive the other out of the market, which will get translated into lower price. So, a monopoly to exist in this case is actually good, although a State Monopoly might be more favourable than a private one, to ensure that the low cost is actually reflected in pricing in the form of a low price (think of a village that requires electricity) **A natural monopoly** occurs when economies of scale are so large that one firm can supply the entire market at a lower average total cost than two or more firms. So, there is only “room” for a single firm.

This can be seen in Figure 2.3.2 (e), which shows the average total cost curve for a firm producing electricity and the total demand for electricity.

Notice that the average total cost curve is still falling when it meets the demand curve (point A). If the firm is a monopoly and produces 30 billion kilowatt-hours of electricity per year, its average total cost of production will be \$0.04 per kilowatt-hour. Suppose now, that there are two firms in the market, having the same average cost, each producing half of the market output, that is, 15 billion kilowatt-hours/year. This would mean that producing 15 billion kilowatt-hours would move each firm at a higher point on its average cost curve resulting in a higher average cost of producing electricity—\$0.06 per kilowatt-hour (point B). This means that if one of the firms expands production, it will move to a lower point on the average total cost curve and will be able to offer a lower price, which will push the other firm out.

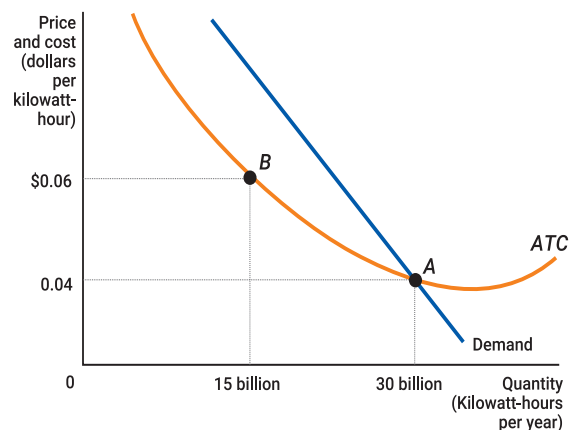


Figure 2.3.2 (e) Natural Monopoly

Source: R. Glenn, Anthony, “Microeconomics”, Pearson, 4th ed

Besides, there being a case of a natural monopoly, the government granting patents or control over a key resource

also facilitates monopoly. In addition, network externalities, which is a situation in which the consumption of a good increases with increasing number of consumers, can give rise to a monopoly.

2.3.3 Monopolistic Competition

The monopolistic competition producer also has some pricing power, and therefore faces a downward sloping demand curve like the monopoly. But the market power is less what the monopolist may have, because even though a monopolistically competitive firm differentiates its products to cater better to consumer tastes, the barriers to entry are low and there are many buyers and sellers, just like in the perfectly competitive market. Because of this type of structure, which is somewhere in between perfect competition and monopoly (and also the closest to the majority of the types of markets existing in the real world), there is some deadweight loss even in this type of market, it has the advantage that the consumer has more choice in terms of product quality, features or style, for example, the clothing market.

2.3.4 Oligopoly

The oligopolistic market has the element of price competition in it because each firm wants to ensure that it gets a larger share of the market. However, the firms know that

undercutting each other in terms of prices will lead to losses for all, so there might be tendencies to signal to each other to maintain similar prices, which will be profit-maximizing for all.

Let us look at figure 2.3.4, which shows the pay-offs of two competing firms, say, Apple and Dell. Each firm will consider what the other firm might do, before it makes its own pricing decision. For example, Apple first considers what it should do if Dell charges a high price (\$1200). In doing this, it will look at the column with \$1200 written on top. It shows us that if Apple responds by charging a high price (\$1200), then it will earn \$10 million in profits, and if instead it charges a lower price (\$1000), it will earn a higher profit of \$15 million. Therefore, it should charge the lower price of \$1000. Now, if Dell charges a low price (\$1000), then we confine ourselves to the second column (with \$1000) written on top, and see what Apple's profit in each of the cases (when it charges a high price and a low price) and then compare the two. This again tells us that Apple will charge the lower price. So, charging the lower price of \$1000 is Apple's dominant strategy. If we now examine Dell's decision-making, which takes into account Apple's possible actions, then we will see that Dell also has a dominant strategy of charging the lower price. And both firms end up charging a low price and earn profits

of \$7.5 million each. However, had Dell and Apple talked, they would both end up charging \$2000 and earning higher profits (\$10 million each). But such collusive practices are prohibited by law. Thus, there also might be tendencies to fix prices high through secret agreements or take steps to ensure high barriers to entry by other

firms so that their profit shares are maintained. This is harmful because it deters competition and deprives the consumers of the better quality and competitive pricing that entails healthy competition, and this is one of the things that regulatory bodies aim to prevent.

		\$1,200		Apple		\$1,000	
Dell	\$1,200		Dell earns \$10 million profit			Dell earns \$5 million profit	
			Apple earns \$10 million profit			Apple earns \$15 million profit	
	\$1,000		Dell earns \$15 million profit			Dell earns \$7.5 million profit	
			Apple earns \$5 million profit			Apple earns \$7.5 million profit	

Figure 2.3.4 Why Oligopolistic Firms Are Tempted to Collude

Source: R. Glenn, Anthony, "Microeconomics", Pearson, 4th ed

2.4 Ensuring Competition

In order to monitor the market and to prevent anti-competitive agreements, abuse of dominance and mergers or acquisitions which cause or may

cause "appreciable adverse effect on competition", most Governments have bodies to regulate the behaviour of market players, such as the Competition Commission of India.

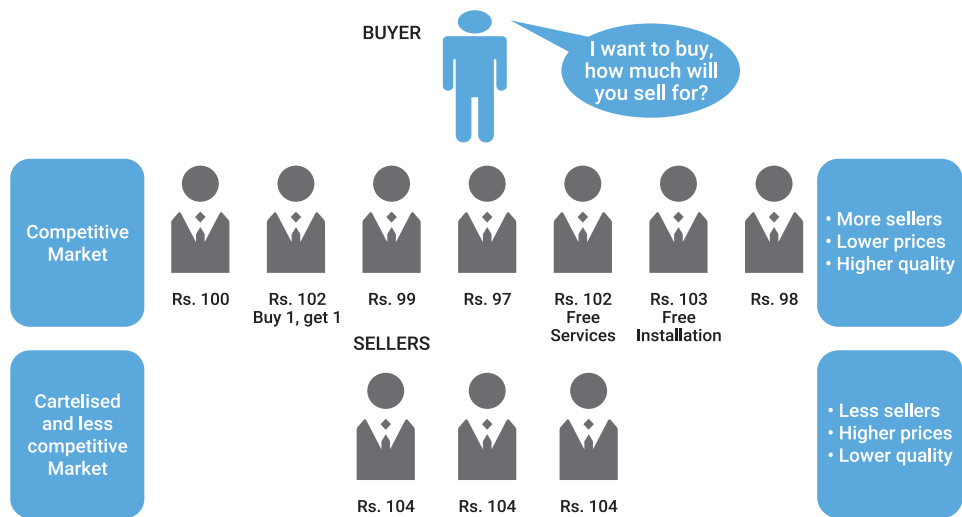


Figure 2.4 Benefits of Competition: High competitive vs Less competitive market

2.5 Conclusion

It is not only important for us to understand the various kind of market structures and their functioning, but also to keep in mind their intricacies so that their regulation can be carried out in the spirit of the Competition Law, which is

to ensure that consumer welfare is not adversely affected, not only in the form of higher prices, but also in the form of a scarcity of product choices available, or lack of innovation preventing further human progress.

Anti-Competitive Agreements

CHAPTER-3

CHAPTER COVERAGE

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3.1 Agreement

Agreements between market players that are executed with an underlying object or effect of restricting or distorting competition in the market are termed as 'anti-competitive' agreements. In general, agreements are categorized as either horizontal or vertical agreements. Agreement essentially means the meeting of minds or understanding between two or more parties to do or not to do any particular activity. It is important to understand the definition of agreement as envisaged under the Competition Act, 2002 since it forms the very foundation of application of section 3 i.e. prohibition of anti-competitive agreements. Any market behaviour or conduct cannot be assessed

under section 3 unless existence of an agreement between two or more parties is established.

3.1.1 Definition

The definition of an agreement under the Act is understood to be inclusive and wide, and therefore extends to any arrangement / understanding / action in concert, verbal or written, legally enforceable / unenforceable. Agreement includes arrangement or understanding along with action in concert, which further amplifies the scope of the definition. The definition covers every mode of behaviour, which has an economic relevance. Thus, agreement covers both, agreement as it is ordinarily understood and an arrangement or understanding or action in concert.

Section 2(b) of the Competition Act, 2002 defines an agreement as "any arrangement or understanding or action in concert, -

- i. whether or not, such arrangement, understanding or action is formal or in writing; or*
- ii. whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings."*

Arrangement

Understanding

Action in concert

3.1.1.1 Arrangement

Arrangement suggests a common course of conduct or behaviour involving some sort of communication or exchange of views between the parties, each of whom is led to expect that the other or others will act in a certain way. However, parallel behaviour of parties is only an indicator of collusion and not a

conclusive proof and is treated at best as a circumstantial evidence. There are other factors or evidences that have to be adduced to reach to the conclusion that the parties actually had a meeting of minds and the conduct or action was a result of such meeting of minds. Firms generally try to justify parallel behaviour in prices, production, dispatch or supplies by explaining the fundamentals of market forces such as demand, increasing cost of production and other economic factors. Circumstantial evidence relied by competition authority includes evidences of communication among the participants.⁴

3.1.1.2 Understanding

Understanding implies some sort of behavioural communication between two or more parties resulting in a particular course of conduct by them. It can also operate in a manner where one party makes the representation with the understanding that the others will follow.

3.1.1.3 Action in concert

The question whether two or more persons have acted in concert have to be considered having regard to their relation, their conduct and common

interest and on the basis of such evidence, that it may be inferred that they must be acting in concert.

3.1.2 Nature of agreement

The agreement may be oral or in writing. It is also not necessary that the agreement is intended to be legally enforceable. Therefore, a legally unenforceable agreement is also covered within the definition. The reason that such phraseology has been used because it is understood that parties who collude or enter into anti-competitive arrangements or understandings will not put that in writing. Therefore, most of the times existence of an agreement has to be inferred or derived from a given set of circumstances. Behaviour or conduct of the parties is used as circumstantial evidence to prove the existence of an agreement. The Competition Act envisages civil liability. Therefore, the standard of proof required to prove an understanding or an arrangement would be on the basis of 'preponderance of probabilities' and not 'beyond reasonable doubt'. Trade Unions or Associations can also be held guilty of violating Section 3 of the Act if they are found to be indulging into anti-competitive practices.⁵

⁴ *Case No.29 of 2010 of CCI- Builders Association of India vs. Cement manufacturers Association of India and Others*. NCLAT has confirmed penalties imposed on the cement companies by the CCI. Appeal has been filed by the cement companies before the Supreme Court of India.

⁵ *Competition Commission of India v. Co-ordination Committee of Artists and Technicians of West Bengal Film and Television & Ors.*, AIR 2017 SC 1449, para 41.

3.2 Anti-competitive Agreements

Section 3 of the Act prohibits anti-competitive agreements which cause or likely to cause an appreciable adverse effect on competition (AAEC), since they are understood to be impediments to free and fair market competition⁶. There are two categories of such agreements- horizontal and vertical⁷.

services. Vertical agreements are those which are entered into between two or more enterprises operating at different levels of the market e.g. manufacturer and retailer. A horizontal agreement between competitors to fix prices, share markets or restrict output / development in the market are subject to stringent penalties; in some jurisdictions like USA, even

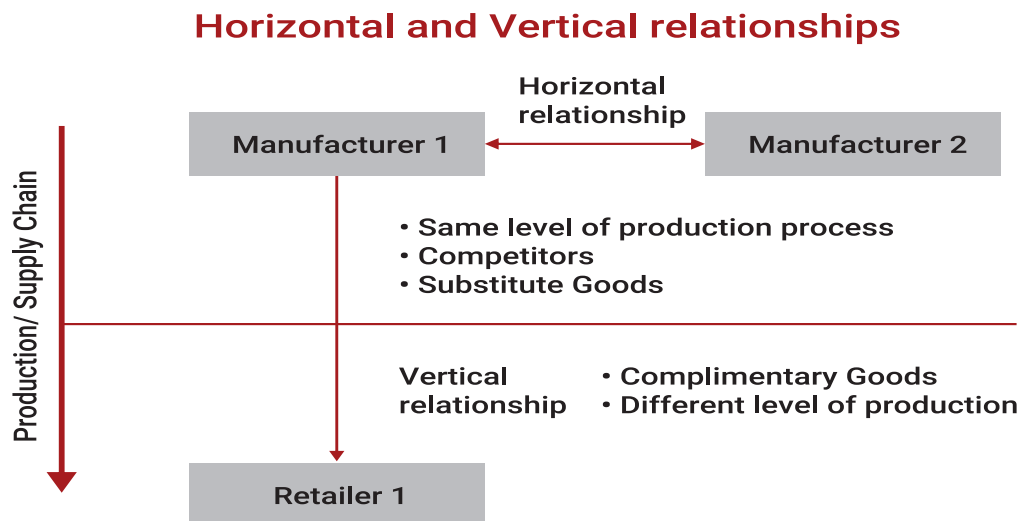


Figure 3.2 : Horizontal and Vertical Relationships

Horizontal agreements are those agreements which are entered into among entities that are operating at the same level or at the same stage of production chain and in the same market i.e. among competitors in a given market. Such agreements are between the producers or suppliers of same goods or suppliers of same

imprisonment of the perpetrators of the conspiracy is possible. Vertical agreements however, are in the nature of day-to-day commercial arrangements between participants in the market and need to be examined only when they cause an appreciable adverse effect on competition in the market.

⁶ *Id* at p. 9.

⁷ *Id* at p. 9.

3.2.1 Scheme under the Competition Act

The Competition Act and the rules and regulations thereunder have been enacted to prevent practices having adverse effect on competition and to promote and sustain competition in the market. Section 3(1) of the Act provides for prohibition of entering into anti-competitive agreements. It shall not be lawful for any enterprise or association of enterprises or person or association of persons to enter into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of service which causes or is likely to cause an appreciable adverse effect on competition within India. As per section 3(2), all such agreements entered into in contravention of the aforesaid prohibition shall be void. This section also specifies certain activities which shall be presumed to have an appreciable adverse effect on competition and also specifies certain agreements which shall be in contravention of section 3(1) if such agreement causes appreciable adverse effect on competition.

Section 3(3) of the Act lays down the various categories of horizontal agreements which are prohibited by the Act.⁸ The Act treats these agreements

presumptively anti-competitive, meaning that the Commission is under no obligation to demonstrate an AAEC, and rather the burden is on the defendant to prove the absence of AAEC. The specific agreements that are presumed to cause AAEC are agreements, which directly or indirectly fix purchase or sale prices; limit or control production, supply, markets, technical development, investments or provision of services; result in sharing markets or sources of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; or directly or indirectly result in bid-rigging or collusive bidding.⁹ The exception to the presumptive rule exists for agreements resulting in joint ventures which enhance efficiency in terms of production, supply, distribution, storage, acquisition or control of goods or services.¹⁰

Section 3(4) of the Act lays down various categories of vertical agreements. These agreements are subject to a rule of reason test, meaning that AAEC has to be demonstrated by the Commission by weighing in the pro and anti-competitive factors mentioned in Section 19(3) of the Act.

⁸ Section 3(3), *The Competition Act, 2002*

⁹ *Id.*

¹⁰ *Id.*

The evidentiary canon to be followed is the preponderance of probabilities test. If the anti-competitive effects outweigh the pro-competitive effects, the vertical restraint shall be hit by Section 3(4) of the Act. The specific agreements prohibited under the said provision include tie-in arrangement; exclusive supply agreement; exclusive distribution agreement; refusal to deal and resale price maintenance¹¹. The list is illustrative and any other vertical restraint found to be causing an AAEC might also be hit by the provision. Remedies for anticompetitive conduct include those listed under Section 27 of the Act, and are imposed by the Commission. The Commission can impose penalty up to 10% of the average of the relevant turnover for the last three preceding financial years. In case of a cartel, the extent of penalty that can be imposed by the Commission is either up to 10% of the relevant turnover for each year of continuance of agreement¹² or up to three times the profits for each year of continuance of agreement, whichever is higher.¹³

Before the provisions relating to horizontal and vertical agreements are discussed in detail, it is better that some important aspects like AAEC and procedural issues are understood.

3.3 Appreciable Adverse Effect on Competition

The test for establishing the violation of the provisions of the Act is that of causing or likelihood of causing an AAEC in the market. The Act, however, does not define the term 'Appreciable Adverse Effect on Competition' (AAEC). Only the probable factors that need to be looked into whilst determining whether or not an agreement is likely to have an AAEC in the market is provided in the Act.

These factors mentioned under section 19(3) of the Act, provide that the Commission while deciding whether or not an agreement is likely to have an AAEC in the market shall bring into consideration any or all of the following factors:

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

¹¹ Section 3(4), Competition Act, 2002.

¹² *Excel Crop Care v. Competition Commission of India*, AIR 2017 SC 2734.

¹³ Section 27(b), Competition Act, 2002.

means of production or distribution of goods or provision of services.

3.4 Procedural Issues

3.4.1 Standard of proof

The Competition Act, being civil law, the standard of proof to establish contravention under this Act is that of civil law, i.e. preponderance of probabilities. ***In Re: Aluminum Phosphide Tablets Manufacturers case***¹⁴, the Commission held, "the existence of an anti-competitive agreement is required to be tested on the principle of 'preponderance of probability; same need not be proved 'beyond reasonable doubt.'" With regards to the evidentiary standard, the Commission has at various occasions held that since cartels relate to clandestine understandings and it is difficult to obtain 'well-documented proof', circumstantial evidence can be sufficiently relied upon to establish the violation. The Commission in ***Delhi Jal Board vs. Grasim Industries Ltd. and Ors.***¹⁵ held, "Commission has consistently set out the standard of proof required to be met in horizontal agreement cases - that of "preponderance of probabilities".

3.4.2 Extraterritoriality – Effects doctrine

The Commission, under Section 32 has been entrusted with the power to

inquire into any agreement, practice, conduct or combination taking place outside India, if it is likely to have an AAEC in India. Thus, the Commission has extraterritorial jurisdiction so long as it can be shown that there is sufficient local nexus with the relevant market in India. To date, the Commission has also entered into Memorandum of Understanding with competition regulators in other jurisdictions namely, Russia, the United States of America (USA), Australia, the European Union (EU), Canada and with the competition law regulators of the BRICS countries to facilitate both knowledge sharing and co-ordination in terms of global cartel investigations. The Commission has the power to inquire into any anti-competitive agreement executed outside India or such agreement in which any party is outside India that may have an AAEC in the relevant market in India, based on the provisions of the Act

3.5 Horizontal and Vertical Agreements under the Act—A Detailed Discussion

As discussed earlier, Section 3 of the Competition Act classifies anti-competitive agreements into two categories, namely, horizontal agreements and vertical agreements. In this section, provisions relating to these agreements are discussed in detail.

¹⁴ *Re: Aluminium Phosphide Tablets Manufacturers*, 2012 Comp LR 753 (CCI)

¹⁵ *Delhi Jal Board vs. Grasim Industries Ltd. and Ors.*, ref. case no. 03 and 04 of 2013 dated 05.10.2017- Matter is currently in appeal.

3.5.1 Types of Horizontal Agreements

As discussed earlier, horizontal agreements are the agreements among entities which operate at the same level or at the same stage of production chain. Such agreements are among the competing producers or suppliers of same goods or suppliers of same services.

It is said, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices"¹⁶.

Section 3(3) stipulates;

"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—

- (a) directly or indirectly determines purchase or sale prices;*
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;*
- (c) 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;*
- (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:*

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.

Types of Horizontal agreement mentioned in section 3(3) are discussed in the tabular format below;

Table 3.5.1 : Types of Horizontal Agreements

Prohibitions and Sections	Price fixing	Section 3(3)(a)
	Output restriction	Section 3(3)(b)
	Market allocation (sharing)	Section 3(3)(c)
	Bid rigging (collusive bidding)	Section 3(3)(d)

¹⁶ Adam Smith 'An inquiry into the nature and causes of the wealth of nations' (1777)

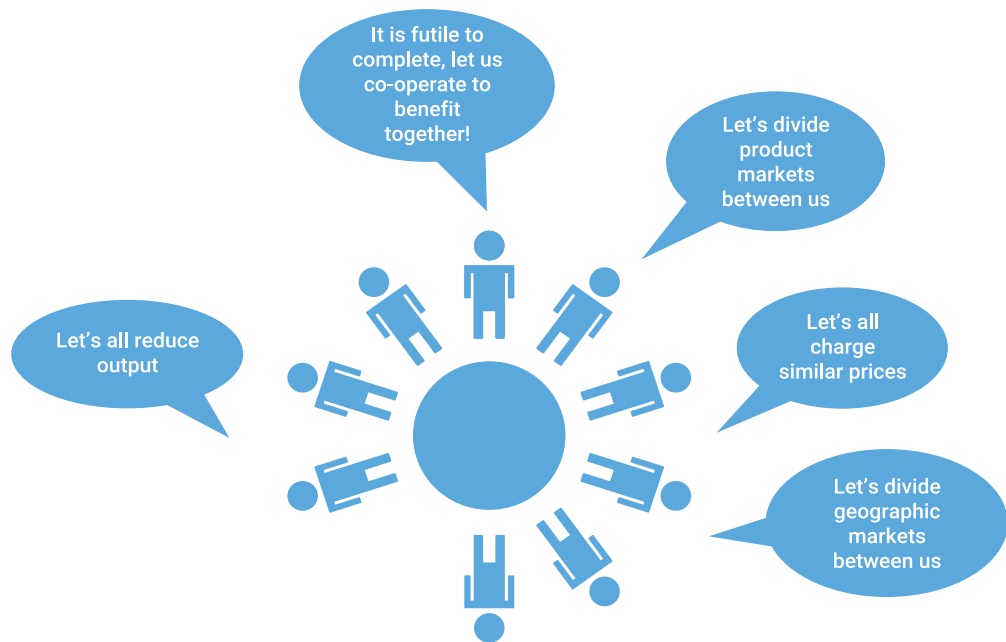


Figure 3.5.1 : Pictorial description of types of Horizontal Agreement.

3.5.2 Cartels

Section 3(3) includes cartels also within its purview. Thus, a brief discussion on cartels would be necessary.

Cartels are 'cancers on the open market economy'¹⁷.

The 1998 OECD Recommendation proclaimed that cartels are *"the most egregious violations of competition law"*¹⁸. Cartels exist at both domestic and global levels. They are the most inimical form of anti-competitive agreements. The existence of cartels in a market economy has direct and grave effect on the economic and financial development in a country. Cartels distort fair trade, innovation

and competition in the market. On the contrary, the members of a cartel achieve higher profits and succeed in making the most of such practices causing detrimental effect on the consumer welfare. OECD defines a hard-core cartel as, *"an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by companies to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas or share or divide markets by allocating customers, suppliers, territories, or lines of commerce... the most egregious violations of competition law"*¹⁹

¹⁷ Speech by Mario Monti on 11 September 2000, available at www.ec.europa.eu/comm/competition/speeches

¹⁸ OECD Council, *Recommendations concerning effective action against hardcore cartels*, (1998)

¹⁹ *Id.*

Recognising its pernicious natures, Cartelization has been included as one of the horizontal agreements that shall be presumed to have AAEC under Section 3 of the Act. As per Section 2(c) of the Competition Act, cartel *includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.* Cartels are agreements between enterprises not to compete on price, product (including goods and services) or customers. The objective of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelization results in higher prices, poor quality and less or no choice for goods or/and services. A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in markets.

Cartels are presumed to have AAEC and therefore anti-competitive. However, agreements entered into by way of joint ventures which increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services have been excluded from the application of Section 3(3) of the Act.

3.5.2.1 Conditions conducive to formation of cartels

Some of the conditions that are conducive to cartelization are depicted in the diagram below:

3.5.2.2 Standard of Proof

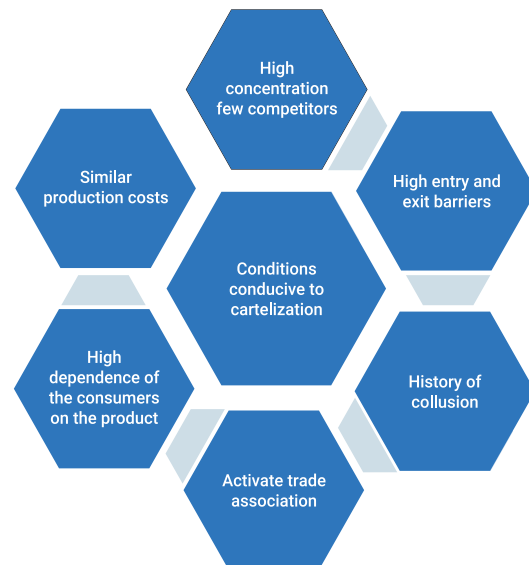


Figure 3.5.2.1 : Indicators of cartel

In most cartel cases, there exist minimal chances of the existence of direct evidence i.e. a written agreement among cartel members, statement of a cartel member who attended a meeting and reached an agreement with competitors, a memorandum to report a meeting with competitors, records of telephone conversations, an electronic mail conversation or a statement of a person who was approached by the cartel to join it and other evidence of like nature. That is to say, generally, members of cartel would refrain from entering into written agreements and would make all possible efforts

to conceal such activities. However, circumstantial evidence may form the most vital piece of evidence and may also prove the existence of a cartel by itself, but it is important to be careful in interpreting indirect evidence. As per ICN report²⁰, it is difficult to deal with cartels due to the following:

- a) Cartels are secretive about their illicit behaviour, and therefore agencies have to undertake great efforts to detect concealed cartels.
- b) Competition authorities need extraordinary powers and skills to collect sufficient evidence to mount a viable case against sometimes-uncooperative defendants.
- c) In the cartel area, competition authorities operate sophisticated leniency programmes to destabilise such conspiracies, which is practically difficult to implement.
- d) The investigation of international cartels tests the limits of competition authority jurisdictional reach.
- e) Last but not least, the growing trend to criminalize cartel behaviour obliges many agencies to work to a particularly high standard of procedure and proof.

Existence of a written agreement is not necessary to establish common

understanding, common design, common motive, common intent or commonality of approach among the parties to an anti-competitive agreement. These aspects may be established from the activities carried on by them, from the objects sought to be achieved and evidence gathered from the anterior and subsequent relevant circumstances. Circumstantial evidence concerning the market and the conduct of market participants may also establish an anti-competitive agreement and suggest concerted action. Parallel behaviour in price or sales is indicative of a coordinated behaviour among participants in a market. The firms often tend to justify the parallel behaviour in prices, production, dispatch or supplies etc. by explaining the fundamentals of the market forces such as demand, increasing cost of production and other economic factors. However, it also remains a fact that parties to an anticompetitive agreement will not come out in open and reveal their identity to be punished by the competition agencies. This is also the reason that the legislature in its wisdom has made the definition of 'agreement' inclusive and wide enough and not restricted it only to documented and written agreement among the parties. Thus, the Commission is not impeded from using circumstantial evidences for making inquiries into

²⁰ *International Competition Network, 'Defining hard core cartel conduct effective institutions effective penalties'. Building blocks for effective Anti-Cartel regimes, Vol1. (2005)*

act, conduct and behaviour of market participants. Parallel behaviour in prices, dispatch, supply accompanied with some other factors indicating coordinated behaviour among the firms may become a basis for finding contravention or otherwise of the provisions relating to anti-competitive agreement of the Act.

Among set of circumstantial evidences, evidences of communication among the participants to an anti-competitive agreement may give an important clue for establishing any contravention. Communication evidences might prove that contravening parties met and communicated with each other to determine their future or present behaviour.

3.5.2.3 Leniency Policy

Leniency policy is a cartel detection

tool and is a type of whistle - blower protection afforded to the members of a cartel who wish to come forward and make disclosure with regard to the existence of a cartel and also to provide evidence thereof so as to avail the leniency benefits offered under the policy. It is alternatively referred to as 'immunity programme' or 'amnesty programme' in various jurisdictions. The chief purpose of having such a cartel detection tool in place is to encourage and incentivize cartel members to make disclosures.

The leniency policy sets forth an array of rules that prescribe for reduced penalties qua a member of a cartel, in trade of disclosure of cogent information to establish the existence of a cartel and on its accord to discontinue any further participation

The Commission in the Cement cartel case (Builders Association of India v. Cement Manufacturers' Association (CMA) and Ors. 2012CompLR629(CCI) observed:

"5.6.13 The Commission holds that evidences as above are indicative of the fact that the Opposite Parties meet frequently in various meetings organized by CMA and collect retail and whole sale prices using the platform of CMA. It is also evident that the details of actual production, available capacities of competing cement companies are also circulated by CMA. in view of these facts, price parallelism does not remain a mere reflection of non-collusive oligopolistic market as has been argued by certain Opposite Parties but mirrors a condition of coordinated behaviour and existence of an anti-competitive agreement in violation of provisions of section 3(3) (a) of the Act which prohibits any agreement or arrangement among the Opposite Parties which directly or indirectly determine the prices in the market."

[Note: Penalties were imposed by the Commission on cement companies, who were part of the agreement. National Company Law Appellate Tribunal (NCLAT) has confirmed the Order of the Commission. The cement companies have preferred appeal before the Supreme Court.]

into the cartel practice and also actively cooperate with enforcement agencies in the investigation. Ordinarily, a reduction of as much as hundred percent penalties is offered to the first informant and the reduction in penalty lessens thereafter. Various countries have been devising well-structured leniency policies to fight the risk of cartel conducts.

In India, The Competition Commission of India (Lesser Penalty) Regulations 2009 (**Lesser Penalty Regulations**) governs the procedure and extent to which leniency/reduced penalties are granted to applicants who make vital disclosures on cartel activity. For a claim for grant of the benefit of leniency under the Lesser Penalty Regulations, the applicant cartel member is bound to produce before the enforcement authority any or all material information and evidence that it possesses relating to substantiate the existence of a cartel. Furthermore, the member is under a compulsion to deter from further participation of any kind in the cartel, from the date of its making disclosures, unless the Commission directs otherwise. In addition to the foregoing, the applicant member is duty bound to act in full cooperation throughout the investigation and other proceedings before the Commission.

The Commission has granted reduction in penalty in the case of **Cartelization**

in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items²¹. One of the bidder during an investigation admitted that he had rigged the three tenders of Indian Railways for BLDC fans along with other two bidders and exchanged numerous calls, emails amongst bidders on rates to be quoted and quantities to be shared. The Commission imposed penalty on the three bidders and on their respective office bearers at the time of the tender. The Commission granted a 75% reduction in penalty to the enterprise and its office bearer under Section 46 of the Act.

As discussed earlier in this chapter, horizontal agreements among enterprises including cartels or otherwise may manifest in one or many ways. These are discussed below.

3.5.3 Price fixing agreements

One of the most important aspects of a competitive market is independent pricing as guided by the market dynamics; and therefore, any sort of collusion with respect to the pricing of the firms is prohibited. Price fixing is among the most common forms of restrictive business practices and, irrespective of whether it involves goods or services, is considered as per se violation in many countries. Price

²¹ *Suo Moto Case No. 03 of 2014, decided on 18th January 2017- Matter is currently in appeal.*

fixing can occur at any level in the production and distribution process. It may involve agreements as to prices of primary goods, intermediary inputs or finished products. It may also involve agreements relating to specific forms of price computation, including the granting of discounts and rebates, drawing up of price lists and variations therefrom, and exchange of price information. Price fixing may be engaged in by enterprises as an isolated practice or it may be part of a larger collusive agreement among enterprises regulating most of the trading activities of members, involving for example, collusive tendering, market and customer allocation agreements, sales and production quotas, etc. Also, agreements fixing

Section 3(3) (a) of the Indian Competition Act provides that any agreement among competitors, directly or indirectly, fixing purchase or sales price is an agreement in complete infringement and violation of the Competition law.

Article 81(1) (a) of the European treaty (now Article 101 TFEU) specifically deals with a 'price fixing' agreement as an anti-competitive agreement. In fact, the mere exchange of information with regard to the current or future price trends are considered anti-competitive and an economic analysis of the nature of information exchange is required.

The fixing of a price affects competition adversely. It enables all the participants

The US Supreme Court in the case of United States v. Trenton Potteries Co., 273 U.S. 392 (1927), observed: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be, in themselves, unreasonable or unlawful restraints without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions."

prices may include those relating to the demand side, such as the case of cartels aimed at or having the effect of enforcing buying power."²²

to predict with a reasonable degree of certainty what the pricing policy pursued by their competitor will be and therefore makes it easier for the

²² Model Law on Competition, United Nations Conference on Trade and Development, Series on Issues in Competition Law and Policy, UNCTAD, TD/RBP/CONF.5/7, available at <http://unctad.org/en/Docs/tdrbpcconf5d7.en.pdf>

market players to operate at supra competitive prices.²³

Competition Act covers both direct and indirect fixing of prices. Indirect price fixing may include fixing commission, discounts, rebates, terms of warranty, maintaining similar price differentials etc. Direct or indirect price fixing may also be done by using the platform of an association of manufacturers or distributors or retailers.

Price fixing agreements can take various forms including the following:

- Agreement regarding providing, eliminating or establishing method of providing discounts
- Agreement on credit terms that will be offered to customers
- Agreement to eliminate goods and services offered at low prices from the market, thereby limiting supply and raising the prices
- Agreement between cartel members not to change or reduce prices without notifying each other

3.5.3.1 Price Parallelism and Plus Factors

*The Commission in the **Bengal Chemist and Druggist Association case**, suo moto Case No. 02 of 2012 and Ref. Case No. 01 of 2013 observed:*

"65. The Commission further observes that the activities of trade association inter alia to direct its members to sell drugs only at their MRP is a palpable anti-competitive conduct which cannot be justified on the ground that most of the members of the BCDA, would be ruined if competitive forces are allowed to operate in the market. Further, the attempt to justify sale of drugs only on MRP on the basis that the margins have been fixed under the DPCO and accepted in the market is untenable as the issue is not the reasonability or the quantum of trade margins but the concerted action to fix uniform trade margin by an agreement amongst the members of the trade association. The activities of the BCDA are in conflict with the objects of the competition law as they cause restraint of trade, stifle competition and harm the consumers."

[Note: The matter is at appellate stage.]

- Agreement on price increase
- Agreement to adhere to published prices
- Agreement not to sell unless it is on the agreed price terms
- Agreement on a standard pricing formula

Over the years, courts, competition authorities and competition experts have come to accept that conscious parallelism, which involves nothing more than identical pricing or other parallel behaviour deriving from

²³ *Vereeniging van Cementhandelaren v. Commission of the European Communities*, Case 8-72, ECLI identifier: ECLI:EU: C:1972:84

*independent observation and reaction by rivals in the marketplace, is not unlawful*²⁴ Collusive behaviour has to be differentiated from a simple parallel conduct. There may be products like food grains, oil, cement, airline fares etc. whose prices remain volatile and intertwined with market forces, such that fluctuations in market conditions lead to change in prices. The upward or downward trend in the market prices thus, might not be due to collusion but purely influenced by market.

Price parallelism is a mirroring effect where traders independently pursue their 'unilateral non-cooperative actions' in view of what other rivals are doing²⁵. There is neither an explicit agreement nor a tacit understanding among the traders. Parallel pricing occurs if firms change their prices simultaneously and proportionally. Price parallelism is however, used as a starting point in prosecuting price fixing cartels as a tool to determine whether a pattern of collusion can be determined. Uniform conduct of pricing by competitors permits

inference on existence of a conspiracy between competitors²⁶. To conclude that price parallelism is as a result of prior meeting of minds to fix prices (price fixing cartel), existence of 'plus factors' has to be shown [parallelism plus]. The Competition authority has to, in the absence of direct evidence, produce enough circumstantial evidence to prove that price parallelism is a result of collusion.²⁷ For instance, overall low capacity utilization and lower supply of cement by the cement companies was taken as plus factors in the **Cement cartel case**²⁸. The Commission observed:

"5.10.2 The Commission observes that in the present case, price parallelism among the cement manufacturers supported and corroborated by factors such as limiting and controlling supply by underutilizing capacity, maintaining similar and parallel behaviour in production and dispatch of cements with a view to maintain high prices in the market as discussed in the preceding paras establish that the cement companies and Opposite Parties

²⁴ Session II, Roundtable on Prosecuting Cartels without Direct Evidence, Global Forum on Competition, Directorate for Financial and Enterprise Affairs Competition Committee, DAF/COMP/GF(2006)3, 2006, available at <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/35967654.pdf>

²⁵ J. DAVID ROBERTSON, *East Asian Trade after the Uruguay Round*, (Cambridge University Press, 1997) at p 202

²⁶ *Alkali Manufacturers Association of India (AMAI) and others v. American Natural Soda Ash Corporation*, (1998) 3 CompLJ 152 MRTPC

²⁷ *Del Monte v. Commission*, Case T-587/08; *Dole v. Commission*, Case T-588/08

²⁸ *Supra* Note 4

named in the instant matter have acted in concert under an agreement.”

3.5.3.2 Information agreements

The exchange of information between businesses can be done through various mediums, ranging from data shared directly between competitors, or data indirectly shared through a common agency or a third party. Information exchange like exchange of price sensitive information, strategic information etc. can lead to competitors fixing prices which can reduce competition.

3.5.4. Fixing Trading Conditions

These include agreement to limit or control production, supply, markets, technical development, investment or provision of services

Production control involves

competitors agreeing to limit the quantity of goods or services available in the market. Agreement to restrict production or output affects prices as it creates an imbalance between demand and supply. Threat to boycott or a decisions taken by associations to boycott a certain entity/entities has been held to be a violation of section 3(3) (b) of the Competition Act as it limits supply in the market.

The Commission in the **FICCI Multiplex case**³⁰ held that the members of the UPDF who were competitors and controlling almost 100% of the market for production and distribution of Hindi pictures in multiplexes in India had acted in concert to fix prices in infringement of section 3(3) (a) of the act, and also limited/ controlled supply by refusing to release Hindi films for exhibition in multiplexes to members

*The Commission in the Kannada **Grahakara Koota Case**, No. 58 of 2012 (CCI) held:*

“7.24 The Commission is of the view that any form of restriction to deny market access to other language films or programmes is not justified. It should be the choice of a film producer or artiste as to whether his film should be dubbed in other language or not. Similarly, the viewer should have the choice as to which movie/programme to watch. Restrictions cannot be imposed on the film exhibitors and distributors and television channels to exploit the exhibition of validly obtained rights of a film or programme. Any kind of regulation or restriction by an association falls foul of competition law provisions.”²⁹

²⁹ See also, Case No. 56 of 2010; KeralaCine Exhibitors Association v. Kerala Film Exhibitors Federation, 2015 CompLR 666 (CCI)

³⁰ FICCI – Multiplex Association of India v. United Producers/ Distributors Forum, Case No. 1/2009 (CCI)

of the informant. Thus, they were found to have violated section 3(3) (b) of the Act.

The objective of such agreements or such conditions is to limit or regulate flow of goods or services through measures like fixing quotas or percentages for participating members or allocate fixed number of units to members or through simply an understanding to not use their manufacturing capacity to the optimal level. For instance, the Commission in **Dumper Owner's Association case**³¹ held that the Opposite Party, being a single point source of supply of dumpers, by its conduct of allocating dumpers of its members to the stevedores who are enlisted with it and refusing to supply the dumpers to the Informant has limited and controlled the provision of the said services in contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act.

3.5.5. Market Sharing Agreements

Such agreements share 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

These agreements are essentially agreements not to compete, "I won't sell in your part of the market if you don't sell in mine".³² This includes competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base rather than allowing competitive market forces to work. Market sharing restricts competition, forces prices up and reduces choice on price and quality for consumers and other businesses.³³

Market sharing can include:

- allocating customers by geographic area
- dividing contracts by value within an area
- agreeing not to:
 - compete for established customers
 - produce each other's products or services
 - expand into a competitor's market.

3.5.6 Bid Rigging - It involves a

³¹ *M/s Swastik Stevedores Private Limited v. M/s Dumper Owner's Association*, Case No. 42 of 2012 (CCI). - Matter currently in Court.

³² *Revised chapter III, Model Law on Competition (2012)*, Intergovernmental Group of Experts on Competition Law and Policy, United Nations Conference on Trade and Development, Twelfth session Geneva, 9–11 July 2012, available at http://unctad.org/meetings/en/SessionalDocuments/ciclpL4_en.pdf

³³ *Bharatpur Truck Operators Union* (order dated 24.8.1984 in RTP Enquiry No.10/1982), *Goods Truck Operators Union, Faridabad*, (order dated 13.12.1989 in RTP Enquiry No.13.13.1987, *Rohtak Public Goods Motor Union* (order dated 25.8.1984 in RTP Enquiry No.250/10983)

concerted action that directly or indirectly results in collusive bidding or manipulation of bids.

Bidding as a practice, is intended to enable the procurement of goods or services on the most favorable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies. Tenders or bids are invited, with a view to obtain the best price(s), product(s) or service(s). But the objective of securing the most favorable prices and the conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive. "Bid rigging" as defined under the Act,³⁴ 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.

Bid rigging, or collusive tendering, as referred to, in various foreign jurisdictions is a practice wherein various market players agree to collaborate and act in a concerted

fashion in response to a tender. Such a concerted action is in gross violation of the Competition law and any or all agreements entered into in consideration of such concerted action shall be predominantly anti-competitive agreements in nature. The term "process for bidding" used in the explanation in Section 3(3) would cover every stage from notice inviting tender till the award of the contract and would also include all the intermediate stages such as pre-bid clarification and bid notifications also.³⁵

3.5.6.1 Forms of Bid rigging

Collusive bidding or bid rigging may occur in various ways. The various agreements that indicate concerted action on the part of the bidders are:

- agreements to submit identical bids;
- agreements as to who shall submit the lowest bid;
- agreement for the submission of cover bids (voluntary inflated bids);
- agreements not to bid against each other;
- agreement on common norms to calculate prices or terms of bids;
- agreement to squeeze out outside bidders;

³⁴ Explanation, Section 3(3), The Competition Act, 2002.

³⁵ *Excel Crop Care Limited v. Competition Commission of India*, 2013 CompLR 799 (COMPAT)

- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis; and
- agreement as to the bids which any of the parties may offer at an auction for the sale of goods or any agreement through which any party agrees to abstain from bidding for any auction for the sale of goods, which eliminates or distorts competition.

Inherent in some of these agreements, is a compensation system to the unsuccessful bidders by dividing a certain percentage of profits of successful bidders. All competition law jurisdictions broadly divide or categorize bid rigging under the following heads:

- *Bid Suppression*: An act of bid suppressing transpires when the conspirator companies collude to not submit a bid with an underlying objective of ensuring that another bidder is awarded the tender.
- *Complementary Bidding*: Complementary bidding also known as 'cover' or 'courtesy' bidding, emerges when competing market players are agreeable to submitting bids with quotations too exorbitant thereby it being too unlikely to be accepted, or likewise stipulating terms and conditions implausible of being considered. Such bids are submitted only with a view to make the bidding process appear as genuine.
- *Bid Rotation*: Bid rotation refers to the practice adopted by competing bidding firms by "taking turns" at being awarded tenders. Bid rotation is in effect a form of market allocation where competitors are entitled to their "fair share" of the industry profits.

For instance, in the case of *In Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab*,³⁶ it was found that all the three Research Designs & Standards Organization (RDSO) of the Indian Railways approved vendors rigged the bids in tender floated by the Diesel Loco Modernization Works (DLMW) for procurement of feed valves used in diesel locomotives. Two out of three bidders submitted complementary bids. Offer of one bidder was found technically suitable, but its offer was passed over as it did not submit the cost of tender documents and other firm's offer was passed over as it did not accept the warranty clause as per conditions of the contract.

³⁶ *Suo Moto Case No. 03 of 2012, decided on 5 February 2014.*

- **Subcontracting:** Subcontracting arrangements are another form of bid rigging arrangement. In such arrangements, competitors agree not to bid or to submit a losing bid and receive sub-contracts in exchange from the successful bidder.

Allocation of contracts on the basis of 'respect for existing "traditional" customer relationships' as well as various measures to support bid-rigging is anti-competitive.³⁷ In **Gulf Oil Corporation Ltd. v Competition Commission of India & Others**,³⁸ the Appellate Tribunal concurred with the Commission's conclusion

that collective boycott by explosive manufacturers in an e-auction amounted to bid rigging.

3.5.6.2 Suspicious behaviour patterns

Unearthing bid rigging can be difficult. Suspicion however, can be aroused by unusual behaviour of the bidders. The following is an illustrative list of situations of suspicious behaviour:

- The bid offers by the different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate that the designated bid winner has prepared all the bids (of the losers).

The Tribunal in the case of National Insurance Company Ltd. and Ors., 2017CompLR1(CompAT) approved the Commission's order and observed:

"14.4 The bid rigging arrangement executed by the Appellants was in the nature of cover bidding whereby three of them agreed to submit bids which were higher than the bid of UIICL. The bidding pattern has been appropriately analyzed by the Commission in the impugned order and the relevant table and findings have been noted in paragraphs 8.2 and 8.3 of this Order. The Appellants, through their separate bids created an impression of genuine competition. This misleading facade resulted in UIICL not ending up as a lone qualifying bidder. It is relevant to note that the Kerala High Court, which was the jurisdictional court, had in its judgment in WA No. 3332 of 2001 dated 29.10.2001, held that when there was only one bidder and the contract was awarded to that bidder, there was demonstrable prejudice to public interest. On the facts of this case for the tender for the year 2010-2011, there were only 2 qualifying bidders i.e. UIICL and OICL and for the year 2011-2012 also there were only two qualifying bidders i.e. NIACL and UIICL. If OICL or NIACL had not bid, this would have been an instance of lone qualifying bidder. Viewed from this perspective, cartelization ensured success of UIICL".³⁹

³⁷ Pre-insulated pipes OJ [1999] L 24/1, [1999]4CMLR402.

³⁸ *Gulf Oil Corporation Ltd. v Competition Commission of India & Others*, Appeal No. 82 to 90 of 2012, dated 18.04.2013

³⁹ *National Insurance Company Ltd. and Ors. v Competition Commission of India* Appeal No. 94 of 2015

- Bid documents contain the same corrections and alterations indicating last minute changes.
- A bidder seeks to bid package for himself/herself and also for the competitor.
- A bidder submits his/her bids and also the competitor's bid.
- A party brings multiple bids to a bid opening and submits its bid after coming to know who else is bidding.
- A bidder makes a statement indicating advance knowledge of the efforts of the competitors.
- A bidder makes a statement that a bid is a 'complementary', 'token' or cover bid.
- A bidder makes a statement that the bidders have discussed prices and reached an understanding.

Warning signals to detect bid rigging

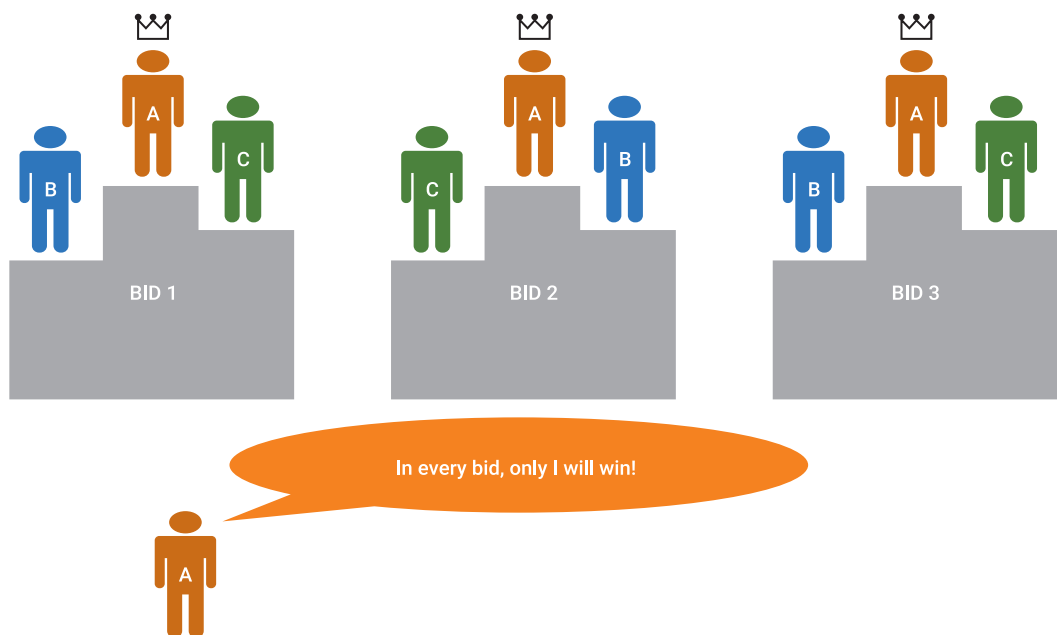


Figure 3.5.6 (a) The same supplier is often the lowest bidder

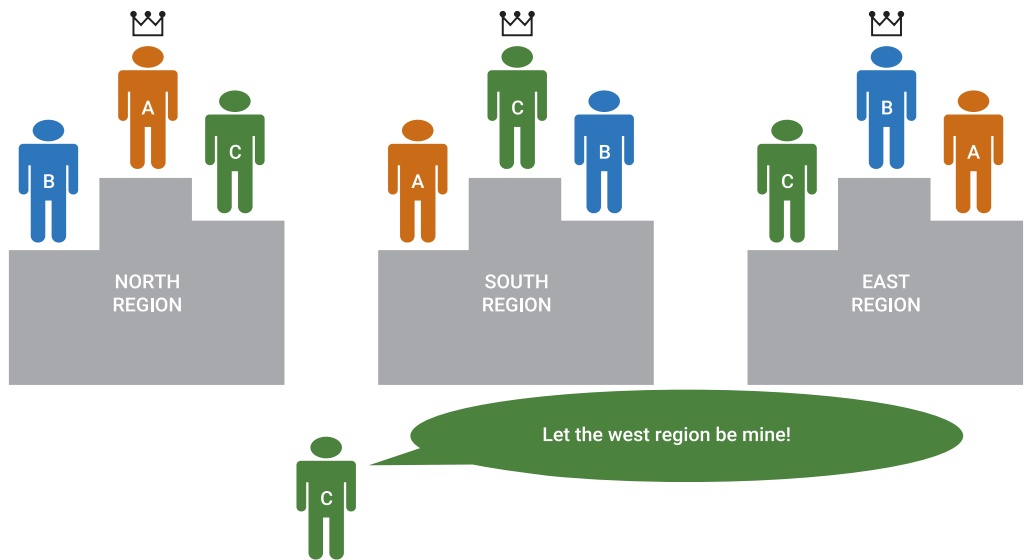


Figure 3.5.6 (b) There is a geographic allocation of winning tenders

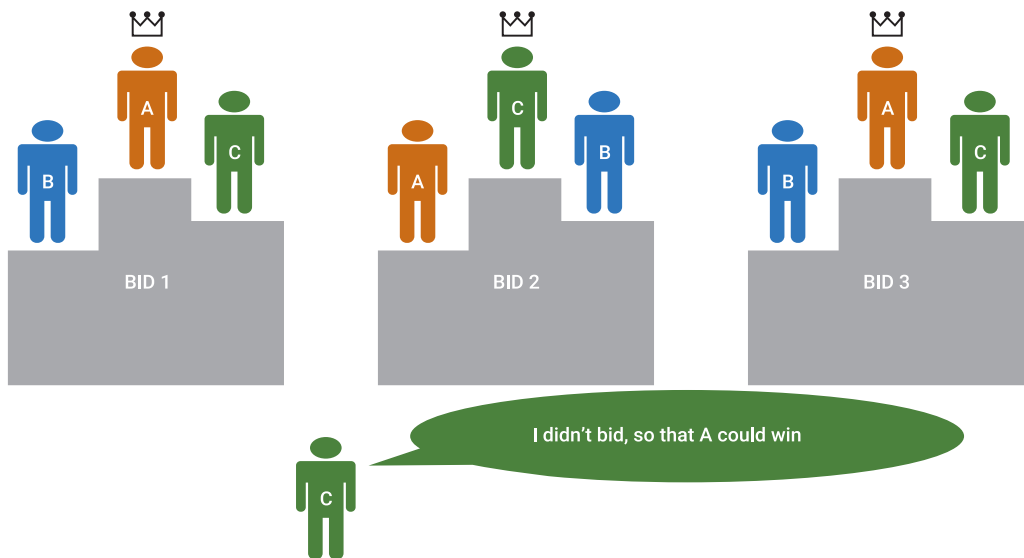


Figure 3.5.6 (c) Regular suppliers fail to bid on a tender they would normally be expected to bid for

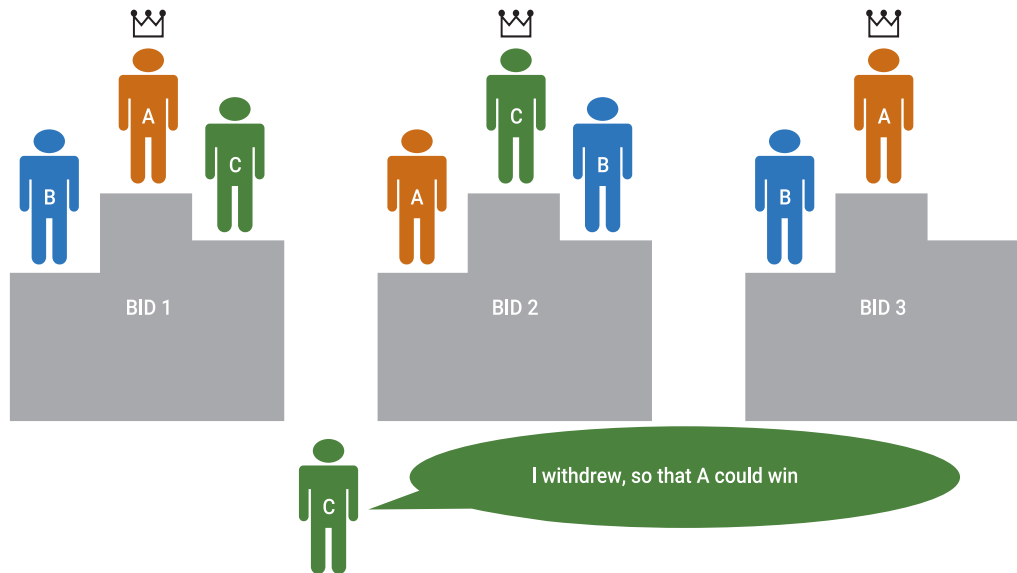


Figure 3.5.6 (d) Some suppliers unexpectedly withdraw from bidding

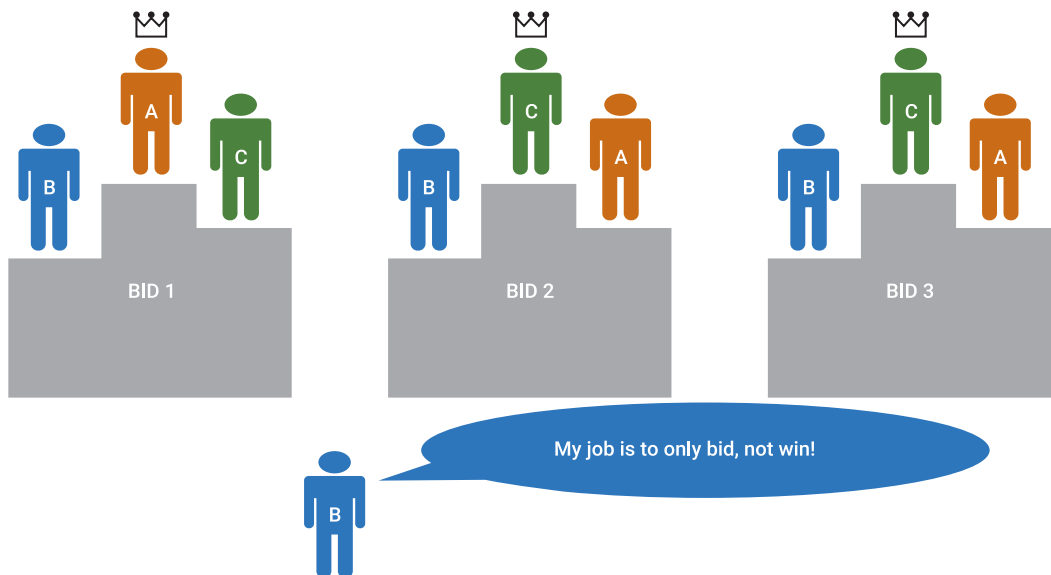


Figure 3.5.6 (e) Certain companies always submit bids but never win

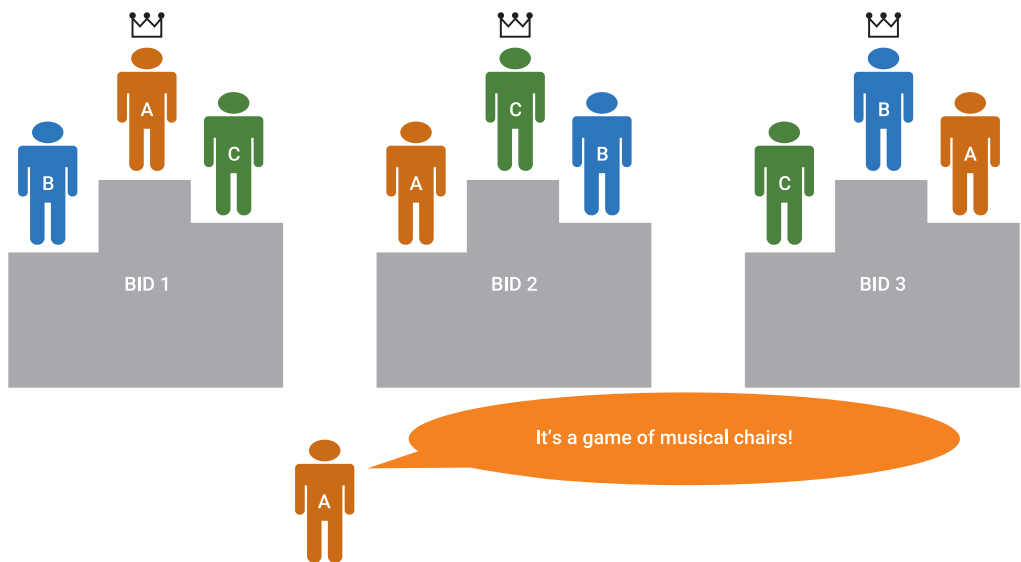


Figure 3.5.6 (f) Each company seems to take a turn being the winning bidder

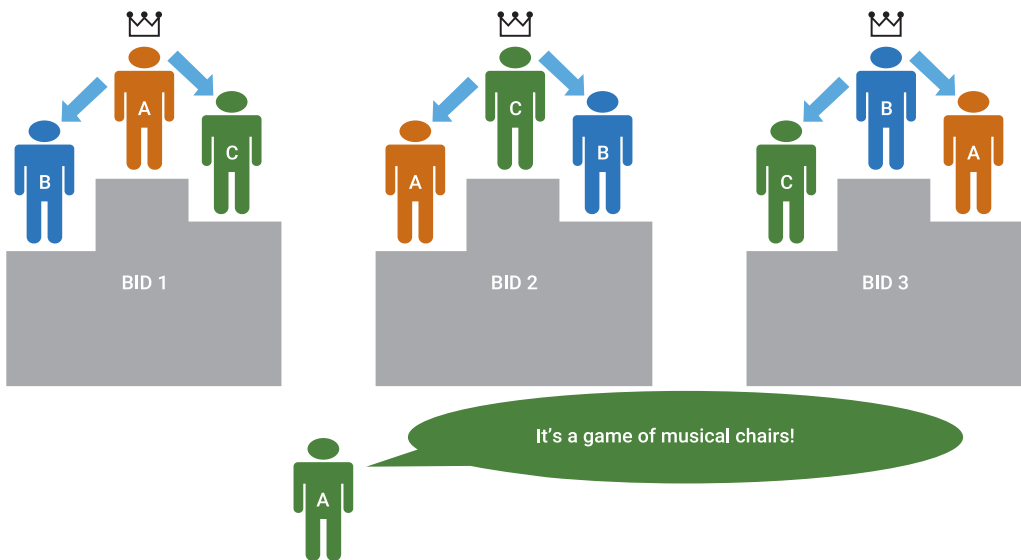


Figure 3.5.6 (g) The winning bidder repeatedly sub-contracts work to unsuccessful bidders

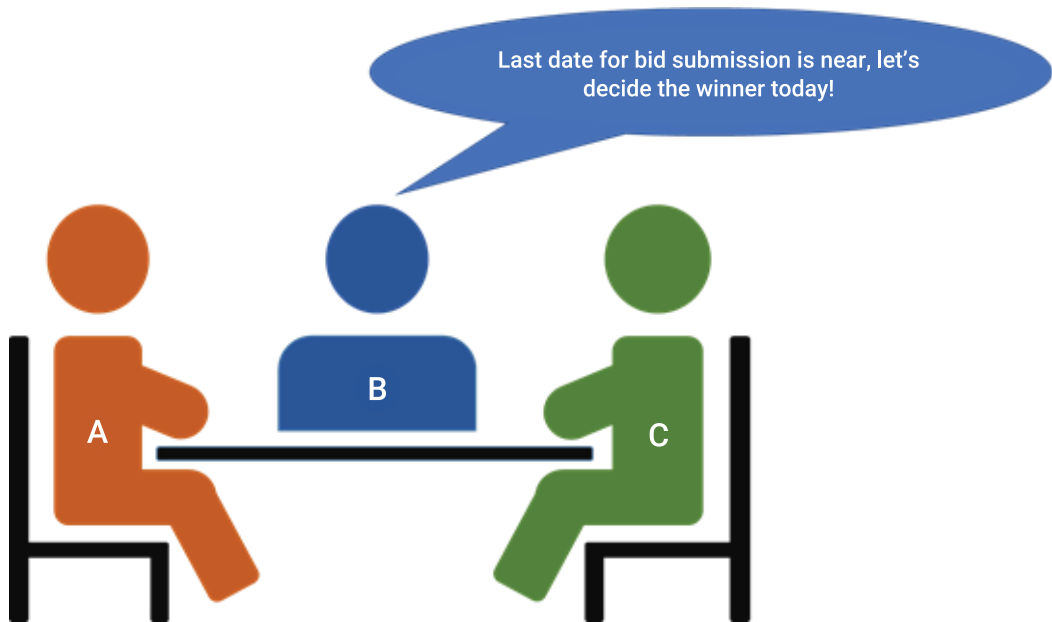


Figure 3.5.6 (h) Competitors regularly socialize or hold meetings shortly before the tender deadline

In **MDD Medical Systems India Private Limited**⁴⁰, the Tribunal held that factors proved like the huge disparity in the rates between competitors, the identical price bids of few other competitors and common typographical errors and other common errors are evidences to prove guilty meeting of minds in between the competitors.

3.5.6.3 Public Procurement and Bid Rigging

Public procurement essentially refers to purchasing goods and services by the government agencies and public sector entities.⁴¹ Public procurement is a key government activity and accounts for on an average of 10-25% of the GDP of national economies

⁴⁰ *MDD Medical Systems India Private Limited vs. Foundation for Common Cause and People Awareness and Ors.*, 2013 CompLR327(CompAT)³², Revised chapter III, Model Law on Competition (2012), Intergovernmental Group of Experts on Competition Law and Policy, United Nations Conference on Trade and Development, Twelfth session Geneva, 9–11 July 2012, available at http://unctad.org/meetings/en/SessionalDocuments/ciclpL4_en.pdf

⁴¹ Public procurement substantially differs from private procurement, as the Government and its agencies have often limited leverage due to the various administrative, procedural and accountability formalities that they have to follow as compared to private sector. A private procurer can choose his purchasing strategy flexibly, whereas public procurement is subject to transparency requirements and a number of regulations. Procurement has to be in a cost effective manner. Thus, efficiency and cost saving are necessary ingredients of the whole procurement process.

worldwide. In India, government procurements are estimated to constitute about 30% of the GDP. Procurement of goods and services is carried out by various ministries, departments, municipal and other local bodies, statutory corporations and public undertakings, both at the Centre and the State level. The fundamental objective of an effective procurement policy is to promote efficiency in the form of selecting the supplier with lowest price or more generally to get the best value for money. It is essential that the procurement regulations do not facilitate collusive arrangements. The formal rules that govern procurement, the way in which auction is carried out and the design of the auction itself can all act to hinder competition and help promote or sustain bid-rigging conspiracies. In past, many Comptroller and Auditor General of India (CAG) audit reports, vigilance reports of Central Vigilance Commission (CVC) and various studies have highlighted wide scale prevalence of cartelization and bid rigging in government procurements.

The major concern surrounding public

procurement is the possibility of collusion amongst bidders promoted by the formal rules governing the procurement which makes it easier for the competitors to communicate. In case where tender specifications, terms and conditions and estimated cost are uncertain, firms tend to collude and manipulate the entire bidding process to their advantage.⁴² Under such a scenario, effective enforcement of the provisions against bid rigging can ensure that the process of public procurement is not hampered by collusive behaviour between the bidders. There are various indications which can be relied upon to detect collusive bidding which includes geographical allocation of winning tenders, similarity in terms of the documents concerning the bids, a huge difference between the winning bid and other bids, regular socialization of the bidders etc.

Some of the factors that help support collusion in Public Procurement are listed below :-

- Small number of companies to supply goods or services⁴³

⁴² *Foundation for Common Cause v. PES Installations Pvt. Ltd. And Anr.*, Case No. 43 of 2010, decided on 16 April 2012.

⁴³ *In Re: Aluminium Phosphide Tablet Manufacturers, Suo Moto* Case No 02/2011, decided on 23 April 2012, the case involved allegation of bid rigging by manufacturers of aluminum phosphide tablets in India. The Commission noted that there are only four manufacturers who quoted identical prices for last eight years and sales were restricted only to the government agencies which made collusion not difficult.

- High entry barriers to the market
- Constant, predictable flow of demand from the public sector
- Active trade association⁴⁴
- Repetitive bidding
- Homogeneity of products or services
- Few 'if any' good alternative products or services
- Little or no technological change in the product or service
- Common or related Directors in the bidding companies.

OECD Checklist for detecting Bid-rigging in Public procurement⁴⁵

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

1. Look for warning signs and patterns when businesses are submitting bids.
Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Subcontracting and undisclosed joint venture practices can also raise suspicions.
 - a. The same supplier is often the lowest bidder.
 - b. There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
 - c. Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
 - d. Some suppliers unexpectedly withdraw from bidding.
 - e. Certain companies always submit bids but never win.
 - f. Each company seems to take a turn being the winning bidder.

⁴⁴ See, *In Re: Western Coalfield, Case no. 34 of 2015, decided on 14 September 2017 - Matter is currently in appeal.*

⁴⁵ *Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement, 2012, available at <http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf>*

- g. Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- h. The winning bidder repeatedly subcontracts work to unsuccessful bidders.
- i. The winning bidder does not accept the contract and is later found to be a subcontractor.
- j. Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted.

Tell-tale signs of a bid rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- a. Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.
- b. Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- c. Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- d. Bids from different companies contain identical miscalculations.
- e. Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- f. The packaging from different companies has similar postmarks or post metering machine marks.
- h. Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- i. Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.
- j. Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns related to pricing.

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be coordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering

cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- a. Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
 - b. Anticipated discounts or rebates disappear unexpectedly.
 - c. Identical pricing can raise concerns especially when one of the following is true:
 - i. Suppliers' prices were the same for a long period of time,
 - ii. Suppliers' prices were previously different from one another,
 - iii. Suppliers increased price and it is not justified by increased costs, or
 - iv. Suppliers eliminated discounts, especially in a market where discounts were historically given.
 - d. A large difference between the price of a winning bid and other bids.
 - e. A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
 - f. There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.
 - g. Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
 - h. Similar transportation costs are specified by local and non-local companies.
 - i. Only one bidder contacts wholesalers for pricing information prior to a bid submission.
 - j. Unexpected features of public bids in an auction, electronic or otherwise such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.
4. Look for suspicious statements at all times.

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.

- a. Spoken or written references to an agreement among bidders.
- b. Statements that bidders justify their prices by looking at "industry suggested prices", "standard market prices" or "industry price schedules".
- c. Statements indicating that certain firms do not sell in a particular area or to particular customers.
- d. Statements indicating that an area or customer "belongs to" another supplier.
- e. Statements indicating advance non-public knowledge of competitors'

pricing or bid details or foreknowledge of a firm's success or failure in a competition for which the results have yet to be published.

- f. Statements indicating that a supplier submitted a courtesy, complimentary, token, and symbolic or cover bid.
- g. Use of the same terminology by various suppliers when explaining price increases.
- h. Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- i. Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- a. Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- b. Suppliers regularly socialise together or appear to hold regular meetings.
- c. A company requests a bid package for itself and a competitor.
- d. A company submits both its own and a competitor's bid and bidding documents.
- e. A bid is submitted by a company that is incapable of successfully completing the contract.
- f. A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- g. Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging.

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

7. Steps procurement officials should take if bid rigging is suspected

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.
- Contact the relevant competition authority in your jurisdiction.

After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

3.5.7 Exemptions under Section 3(3)

3.5.7.1 Export Cartels

The Act provides that the restriction on cartels does not apply to the right of any person to export goods from India to the extent such agreements relate exclusively to production, supply, distribution or control of goods or provision of services for such export. To this extent, the Act distinguishes and exempts export cartels (i.e., a cartel between enterprises located in India that intend to cartelize markets outside India) as opposed to import cartels, (i.e., a cartel between enterprises located outside India with the aim of cartelizing a relevant market within India).

3.5.7.2 Sectoral Exemption

The Central Government has provided exemption to Vessel Sharing Agreements (VSAs) in the liner shipping industry from the purview of Section 3 of the Act till July 3, 2021.⁴⁶

3.6 Vertical Agreements

Vertical agreements, as discussed earlier, are agreements between manufacturers and its downstream distributors, retailers or upstream raw materials suppliers, etc. (i.e. agreements between enterprise at different stages or level of production). Therefore, any agreement with the final customer/consumer will be outside the ambit of assessment under section 3(4) which deals with vertical agreements.

⁴⁶ Vessel Sharing Agreements Exempted from the Purview of CCI, Press Information Bureau, Government of India, Ministry of Shipping, 2015 available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=118581>

The Commission in the **DTH Service providers case**⁴⁷ observed:

"18.32 A manufacturer / service provider and the consumer cannot ever be said to be part of any "production chain" or even operating in "different markets" because a consumer does not participate in production and at the same time, the market for any good or service must include the producer and the consumer. There cannot be any market that only has the producer or the consumer. Therefore, both are, by definition, part of the same relevant market. Any "agreement" between the producer / service provider and consumer occurs after inter-brand or intra-brand competition has already played out and therefore such agreements with the end consumers do not have any competition aspect. Economic theory supports the view that if any such restraint is imposed by a manufacturer / service provider on the end consumer, it would be resolved over time since the consumers would start shifting to competitors who do not impose such restricting conditions. This legal and economic position takes the subscription "agreement" between DTH operators and its subscribers out of the purview of section 3(4) of the Act."

Rule of reason applies to vertical agreements which means that these agreements are not presumed to have AAEC but are assessed in its legal and economic perspective to determine whether the agreement in question poses any real threat to competitive forces. *"The rule of reason normally requires ascertainment of facts or features peculiar to the particular business, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, the history of the restraint and the evil believed to exist, the reason for adopting the particular restraint and the purpose sought to be attained. It is only on a consideration of these factors that it can be decided whether a particular act, contract or agreement imposing the restraint is unduly restrictive of competition so as to constitute restraint of trade."*⁴⁸

Only when the negative effects of the restraint overcome the positive effects, can the agreement be termed as anti-competitive. This requires balancing the negative and the positive factors mentioned under Section 19(3) (a-c) and Section 19(3) (d-f) respectively.⁴⁹

Further, the burden of proving AAEC in vertical agreements lies with the Commission itself unlike horizontal agreements where the burden of proving no AAEC lies with the party. Vertical agreements are likely to have

⁴⁷ Consumer Online Foundation Informant v. Tata Sky Limited & Ors., Case No. 2 of 2009 (CCI)

⁴⁸ Mahindra & Mahindra Ltd vs Union Of India & Anr, 1979 AIR 798, 1979 SCR (2)1038. See also, Eros International Media Ltd. v. Central Circuit Cine Association & Others, 2012 ComplLR 20 (CCI).

⁴⁹ In ShamsherKataria v Honda Siel, Case No. 03/2011 the commission while dealing with a vertical agreement held that "where such agreements are entered into by a dominant entity, and where the restrictive clauses in such agreements are being used to create, maintain and reinforce the exclusionary abusive behaviour on part of the dominant entity, then the Commission should give more priority to factors laid down under section 19(3)(a) to (c) than the pro-competitive factors stated under section 19(3)(d) to (f) of the Act, given the special responsibility of such firms not to impair genuine competition in the applicable market."

an adverse effect on the competition only if the firm imposing vertical restraint has some sort of market power in the relevant market.

As per section 3(4) of the Act, 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.⁵⁰

Types of Vertical Agreements mentioned in section 3(4) of the Act are discussed in tabular form below:-

Table 3.6 Types of Vertical Agreements

Prohibitions and Sections	Tie-in Arrangement Section 3(4) (a) including Explanation (a)	Tie-in arrangement includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.
	Exclusive Dealing Section 3(4)(b) and (c) [including explanations (b) and (c)]	Exclusive supply agreement includes any agreement restricting in any manner the purchaser in the course of such trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. 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.
	Refusal to deal Section 3(4)(d) including Explanation (d)	Refusal to deal includes any agreement which restricts or is likely to restrict by any method the persons or classes or persons to whom goods are sold or from whom goods are bought.

⁵⁰ The European Commission's guidelines of vertical agreements outline the different types of vertical agreements as: Single branding group; Limited distribution group; Re sale price maintenance group; Market partitioning group.

	<p>Resale price maintenance Section 3(4)(e) including Explanation (e)</p>	<p>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)</p>
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3.6.1 Tying arrangements

Tying refers to the behaviour of selling one product (the tying product) conditional on the purchase of another product (the tied product). In *Sonam Sharma v. Apple Inc. and other*⁵¹ (Apple case), the Commission differentiated between tying and bundling, and held that the term 'tying' is most often used when the proportion in which the customer purchases the two products is not fixed or specified at the time of purchase, as in a 'requirements tie-in' sale, whereas a bundled sale typically refers to a sale in which the products are sold only in fixed proportions (e.g., one pair of shoes and one pair of shoe laces or a newspaper, which can be viewed as a bundle of sections, some of which may not be read at all by the customers). Tying may be anti-competitive as it would restrict access to the tied product market by competitors and may also directly lead

to supra-competitive prices, especially in three situations. Firstly, if the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the supplier may seek to avoid this substitution and as a result be able to raise its prices. Secondly, when the tying allows price discrimination according to the use the customer makes of the tying product, for example the tying of ink cartridges to the sale of photocopying machines (metering). Thirdly, when in the case of long-term contracts or in the case of after-markets with original equipment with a long replacement time, it becomes difficult for the customers to calculate the consequences of the tying.⁵²

⁵¹ *Sonam Sharma v. Apple Inc. and others*, Case No. 24 of 2011

⁵² Para 217, *Guidelines on Vertical Restraints*, COMMISSION NOTICE, EUROPEAN COMMISSION, Brussels, SEC(2010) 411, SEC(2010) 413, available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

⁵³ *Supra* Note 51

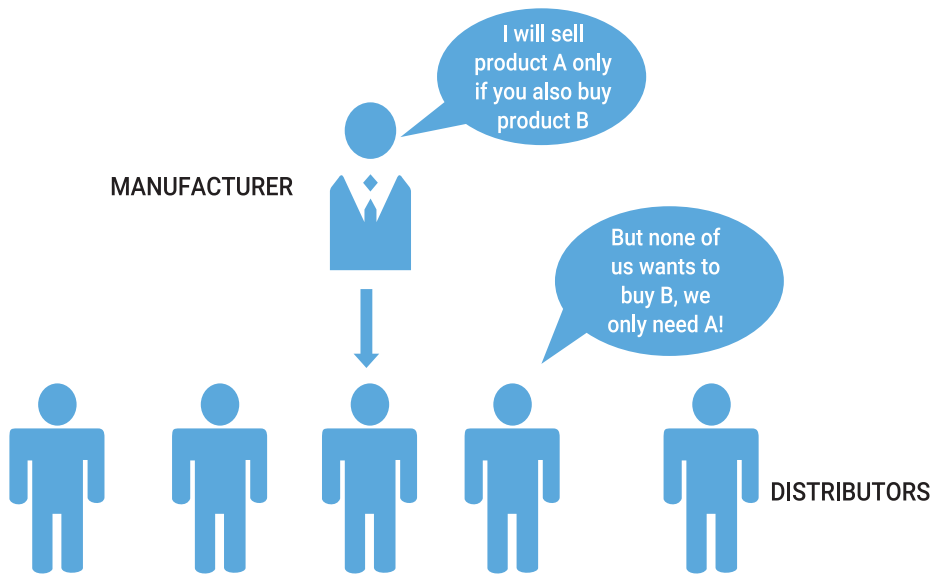


Figure 3.6.1 Pictorial representation of tie-in arrangements

The Commission in the Apple case⁵³ laid out the following conditions necessary and essential in respect of anti-competitive tying:

1. Presence of two separate products or services capable of being tied: In order to have a tying arrangement, there must be two products that the seller can tie together. Further, there must be a sale or an agreement to sell one product or service on the condition that the buyer purchases another product or service (or the buyer agrees not to purchase the product or service from another supplier). In other words, the requirement is that purchase of a commodity was conditioned upon the purchase of another commodity.
2. The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product: An important and crucial consideration for analysing tying violation is the requirement of market power. The seller must have sufficient economic power in the tying market to leverage into the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product.⁵⁴
3. The tying arrangement must affect a "not insubstantial" amount of commerce: Linked with the above requirement, tying arrangements are generally not perceived as being anti-competitive when substantial portion of market is not affected.

⁵⁴ *M/S ESYS Information Technologies Pvt. Ltd v. Intel Corporation, 2014 CompLR 1132 (CCI)*

3.6.2 Exclusivity arrangements

Exclusivity arrangements may be in the form of 'exclusive supply agreement' or 'exclusive distribution agreement'. As per the Act, '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 person⁵⁵ and '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.⁵⁶

Exclusive arrangements may have both positive and negative effects on competition. Such arrangements might help in assuring steady source of supply and protect consumers against price fluctuations. They may also reduce selling expense and protect the position of weaker sellers/competitors against more established sellers. For the manufacturer, such arrangements are often used to enter new markets, reduce cost of distribution, to provide better after sale services, to ensure supply of genuine spare parts to the consumers etc.

However, exclusive agreements may also restrict competition in the channel of distribution where opportunity of rivals to compete is restricted.

The main competition risk of exclusive supply is anticompetitive foreclosure of other buyers. The market share of the buyer on the upstream purchase market is obviously important for assessing the ability of the buyer to "impose" exclusive supply which forecloses other buyers from access to supplies. The importance of the buyer on the downstream market is however the factor which determines whether a competition problem may arise. If the buyer has no market power downstream, then no appreciable negative effects for consumers can be expected.⁵⁷ The possible competition risks of an exclusive distribution agreement are mainly reduced intra-brand competition and market partitioning, which may in particular facilitate price discrimination. Exclusive distribution may lead to foreclosure of other distributors and therewith reduce competition at that level. However, market power of the supplier has to be taken into account for any assessment of AAEC. The more powerful the supplier is, more is the risk

⁵⁵ Explanation (b) to Section 3(4), Competition Act, 2002.

⁵⁶ Explanation (c) to Section 3(4), Competition Act, 2002.

⁵⁷ Para 194, Guidelines on Vertical Restraints, COMMISSION NOTICE, EUROPEAN COMMISSION, Brussels, SEC(2010) 411, SEC(2010) 413, available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

of loss of intra-brand competition.⁵⁸ If the alleged agreement does not lead to foreclosure of competition or has the likelihood to drive existing competition out of the market or hinders entry of new players in to the market, it cannot be held to be anti-competitive.⁵⁹

In the **Automobile case**,⁶⁰ the Commission noted that the agreements entered by the car manufactures contained clauses that required the authorized dealers to source spare only from the original equipment manufacturers (OEMs) or their approved vendors and was of the view that such agreements were in the nature of exclusive supply and distribution agreements and such practices also amounted to refusal to deal under section 3(4) (b), (c), (d) of the Act.

In **Jindal Steel and Power Limited v. Steel Authority of India**⁶¹ (SAIL case), it was alleged that the Steel Authority of India Limited had entered into an exclusive supply agreement with Indian Railways to supply rails which resulted in foreclosure of the market as alleged by Jindal Steel and Power Limited and contravention with Sections 3(1) read with 3(4) of the Act. However, the

Commission did not find the impugned exclusive supply agreement to be anti-competitive on the grounds that the pricing of the product was rational and the terms of the agreement (which were for the exclusive supply of rails by SAIL to IR for an open-ended duration and did not include a termination clause) entered into between SAIL and IR did not foreclose the market.

3.6.3 Refusal to deal

'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;⁶²

In the **Automobile case**,⁶³ the Commission noted that the agreements entered by the car manufactures contained clauses that required the authorized dealers to source spare only from the original equipment manufacturers (OEMs) or their approved vendors and was of the view that such agreements were in the nature of exclusive supply and distribution agreements and such practices also amounted to refusal to deal.

⁵⁸ Para 151, *Guidelines on Vertical Restraints*, COMMISSION NOTICE, EUROPEAN COMMISSION, Brussels, SEC(2010) 411, SEC(2010) 413, available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

⁵⁹ *M/s Amit Auto Agencies v. M/s King Kaveri Trading Co*, 2013 ComplLR 892 (CCI)

⁶⁰ *Supra* Note 49

⁶¹ *Jindal Steel and Power Limited v. Steel Authority of India Case No.11/2009 decided 201.12.2011*

⁶² *Explanation (d), Section 3(4), Competition Act, 2002.*

⁶³ *Supra* Note 49

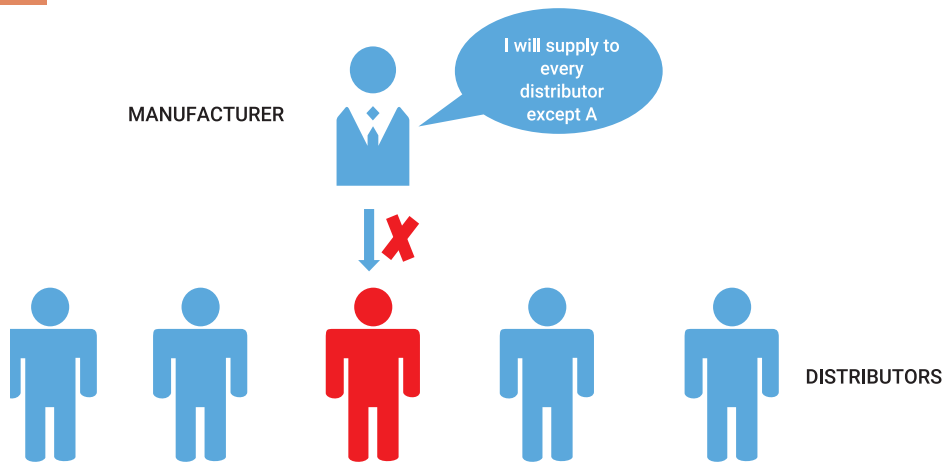


Figure 3.6.3 Pictorial representation of refusal to deal

The general criteria which has to be satisfied to establish refusal to deal is:

- Product to which access is sought is indispensable to someone wishing to compete in the downstream market;
- A refusal to grant access lead to the elimination of effective competition in the downstream market;
- There is no objective justification for the refusal to supply.

3.6.4 Resale price maintenance

As per section 3(4)(e) of the Act, 'Resale price maintenance' includes any agreement to sell goods on condition that the prices to be charged on 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. Only minimum resale price maintenance raises competition concerns.

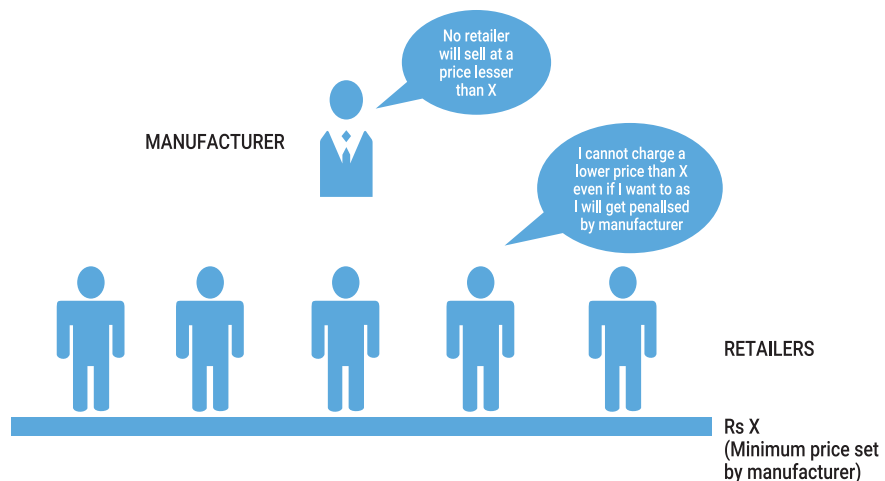


Figure 3.6.4 Pictorial representation of resale price maintenance

3.7 Section 3 and IPR

The Indian Competition Act provides for an exemption from the application of Section 3 to all or any agreements restraining the infringement of or imposing reasonable conditions, necessary for the protection of intellectual property rights.

right holder to impose reasonable conditions, as may be necessary for protecting such rights.

In the **Automobile case**⁶⁵, the car manufactures claimed that the restrictions imposed upon the Original Equipment Suppliers (OESs) from undertaking sales, of their proprietary

Section 3(5) of the Act states:

“Nothing contained in this section shall restrict:

- i. *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—*
 - a. *the Copyright Act, 1957 (14 of 1957);*
 - b. *the Patents Act, 1970 (39 of 1970);*
 - c. *the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);*
 - d. *the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);*
 - e. *the Designs Act, 2000 (16 of 2000);*
 - f. *the Semi-Conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);*

The Commission in the **FICCI Multiplex case**,⁶⁴ observed that the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of 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

parts to third parties without seeking prior consent would fall within the ambit of reasonable condition to prevent infringements of their IPRs. The Commission observed that while determining whether an exemption under section 3(5) (i) of the Act is available or not, it is necessary to consider, inter alia, the following:

- i. *whether the right which is put forward is correctly characterized as*

⁶⁴ Para 23.30, *FICCI Multiplex Association of India v. United Producers/Distributors Forum*, 2011 CompLR 79 (CCI).

⁶⁵ *Supra* Note 49

protecting an intellectual property; and

- ii. Whether the requirements of the law granting the IPRs are in fact being satisfied?*

After analysis of the material placed on record with regard, the Commission held that the exemption enshrined under section 3(5) (i) of the Act was not available to those OEMs for the reasons that OEMs had failed to submit the relevant documentary evidence to successfully establish the grant of the applicable IPRs, in India, with respect to the various spare parts. And also that they had failed to show that their restriction amounted to imposition of reasonable conditions, as might be necessary for protection any of their rights.

In nutshell, it may be understood that the provisions of section 3 shall not restrict the intellectual property rights 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 conferred or may be conferred upon him under the enactments specified in Section 3(5) (i) of the Act.

Dominant Position and Abuse thereof

CHAPTER-4

CHAPTER COVERAGE

4.1 Enterprise and Group

4.2 Relevant Market

4.2.1 Relevant Product Market

4.2.2 Relevant Geographic Market

4.2.3 Other Types of Market

4.3 Dominant Position

4.4 Abuse of Dominance

4.1 'Enterprise' and 'Group'

Section 4(1) of the Competition Act prohibits abuse of dominant position by an 'enterprise' or 'group'. It is important to keep in mind that the Competition Act does not frown on dominance itself but prohibits abuse thereof. Section 4 gives an exhaustive list of actions/activities which amount to abuse of dominant position. Unlike anti-competitive agreements, it is not

necessary for the CCI to prove that the conduct has caused any adverse effect on competition. The CCI needs to prove the following:

- a. The concerned party is a dominant player in the relevant market; and
- b. The concerned party has abused its position of dominance.

Section 2(h) gives a wide definition to the term 'enterprise'⁶⁶. It includes all firms/ individuals engaged in any kind

⁶⁶ "Enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

of commercial activity. It also covers a department of government engaged in commercial activity. However, it makes an exception for the activities relatable to sovereign functions of the government *including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.*

The CCI has adopted a functional approach while assessing whether or not an entity is an enterprise under section 2(h) of the Competition Act. While analysing whether or not Indian Railways was an enterprise under section 2(h) of Competition Act, the CCI was of the view that various activities of the enterprise are to be considered individually and if some of the activities of the enterprise are in the nature of sovereign functions that does not mean that all other activities of the enterprise have to be considered non-economic.⁶⁷

A government department may have both, sovereign as well as commercial functions. As far as its commercial functions are concerned, the said department is an enterprise under Competition Act.

In a catena of cases the CCI has held that a department of government, as far as it carries out commercial ventures, is an enterprise in terms of section 2(h) of the Competition Act. Some of such cases are *New Okhla Development Authority*,⁶⁸ *Haryana Urban Development Authority*⁶⁹ and *Indian Railways*⁷⁰. It may be important to note here that the Supreme Court of India in the case of ***Lucknow Development Authority vs. M.K. Gupta***,⁷¹ while deciding the issue of jurisdiction of the National Commission, the State Commission and the District Forum under the Consumer Protection Act, 1986, has stated as under:

Explanation. -For the purposes of this clause, — (a) “activity” includes profession or occupation; (b) “article” includes a new article and “service” includes a new service; (c) “unit” or “division”, in relation to an enterprise, includes (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the provision of any service;”

⁶⁷ *Arshiya Rail Infrastructure Limited (ARIL) v. Ministry of Railways*, Case No. 64/2010, 2/2011 and 12/2011.

⁶⁸ *In Re: R & R Tech Mach Limited*, Case No 09/ 2014 (CCI).

⁶⁹ *Shri Jatin Kumar v. Haryana Urban Development Authority*, Case No. 101/ 2015 (CCI)

⁷⁰ *Id.*

⁷¹ 1994 AIR 787.

"...When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objective of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it..."

"Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation."

4.2 Relevant Market

It is important to note that the 'dominant position' has to be in a 'relevant market'. A relevant market definition is tool for

aiding the competitive assessment by identifying those substitute products or services which provide an effective competitive constraint. Defining relevant market is the first step towards assessing the dominance of a market player whose conduct

Does a tea producer compete with other tea producers only? Or does he also compete with coffee producers?

has been alleged to be abusive. The contours of relevant market guide the competition authority, both in terms of product/service and geographic reach, as to what competitive constraints are faced by such market player.⁷² Hence, it is important to define the relevant market before analysing the dominant position of an entity.

In terms of section 2(r) of the Competition Act, a relevant market is to be defined by the CCI with reference to the relevant product market or relevant geographic market or both the markets. In terms of section 2(t), "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". The relevant

⁷² *Mr. Pankaj Aggarwal v. DLF Gurgaon Home Developers Private Limited and Mr. Sachin Aggarwal v. DLF Gurgaon Home Developers Private Limited, Case Nos. 13 & 21/ 2010 and 55/ 2012-Matter is in appeal.*

product market delineation classifies all those products/services which act as competitive constraints on each other to keep the conduct of market players under check.⁷³

In terms of section 2(s), *"relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas."* Relevant geographic market defines the market within the territorial boundaries where the conditions of competition for demand and supply are distinctly homogenous.⁷⁴

It can be seen from the definition that relevant product market is defined primarily on the basis of demand side substitutability, i.e., whether consumers consider different products to be substitutable. For example, demand side substitutability exists when a sufficient number of purchasers of product A regard product B as a credible alternative and would switch from A to B in response to a small change in relative prices. Hence, in this example, Product A and Product B will be considered as part of the same relevant market.

A sufficient number of consumers should consider two or more products to be substitutable for them to be treated as part of the same relevant market.

European Commission also recognizes the concept of supply side substitutability. It is defined as the extent to which alternative suppliers would switch, or begin, production in response to a hypothetical price increase. However, an argument based on supply side substitutability can only be used to support conclusions based on demand side substitutability. The CCI has referred to supply side substitutability in the **Apple case**.⁷⁵ Dealing with the differences between GSM and CDMA technologies, it relied on the different handsets require for these technologies and stated that *'Even from the supply side, the two are not substitutable in as much as each require set of equipments that are not compatible with other'*.

As provided in section 2(r), relevant market is defined on the basis of (i) relevant product market, and (ii) relevant geographic market. Both these elements have to be defined in order to come to the conclusion of the relevant market.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Supra* Note 51

4.2.1 Relevant Product market

Relevant product market is the market in which substitutable products are sold. Section 19(7) of the Competition Act gives the following factors which the CCI will consider while defining the relevant product market:

For example - It can be argued that a pen and a pencil are substitutable product since both are used for writing and hence fall in the same product market. However, it is also possible to argue that because of the difference in price of a pen and a pencil, they do not fall in the same market.

- a) *Physical characteristics or end-use of goods* – In **Case No. 13/2013**, the CCI distinguished between Electronic Ticketing Machines (ETM) and Point of Sale terminals (POS) as the physical characteristics and end use of ETMs which do not have electronic payment system are entirely different from the POS.
- b) *Price of goods or service* – While the end use of certain goods may be same, the difference in their prices may place them in separate markets. For instance, a low end car and a luxury car both are modes of personal transport, but the difference in their prices ensure that they are part of different markets

as consumers will not consider them substitutes. In the **Coal India case**,⁷⁶ the CCI considered the difference in the price of domestic non-coking coal and imported non-coking coal to conclude that they are not substitutable and hence, not part of the same relevant product market. In **Adani gas**,⁷⁷ the CCI was analysing the substitutability between natural gas supplied to different sets of industrial consumers, domestic consumers, commercial consumers and transportation consumers. The CCI concluded that these are different relevant product markets because the intended use and price of natural gas for each of these categories of consumers was different. While industrial consumers use gas to meet the energy requirements in

For Example - While both a Jaguar and a Nano are four wheeler automobiles, there is difference in their price which puts them in different category.

their plants for heating etc., the end use of gas for domestic consumers is cooking for self-consumption which is different from commercial consumers such as restaurants, malls, hospitals etc. who use it for commercial purposes. Similarly,

⁷⁶ *M/s GHCL Limited v. M/s Coal India Limited*, Case No. 08 of 2014 (CCI)- Matter is in Appeal

⁷⁷ *Faridabad Industries Association (FIA) v. M/s Adani Gas Limited*, Case No. 71 of 2012- Matter is in Appeal

consumption of gas by consumers for meeting their transportation requirements makes these consumers a different segment of consumers. The price at which natural gas is supplied to these different consumer segments too being different and the technical considerations involved in supply and distribution of gas to the different segments being different further necessitates a distinction to be made between consumers under the said categories.

- c) *Consumer preferences* – Consumers may have certain specific preferences and hence a particular set of consumers may consider two products to be substitutes while another set of consumers may not. In the **BCCI case**,⁷⁸ the CCI considered the distinct characteristics as well as consumer preference to conclude that the relevant market was the market for organization of professional domestic cricket leagues/events in India. In **HT Media**,⁷⁹ the CCI considered the 'role and tastes of the audience in music' to conclude that Bollywood Music is not substitutable with other kinds of music. In **Indian**
- d) *Exclusion of in-house production* – Goods which are produced and consumed in-house by an enterprise are not available in the market and do not compete with other goods in the market. Hence, they are to be excluded from the relevant market.
- e) *Existence of specialised producers* – Specialised producers may be treated as separate relevant market.
- f) *Classification of industrial products* – Classifications like National Industrial Classification may be used to delineate the relevant product market.

Exhibition Industry Association⁸⁰

the CCI considered the consumer preference to conclude that the relevant market was the market for 'provision of venue for organizing national and international exhibitions and trade fairs'. In **Google Case**⁸¹ the CCI, considering the consumer preference, concluded that the relevant product market was the online general web search services and distinguished it from URL based direct search option.

⁷⁸ Case No. 61/2010 - Matter is currently in appeal.

⁷⁹ M/s HT Media Limited Informant V. M/s Super Cassettes Industries Limited, Case No. 40 of 2011 (CCI) - Matter is currently in appeal.

⁸⁰ Case No. 74/ 2012-Matter is in Appeal.

⁸¹ Case No. 07 & 30 of 2012-Matter is in appeal.

With increasing sophistication in the market, relevant product market definition is getting increasingly complicated and the competition authorities are being forced to look at whether or not the products are close substitutes. For instance, in the case of Adidas/ Reebok,⁸² European Commission faced this difficulty in the context of shoes. Without actually defining the relevant market, the European Commission discussed the market in the following terms:

"19. In conclusion, the findings of the investigation seem to indicate that the distinction of sport shoes in sport categories and sub-categories is indeed blurred. On the other hand, the tendency by consumers to buy real sport shoes (e.g. a pair of running or tennis shoes) just for purely leisure purposes is difficult to measure. While it is certainly true that over the last twenty years' sport shoes have become a fashion item, hence playing a dual role, most recently the market seems to be evolving towards a further, more sophisticated segmentation. In particular, it is unclear to what extent high end athletic shoes (having more pronounced technical characteristics and selling for a higher price) perform a multifunction role for consumers as much as it is the case for low and mid budget shoes. At the same time,

the relatively recent category of "sport inspired" lifestyle shoes seem to increasingly catalyze the demand of those fashion conscious consumers who buy athletic shoes for mainly leisure purposes. As a consequence, it cannot be ruled out that sport/ performance shoes belonging to the upper range of the market would be prevalently targeted by sportsmen, and their price little constrained by leisure shoes."

4.2.2 Relevant Geographic Market

Relevant Geographical Market in the geographical area or territory in which the relevant product is sold or consumed or the concerned player is present. Similarly, Section 19(6) of the Competition Act gives the following factors which the CCI would consider while defining the relevant geographic market:

For Example- Snow scooters can be used only in locations where it snows and hence the geographic market for snow scooters would be confined to such areas.

- a) *Regulatory trade barriers* – Regulatory trade barriers may lead to creation of different relevant geographic market. For instance, telecom licenses are given on the basis of different telecom circles. Hence, different telecom

⁸² M.3942, 2006, available at

http://ec.europa.eu/competition/mergers/cases/decisions/m3942_20060124_20310_en.pdf

circles are different geographic markets for telecom services. In **Faridabad Industries Association (FIA)**,⁸³ the CCI was examining the relevant geographic market for city gas distribution (CGD) network for supply of natural gas. The CCI concluded that the district of Faridabad was the relevant geographic market because the Government of Haryana had authorized only one service provider to build and operate a CGD network in Faridabad district.

- b) *Local specification requirements* – Local specification requirements may lead to a different relevant geographic market. In **Google Case**,⁸⁴ the CCI inter alia, considered the local specification requirements in India to conclude that the relevant geographic market for online general web search services was India.
- c) *National procurement policies* – The national procurement policies of the government may create barriers leading creation of separate relevant geographic market.
- d) *Adequate distribution facilities* – Distribution facilities are essential for any business. Absence of

adequate distribution facilities may lead to creation of separate relevant geographic market.

- e) *Transport costs* – Transport costs impact the final price at which goods are offered to the consumer. Hence, significant different in transport costs may lead to different relevant geographic markets. In **M/s Three D Integrated Solutions Ltd.**,⁸⁵ the CCI considered India as the relevant geographic market for point of sale terminals because there was no distinction in the conditions of supply and usage in the entire territory of India.⁸⁶
- f) *Language* – Depending on the nature of the product/ service, the language may delineate the relevant geographic markets.
- g) *Consumer preferences* – Consumers in different geographical regions have different preference. For instance, while tea and coffee may be considered substitutable by a large number of people in Indian market, consumers in certain parts of southern India may have a specific preference for coffee and may not consider tea a substitute. Hence, South India may be treated as a separate market for such products. In

⁸³ Case No. 71/ 2012 - Matter is currently in appeal.

⁸⁴ Case No. 07 & 30 of 2012 - Matter is currently in appeal.

⁸⁵ Case No. 13/2013 - Matter is currently in appeal.

⁸⁶ The Commission also considered the fact that parameters like regulatory barriers, logistic facilities, consumers' preferences, currency etc. are also identical in the entire country.

DLF case,⁸⁷ the CCI considered Gurgaon as the relevant geographic market for the provision of services for development/sale of residential apartments observing as under:

"The 'geographic region of Gurgaon' has gained relevance owing to its unique circumstances and proximity to Delhi, Airports, golf courses, world class malls. During the years it has evolved as a distinct brand image as a destination for upwardly mobile families. As it has been reasoned out in the order passed by this Commission in the Belaire case, a person working in NOIDA is unlikely to purchase an apartment in Gurgaon, as he would never intend to settle there. Thereafter, the Commission in that order distinguished between buyers looking for residential property out of their hard earned money or even by taking housing loans and those buyers who merely buy such residential apartments for investment purposes; stating clearly that the Commission was not looking at the concerns of speculators, but of genuine buyers. It was therefore, observed that a small 5% increase in the price of an apartment in Gurgaon, would not make a person shift his preference to Ghaziabad, Bahadurgarh or Faridabad or the peripheries of Delhi or even Delhi in a vast majority of cases."

h) *Need for secure or regular supplies or rapid after-sales services* – Certain products/ services require secure, regular or rapid after-sales services. The ability of enterprises to provide such after-sales services may vary in different regions, leading to creation of different geographical markets.

For example- It will be difficult to provide after-sales services for any electronic device in far flung areas like Ladakh. Hence, for such after-sales market, Ladakh may be treated as a separate geographical market.

With respect to the relevant geographic market, the CCI has categorically held that the relevant geographic market under the Competition Act cannot go beyond the territory of India. Relying on explanation to section 4 of the Competition Act, i.e. 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in 'India', which enables its competitors or consumers or the relevant market in its favour, the CCI has held that a contention that the relevant market should be global is *ex facie* contrary to the express provisions of the Competition Act and has to be rejected.⁸⁸

The relevant market definition is not a rigid concept and it is not

⁸⁷ Case Nos. 13 & 21/ 2010 and 55/ 2012 – Matter is currently in appeal.

⁸⁸ Case Nos. 03 and 59/ 2012; Case No. 08/ 2014 – Matter is currently in appeal.

necessary that a relevant market once defined cannot be altered. Relevant market definition can be narrowed or broadened depending upon the facts and circumstances of each case. A relevant market defined under one set of circumstances may change with changes in those circumstances. This necessarily implies that the concept of relevant market definition is a fluid concept. Depending upon the facts and circumstances of each and every case, various alternative market definitions can be employed in apparently similar, yet different, circumstances.⁸⁹

The CCI will not be limited by the technicalities of the market but also rely on consumers' understanding of the market. The interchangeability of

Consumers do not have the technical knowledge to differentiate between most of the spare parts. Hence, all the spare parts can be treated as part of the same relevant product market.

the products constituting the same relevant product market must be viewed from the perspective of the consumer's understanding of the characteristics of the products.⁹⁰ In the **Automobile case**,⁹¹ the CCI considered the Consumers' understanding of the car spare parts market and held that a consumer

in the car aftermarket does not differentiate between a gear-box and other ancillary spare parts that might be necessary to repair the car. Hence, from the consumer's perspective the technical differentiation between a gear box and an anti-lock system does not necessarily put such spare parts in different relevant product markets

The CCI has distinguished between the primary and secondary market in the residential real estate market in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 and stated as under:

"...While "secondary market" may have some bearing on the demand and supply variables, it certainly cannot form a part of the relevant market for the simple reason that the primary market is a market for "service" while the secondary market is a market for immoveable property. Moreover, while building an apartment, a builder performs numerous development activities like landscaping, providing common facilities, apart from obtaining statutory licenses while a sale in secondary market merely transfers the ownership rights. An individual who is selling an apartment he or she has purchased cannot be considered as a competitor of DLF Ltd. or any other builder/ developer. Nor is he or she providing the service of building/

⁸⁹ Case Nos. 13 & 21/ 2010 and 55/ 2012.

⁹⁰ Case No. 03/ 2011.

⁹¹ Case No. 03/2011.

developing. The dynamics of such sale or purchase are completely different from those existing in the relevant market under consideration. The value added or the value reduced due to usage or otherwise does not even leave the apartment as the same one as had been built or developed by the builder/developer..."

Sometimes the CCI may dispense with the requirement of defining the relevant market. The technicality on the relevant product market need not be dwelled into if the dominance of the enterprise remains the same even in alternative relevant market definitions. Determination of relevant market is important for assessing dominance of the enterprise. But defining relevant market is not an end in itself. The CCI has held that if the primary reason for defining relevant market is assessment of dominance of a particular enterprise/market player with regard to that relevant market, then such exercise can be dispensed with when such assessment remains unchanged in different alternative relevant market definitions.⁹²

The CCI has also used economic tools to define the market. A commonly used tool is the SSNIP ("small but significant non-transitory increase in price) test. SSNIP test seeks to identify

smallest market within which a hypothetical monopolist could impose a Small Significant Non-Transitory Increase in Price. It is usually defined as a price increase of 5%-10% for at least 12 months. In such a scenario

SSNIP test is a commonly used economic tool to define the relevant market.

if consumers shift to an alternate product then the alternate product is a part of relevant market and after including it in the relevant market the SSNIP test has to be repeated. Applying the SSNIP test, the CCI in the **BCCI Case** concluded that other forms of entertainment are not a substitute for cricket.⁹³

The CCI has also used the Elzinga-Hogarty test in some of the cases⁹⁴ to define the relevant geographic market. Elzinga-Hogarty test uses the movement of commodity between two geographic areas in order to assess if firms in one geographical area face competition from firms in the other geographical area.

Apart from conventional markets, there could be other market situations also, which may require a separate treatment while determining the relevant market.

⁹² Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012.

⁹³ Case No. 61/ 2010.

⁹⁴ Combination Registration No. C-2018/02/558.

4.2.3 Some other types of markets

- a. Temporal market – It is a market which emerges for a short period of time. For instance, natural disaster may lead to creation of temporal market for different products in the regions impacted by such disasters as access to such areas may be restricted for a certain period of time.
- b. Systems market – These are markets where a consumer considers and is able to consider the complete life-cycle price of a product, including the price in the after-market. In such markets, change in the prices in the after-market will change the buying pattern in the primary market.
- c. Cluster market – Cluster market is constituted by a set of non-substitutable products which an economic entity must provide in order to effectively compete in the market. Cluster markets are characterized by transaction complementarities between various components of a bundle of products or services. The relevant unit with respect to market definition is the bundle of goods or services that is demanded by

consumers and supplied by the producers and not the individual units of such bundle, although such units may not be interchangeable or substitutable with each other. In this context, the concept of substitutability or exchangeability applies to the bundle rather than to its separate components where a bundle of products or services serves as a first candidate market. Thus, the fact that bundles of goods or services are demanded and supplied in a market does not affect the basic principle of market definition, i.e., interchangeability or substitutability between competing products.⁹⁵ Similarly, different kind of banking services like credit/debit card, saving account, current account, and online payment systems may be treated as a cluster market.⁹⁶ The courts in the USA have held that there exists a cluster market of medical services (consisting of a bundle of products/services which are not interchangeable with each other) which are demanded together and are supplied together by hospitals.⁹⁷

- d. Platform market – Also called two-sided market, it is a market with

⁹⁵ Case No. 03/2011.

⁹⁶ *United States v. Phila. Nat'l. Bank*, 374 U.S. 321 (1963).

⁹⁷ *FTC v. Freeman Hasp.*, 69 F.3d 260,268 (8th Cir. 1995); *FTC v. Univ. Health Inc.* 938 F.2d 1206, 1210-12 (11th Cir. 1991); *United States v. RocliordMem 'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990).

two group of users which provide each other with beneficial network effects. For instance, an Amazon or a Flipkart provide a platform for buyers and sellers to carry out commerce online.

4.3 Dominant Position

Before a conduct is condemned as an abuse, it is necessary to prove that the firm indulging in the said conduct is in a dominant position in the relevant market. An important corollary is that an abusive conduct by a non-dominant enterprise does not contravene Section 4 of the Competition Act.

Hence, it is important to understand what amounts to 'dominant position'. Dominant position of an enterprise is a reflection of the market power that a firm enjoys. A firm is said to be in dominant position if it has the ability to manipulate the market, its competitors and its consumers in its own favour.⁹⁸ Explanation to section 4 defines 'dominant position' as under:

Dominant position of a firm reflects its ability to operate independent of the market forces.

"dominant position" means a position of strength, enjoyed by an enterprise,

in the relevant market, in India, which enables it to –

- (i) operate independently of competitive forces prevailing in the relevant market; or*
- (ii) affect its competitors or consumers or the relevant market in its favour;"*

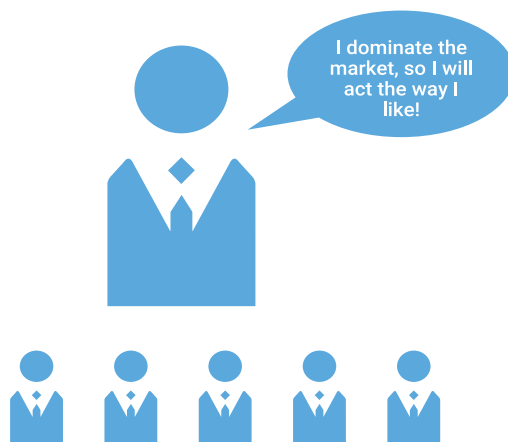


Figure 4.3 Pictorial representation of dominant position

The concept of dominant position is linked to the concept of market power. It is the market power of an enterprise which allows an enterprise to act independently of competitive forces and affect the relevant market in its favour, to the detriment of its competitors and consumers.⁹⁹ European Commission's Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings¹⁰⁰ provides:

⁹⁸ *Arshiya Rail Infrastructure Limited and KRIBHCO Infrastructure Limited V Ministry of Railways and Container Corporation of India Ltd.*; Case Nos. 64/2010, 2/2011 and 12/2011.

⁹⁹ *In Re: M/s Three D Integrated Solutions Ltd. and M/s VeriFone India Sales Pvt. Ltd.*, Case No. 13/2013 (CCI).

¹⁰⁰ (2009/C 45/02), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29>

"This notion of independence is related to the degree of competitive constraint exerted on the undertaking in question. Dominance entails that these competitive constraints are not sufficiently effective and hence that the undertaking in question enjoys substantial market power over a period of time. This means that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers."

A seller faces competitive challenges from existing competitors, entry of newer competitors, or from newer rival products. Competition among the sellers promotes productive and allocative efficiencies and optimizes consumer surplus. However, competition concerns arise when the measures taken by a seller include conscious actions intended to create entry barriers, drive out existing rivals, control output or price, impose restrictive and supplementary obligations on captive consumers, impose unfair or discriminatory conditions or prices to the disadvantage of consumers or rival firms or leverage strengths in one market to enter or protect another market. To avoid the challenges from newer, more efficient and innovative products, sellers may also take measures to thwart

technical or scientific development in a market. Such conduct is considered anti-competitive and comes under the scanner of competition laws.

Therefore, for the purpose of Explanation (a) (i) to section 4, it is important to examine the ability of an enterprise to operate independently of competitive forces generated by its rivals. Another aspect of dominance given in Explanation (a) (ii) to section 4 relates to the ability of an enterprise to "affect its competitors or consumers or the relevant market in its favour." For example, an enterprise may have the capability to not only operate independently of competitive forces but may actually be in a position to influence its competitors or consumers in the relevant market or the relevant market in its favour. In a sense, this is a higher degree of strength where an enterprise may be freely able to adopt price or non-price strategy to overcome downward pressures on its profit from its competitors, or to capture or bind consumers or to create a market environment that would deter newer competition, both in terms of competing enterprises or rival products.¹⁰¹ In Case Nos. 64/2010, 2/2011 and 12/2011¹⁰², the CCI ruled that Container Corporation of India could not be held to be dominant in the relevant market because there was no

¹⁰¹ *Belaire Owner's Association v. DLF Limited*, Case No. 19 of 2010 (CCI).

¹⁰² *Arshiya Rail Infrastructure Limited (ARIL) v. Ministry of Railways (MoR)*, Case Number: 64/2010, 02/2011 & 12/2011 (CCI).

evidence to suggest that it enjoyed a position of strength to influence either the competitors or the customers in its favour.

The CCI, while assessing the dominant position of an enterprise, has emphasized on the consumer interest and importance of ensuring consumers' surplus. In **DMRC case**,¹⁰³ the CCI held that a consumer must be allowed to exercise its consumer choice and freely select between competing products or services. This right of consumer's choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer.

Free choice of the consumer must be safeguarded in a free market economy.

A firm's dominance does not depend merely on the size or market share of the firm but on an exhaustive list of factors provided in Section 19(4) of the Competition Act. These factors are as under:

- a) *Market share of the enterprise* - Usually an analysis of 'dominant position' starts with the study of market share of an enterprise in

the Relevant Market. While the Competition Act does not provide a threshold beyond which an enterprise will be treated as a dominant player, a high and durable market share can be an important indicator for lack of competitive constraints and accordingly for dominance. However, it must be emphasized that market share is only one of the factors that the CCI is required to analyse in terms of section 19(4) of the Competition Act and it cannot be studied in isolation to arrive at a conclusive finding regarding the dominant position of an enterprise. In **Case No. 39/ 2012**,¹⁰⁴ the CCI clarified that market share of an enterprise is only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance. It is important to note that Competition Act has not prescribed any market share threshold for determining dominance of an enterprise in the relevant market. This stands particularly true in case of new economy/ hi-tech markets. In **Fast Track Call Cab Pvt. Ltd. case**,¹⁰⁵ the CCI has stated as under:

"15. ...It is a widely accepted view that high and durable market share can be an important indicator for

¹⁰³ *M/s PandrolRahee Technologies Pvt. Ltd. v. DMRC &Ors., Case No. 03 of 2010.*

¹⁰⁴ *Mr. RamakantKini v. Dr. L.H. Hiranandani Hospital, Powai, Mumbai, Case No.39 of 2012 (CCI).*

¹⁰⁵ *In Re: Fast Track Call Cab Pvt. Ltd, Case Nos. 6/ 2015 and 74 of 2015 (CCI).*

lack of competitive constraints and accordingly for dominance. However, that does not imply that uniform market share thresholds and a standard time-period to assess durability of market share can be applied in the same manner to all businesses/sectors. The variance across industries in terms of their inherent characteristics, such as nature of competition, technology and innovation dimensions, calls for a case-by-case assessment of market share and its implications for dominance with reference to the totality of the market dynamics and competitive strategies of firms. Thus, the Informants' proposition that market share of more than 50% leading to a presumption of dominance cannot be accepted, especially when the scheme of the Act does not specify any numerical threshold. Moreover, market share is but one of the indicators enshrined in Section 19(4) of the Act for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. Particularly, in case of new economy/hi-tech markets, high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral, as is visible from the fluctuating trends in market

shares across different months in the relevant market throughout the period of investigation."

b) *Size and resources of the enterprise*

- Size of an enterprise and the resources at its disposal heavily influence its ability to affect the market through its conduct. Hence, a large enterprise with huge resources at its disposal is more likely to enjoy a dominant position. Having a large production capacity or a technological lead may also imply dominance for an enterprise.¹⁰⁶ In many cases involving the residential real estate market, the CCI has considered the land banks held by the enterprises as one of the factors for analysis.¹⁰⁷ However, mere size by itself cannot be used to conclude dominance. In the **Float Glass case**,¹⁰⁸ the CCI refused to conclude that M/s Saint Gobain Glass India Limited (SGGIL) enjoyed dominant position merely because the data relating to production facility and installed capacity, led to the inference that SGGIL was the largest player in the market

c) *Size and importance of the competitors* – A firm's size and resources may not be able to give it dominance in the relevant market

¹⁰⁶ Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76, European Court Reports 1979 -00461.

¹⁰⁷ Case Nos. 13 & 21/ 2010 and 55/ 2012.

¹⁰⁸ M/s HNG Float Glass India Ltd. v. M/s Saint Gobain Glass India Ltd., Case No.51 of 2011 (CCI).

in case its competitors are also of comparable size. Hence, relative size of the competitors is an important factor while assessing dominance.¹⁰⁹ For instance, if an enterprise has 40% market share and all its competitors have market shares in the range of 5-10%, it is possible to argue that the enterprise with 40% market share enjoys dominant position in the relevant market. In the DLF matter, the CCI analysed the market power of DLF in the residential real estate market in Chennai and compared it with other competitors in the relevant market to conclude that **DLF**¹¹⁰ did not enjoy the dominant position as there were a large number of developers and builders in Chennai who were engaged in developing residential space.

d) *Economic power of the enterprise including commercial advantages over competitors* – CCI may assess the financial strength of the enterprise as well as any commercial advantage that it may have over its competitors. Such commercial advantage may include control over source of supply or distribution network, brand value, control over essential infrastructure/ technology or credit sales.

e) *Vertical integration of the enterprises or sale or service network of such enterprises* – It takes a long time to establish supply and distribution network. A firm which has structural relationship with other firms in its supply/distribution network enjoys an obvious advantage over its competitors and this will be considered by the CCI while assessing its dominance. In the **Automobile case**,¹¹¹ the CCI considered vertical integration in the car market in India and concluded that each car manufacturer had entered into a network of contracts, pursuant to which, they had become the sole supplier of their own brand of spare parts and diagnostic tools in the aftermarket. The CCI further held that the car manufacturers, pursuant to such agreements had effectively shielded themselves from any competition.

f) *Dependence of consumers on the enterprise* – CCI may also assess the dependence of consumers on an enterprise for its product/ services. Such dependence may arise because of inelastic demand, habit or even inertia. Sometime temporary dependence may arise in case of crisis situation. Dependence may also arise

¹⁰⁹ *Relative financial strength and size of land bank was considered by Commission in Belaire Owner's Association v. DLF, Case No. 19/ 2010*

¹¹⁰ *DGCOM Buyers & Owners Association, Chennai Informant v. DLF Ltd., Case no. 29/2012 (CCI)*

¹¹¹ *Supra Note 49*

because of the ownership of a large amount of the relevant product. In **HT Media**¹¹² the CCI concluded that due to its ownership of popular content, M/s Super Cassettes Industries Limited's customers were heavily dependent on it. In the matter concerning **POS terminals**¹¹³ the CCI inter-alia considered the dependence of consumers on point of sale terminals owned by Verifone. The CCI considered that certain services like upgrading the software and Kernel, SDK etc. can only be provided by the POS vendors. The buyer remains dependent on the vendor throughout the life of POS terminals. The CCI noted that once a buyer has developed some VAS application on a particular brand of POS terminals which has been found working successfully the buyer prefers to procure the same brand to maintain continuity and also to avoid further wastage of time and money on development of another VAS application. Therefore, the consumers who had purchased POS terminals of Verifone and already developed software/applications on those terminals would usually prefer to continue with the devices of Verifone.

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* – Certain public sector undertakings enjoy statutory monopoly which makes them dominant in the relevant market. For instance, in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of the Central Government. Government of India has created public sector undertaking in the name of Coal India Limited and vested the ownership of the private mines in it. As a result, Coal India Limited and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. Hence, CCI held that Coal India Limited enjoyed dominant position in the market for production and supply of coal.¹¹⁴ Similarly, in Case No. 09/2014 the CCI analysed the dominance enjoyed by **New Okhla Industrial Development Authority**,¹¹⁵ in the relevant market for allotment of land in NOIDA and stated as under:

"19. Under U.P. Industrial Area Development Act, 1976, OP 1 was constituted to-apart from other

¹¹² *Supra* Note 79

¹¹³ *Supra* Note 99

¹¹⁴ Case Nos. 03/2012, 11/2012, 59/2012.

¹¹⁵ *R & R Tech Mach Limited v. New Okhla Industrial Development Authority*, Case No. 09/2014 (CCI).

objectives-demarcate and develop sites for various land uses, to allot plot/properties as per regulations. Therefore, OP 1 has the sole authority under law to identify and develop sites for varied land uses and then to allocate plots/properties in accordance with regulations and policies of the state government. This makes OP 1 dominant in the sphere of relevant market for allotment of land in NOIDA according to its land use."

Similarly, in the **BCCI Case**,¹¹⁶ the CCI considered the complete environment for organising cricket tournaments in India to conclude that Board of Control for Cricket in India was the dominant player in the relevant market.

h) *Entry barriers* – The CCI may consider 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 while assessing dominance. In **Case No. 40/ 2011**,¹¹⁷ the CCI considered the nature of entry barriers in the market for music licensing:

"The Commission notes that there are significant barriers to entry in the

market. In order to be successful in the business of licensing of music, particularly Bollywood music, a company needs to buy the music rights of Bollywood movies which according to the evidence can go up to 10 crore. Even after the purchase of music rights, vast investments are required in the promotion of music as well in a distribution network. Finally, in order to become competitive in the market, a music company needs to be able to build a repertoire of music that takes time and more investments. There are therefore, barriers to entry in the market and the Commission holds that in this case there are substantial barriers to entry which make it impossible/ more difficult for a firm to enter the market."

The extant regulations can also create entry barriers. For instance, while examining the City Gas Delivery (CGD) network for delivery of natural gas, the CCI examined the applicable provision of the Petroleum and Natural Gas Regulatory Board Act, 2006 and regulations made thereunder. The CCI noted that applicable regulations created entry barrier as they contain provisions to grant 25 years' infrastructure exclusivity to lay, expand or operate a CGD network. Moreover, the Authorization Regulations provided

¹¹⁶ Case No. 61/2010.

¹¹⁷ Supra Note 79

up to three years marketing exclusivity from the date of authorization to an existing CGD networks and five years from the date of authorization to a new CGD network from the purview of common or contract carrier.¹¹⁸ The CCI has also considered this factor from the perspective of locked-in customers. The CCI concluded that the fact that an owner of a particular brand of car is locked-in and has to necessarily use the spare parts/diagnostic tools compatible to that particular brand of cars is in itself an entry barrier of other competitors of the said brand from entering into its aftermarket.¹¹⁹

i) Countervailing buying power – Countervailing buying power offsets the market power of the seller enterprise¹²⁰. Such countervailing buying power may arise because of the size of the buyer, small number of buyers in the market or larger number of sellers in the market. In many merger cases, European Commission

has concluded that countervailing buying power ensures that in spite of high market share of the merging enterprises, the merging enterprises will not gain dominant position. For instance, in the case of **Enso/Star**,¹²¹ European Commission concluded that Tetra Pak has countervailing buyer power to such an extent that it will neutralise the potential increase in market power of the merger between Stora and Enso.

Similarly, in the case of **Friesland Coberco / NUTRICIA**,¹²² European Commission held that sustainable price increases from the merging parties was not likely due to the strong countervailing power of the customers. The European Commission noted that the four biggest customers of the merging parties account for 70-90% of their total sales. This demonstrated the strong position of these buyers' vis-a- vis the merging parties.

Hence, in case the customer(s) enjoy

¹¹⁸ *Faridabad Industries Association (FIA) Informant v. M/s Adani Gas Limited*, Case No. 71 of 2012 (CCI) - Matter is currently in appeal.

¹¹⁹ *Supra* Note 49

¹²⁰ *Korsnas/AD Cartonboard* [Para 46](2004), *Friesland Coberco/Nutricia*[Para 45] (2001), *Granaria/Ültje/Intersnack/May Holding*, [Para 57] (2000), *Philip Morris/Nabisco* [Para 25] (2000).

¹²¹ *Enso/Stora*, Case No IV/M.1225, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D0641&from=EN>. Facts: Proposed merger of Enso Oyj ("Enso"), a Finnish paper and board company with Stora Kopparbergs Bergslags AB ("Stora"), a Swedish paper and board manufacturer.

¹²² Case No COMP/M. 2399; available at http://ec.europa.eu/competition/mergers/cases/decisions/m2399_en.pdf. Facts: Proposed acquisition of Nutricia Dairy and Drinks Group ("NDDG") involved in production of dairy drinks, sport drinks and coffee whiteners by Friesland Coberco Dairy Foods Holding N.V. ("FCDF"), Netherlands, which develops, produces and sells a range of branded dairy products and fruit-based drinks for the consumer market, professional users and food manufacturers. Also see, *Korsnas/AD Carton board* Case No COMP/M. 4057, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4057_20060512_20310_en.pdf;

countervailing buying power, the market power of the enterprise may not give it dominant position.

j) *Market structure and size of market* – Structure of the market has a significant impact on the market power of the enterprises. Following factors may be considered while assessing the market structure:

- i. Security of supply of raw materials,
- ii. Surplus production capacity,
- iii. Technological lead over competitors,
- iv. Access to capital,
- v. Strong brand name due to large-scale advertising campaigns,
- vi. Highly developed sales network,
- vii. Strong presence on adjacent markets,
- viii. Extensive range of products,
- ix. Technological and financial resources,
- x. Market maturity.

k) *Social obligations and social costs* – CCI may analyse the social obligations and social costs borne by an enterprise while assessing its dominance.

l) Relative advantage, by way of the contribution to the economic development, by the enterprise

enjoying a dominant position having or likely to have appreciable adverse effect on competition.

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

The CCI may consider all or any of the above factors to analyse the position of strength enjoyed by an enterprise. Additionally, the CCI may also consider whether or not this position of strength gives the enterprise the ability to operate independently of competitive forces in the relevant market or the ability to affect its competitors or consumers or the relevant market in its favour.¹²³ While analysing dominance, the CCI may also consider whether the alleged abuse had any co-relation with the dominant position enjoyed by the enterprise. In **Case No. 66/2013**,¹²⁴ the CCI has approved non-complete clauses in employment contracts and held that the market power enjoyed by the enterprise had nothing to do with the relevant market in which the employer enterprise was allegedly dominant.

4.4 Abuse of Dominance

A dominant firm has a special responsibility/duty to ensure that its conduct does not lessen competition in the market. Essentially there are two kinds of abuses:

a. Exploitative – These are abuses

¹²³ *Belair Owner's Association v. DLF Limited, Case No. 19/2010 - Matter is currently in appeal.*

¹²⁴ *Mr. Larry Lee Mccallister v. M/s Pangea3 Legal Database Systems Pvt. Ltd., Case No. 66/2013.*

vide which a dominant player exploits other enterprises in its environment in order to increase its own revenue. For instance, it may force its suppliers to accept low prices or impose high prices on enterprises which purchase its products/ services.

- b. Exclusionary – These are the abuses vide which a dominant player tries to exclude an enterprise from the market. For instance, a dominant enterprise may offer better prices to its subsidiary as compared to the prices that it offers to its subsidiary's competitors. This discriminatory pricing will ensure that the competitors will not be able to compete with its subsidiaries and will be forced to exit the market.

While discussing the abuses, the CCI has laid a lot of emphasis on consumer choice. Any restriction on consumer choice by a dominant player can be considered anti-competitive. In Case No. 13/2013, the CCI has held that by restricting the development of payment softwares for any payment association and not disclosing the said clause to the large buyers in India who would require customized payment softwares to run on the POS terminals bought by them, Verifone had restricted the availability of substitutable payment solutions thereby restricting the choice for the buyers. Thus, the

restrictions imposed by Verifone on development of payment software by the third parties were anti-competitive.

Section 4(2) gives an exhaustive list of actions/ activities which, if committed by a dominant entity, would amount to an abuse of dominant position. Following paragraphs would discuss these activities:

a) *Imposition of unfair or discriminatory (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service* - A dominant entity may exploit its dominant position and impose unfair condition or price in the course of a transaction related to purchase and sale of goods or services. Similarly, it can even impose discriminatory condition in the course of such transactions. Such conditions are generally imposed by a dominant entity in order to maximise its profits at the cost of other entities in the market. However, such conditions can be justified if they are adopted to meet the competition in the market. Some of commonly found abusive pricing practices are as under:

- *Charging excessive prices* – It is difficult for any competitive authority to conclude what amounts to excessive pricing. However, in **United Brands Case**¹²⁵ European Commission held that a price may be treated as excessive if it has no

¹²⁵ *United Brands Company and United Brands Continental BV v Commission of the European Communities. (Chiquita Bananas), Case 27/76, European Court Reports 1978 -00207.*

reasonable relation to the economic value of the product supplied. Hence, a case for excessive pricing will require an analysis of pricing and the cost of production of the product under investigation.

- *Extracting excessively low purchase prices* – A dominant may exist on purchase side of the market. Hence, a dominant buyer may force its supplier to offer excessively low prices.
- *Engaging in price discrimination* – It is basically a case of dissimilar prices in equivalent transactions. For instance, a supplier of raw material may try and offer preferential prices to its own subsidiary. This will lead to margin squeezing for the subsidiary's competitors. This may be justified in the case of lower prices which arise of economies of scale i.e. if the subsidiary is buying large volume of the products. It can also be justified if the low prices are being offered to meet the competition.
- *Offering fidelity or other unlawful rebates* – Rebates may be considered abusive when given in exchange of customer loyalty or when they are found to be loyalty-inducing. Exclusionary Rebate Schemes are aimed at tying the

customer to the dominant company for all or most of its purchases. One of the important factors is the duration for which rebate is being offered.

- *Charging predatory prices* – Predatory pricing is the pricing below the average variable cost of the production of the subject product. The intention of such conduct is to foreclose the market for competitors.

In **Case No. 86/2016**,¹²⁶ the CCI noted that Ghaziabad Development Authority's (GDA) allotment letter had clause by which penal interest @ 10.5% per annum would be levied on the allottees if there was delay in the payment of installments. There was no corresponding liability on GDA in case of delay in giving possession of the flats. The CCI held that this condition is one-sided and therefore, unfair in terms of the provisions of Section 4 of the Competition Act. It also held that increasing the price of flats by 3.5 times without any valid justification by GDA, also amounted to imposition of unfair condition. Similarly, in Case No. 08/2014, the CCI held that Coal India Limited had abused its dominant position by unilaterally changing the terms of contract and discriminating between its consumers.

¹²⁶ *Shri Satyendra Singh v. Ghaziabad Development Authority, Case No. 86 of 2016 (CCI) - Matter is currently in appeal.*

In the **Intel Case**,¹²⁷ European Commission held that Intel abused its dominant position in the x 86 CPU markets, inter-alia by implementing a series of conditional rebates to computer manufacturers and to a European retailer. The rebates were conditional on computer manufacturers buying all their processors from Intel. This case was initiated on the complaint of a much smaller rival, AMD and led to the imposition of penalty amounting to 1 billion Euros.

b) Limiting or restricting –

- i. *Production of goods or provision of services or market therefore; or*
- ii. *Technical or scientific development relating to goods or services to the prejudice of consumers;*

A dominant entity may not indulge in an activity which may lead to any kind of limitation or restriction on (a) production of goods; (b) provision of services; (c) technical or scientific development in the market. All the three activities are done by an entity in dominant position either for maximising the profit or for maintenance of its dominant position in the market. For instance, Entity A,

a dominant air carrier, controls 80% of the market. During the vacations, when the demand for air travel is high, it intentionally grounds several of its aircrafts with the objective of increasing the demand supply gap and consequent increase the price of air tickets in the market.

In **Case No. 13/2013**,¹²⁸ the CCI has held that Verifone's SDK License Agreement contravened section 4 of Competition Act as the restriction on licensing, sale or transfer of any software that buyers develops using the licensed software of Verifone was unfair and limited the provision of VAS services and technical and scientific development of VAS services used in POS terminals in India.

In the **case of British Post Office v. Deutsche Post AG**,¹²⁹ Deutsche Post AG ("DPAG"), which is both a regulatory authority and a player in the postal market in Germany, made supply of its forwarding and delivery service subject to the condition that the sending postal operator, or the entity in Germany which DPAG considered to be the domestic sender, agrees to pay a surcharge corresponding to the full domestic tariff minus the applicable terminal dues. This condition was not acceptable to the sender and/or the

¹²⁷ Case COMP/C-3/37990 – Intel-Remanded by ECJ

¹²⁸ Supra Note 99

¹²⁹ [OJ 2001 L331/40] –Matter is in appeal.

sending postal operator but due to lack of alternative delivery solution, DPAG put the sender and the sending postal operator in a situation where, in order to get the mail delivered, they had no choice but to pay the surcharge claimed by DPAG. It was held to be an abuse of dominant position.

c) Indulging in practice or practices resulting in denial of market access in any manner.

A dominant entity cannot indulge into creation of barriers in the market. It may like to do so in order to ensure its continued dominance in the market. It is because of this reason that under the 'essential facilities doctrine' (EFD), a dominant entity may be forced to share an essential facility with its competitors. The rationale behind the EFD is to impose a duty upon dominant undertakings to grant access to the facility in consideration for a reasonable fee, to other undertakings which cannot pursue their own activity without access to such a facility.¹³⁰ While thus far, the CCI has not applied the EFD to direct a dominant enterprise to provide access to an essential facility to its competitors, it is empowered to do so. When a dominant enterprise in the relevant market controls an infrastructure or a facility that is necessary for accessing

the market which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services, the enterprise may not without sound justification refuse to share it with its competitors at reasonable cost. The CCI may under the provisions of Section 4(2)(c) of the Competition Act (relating to denial of market access by a dominant enterprise) pass an order requiring the dominant enterprise to provide access to an essential facility to its competitors in the downstream markets.

In the **BCCI Case**,¹³¹ the CCI has concluded that the representation and warranty given by BCCI in the IPL Media Rights Agreement that "*it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league*" and Rule 28(b) of the BCCI Rules which provided that no member or a Club affiliated to a member or any other organisation shall conduct cricket match or tournament specified therein, without the approval of BCCI, amounts to denial of market access for organization of professional domestic cricket leagues/ events in India, in contravention of Section 4(2) (c) read with Section 4(1) of the Act. In

¹³⁰ *Oscar Bronner GmbH Co. KG v. Mediaprint ECJ*, [1998] ECR I-7791.

¹³¹ *Sh. Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI)*, Case No. 61/2010 (CCI).

the **Automobile case**,¹³² the CCI held that car manufacturers were denying market access to independent service providers by restricting their access to genuine spare parts and diagnostic tools required to effectively compete with the authorized dealers of the car manufacturers in the aftermarket.

In the **case of Otter Tail Power Co. v. United States**,¹³³ Otter Tail, an electrical utility sold electricity both, directly to consumers and to municipalities, who resold to consumers. It suddenly refused to sell electricity to municipalities and decided to sell it directly to consumers. It was held that such an activity was anti-competitive.

d) *Making 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.*

An entity in a dominant position cannot impose obligations in a contract which are not related to the object of the contract. Such obligations are generally meant to either maximise profit or for continuance of dominance.

In the Intel case discussed above, Intel was found to be guilty of giving wholly or partially hidden rebates to computer manufacturers - A, HP, NEC,

Lenovo on condition that they bought all, or almost all, their x86 CPUs from

For example- Entity A is a dominant player in the smart phones market and competes with its smaller rival entity B. Entity A, supplies its products to its retail sellers on a condition that they would not buy smart phones from Entity B.

Intel. Intel also made direct payments to Europe's largest PC retailer – Media Saturn Holding (MSH) on condition that it stocked only computers with Intel x86 CPUs.

e) *Using dominant position in one relevant market to enter into, or protect, other relevant market.*

Also known as leveraging, it is a strategy using which an entity uses its dominance in one market to leverage its product in another market. Such a strategy is used to reduce competition in the new market in which the concerned entity is venturing.

For example- Entity A is dominant in the market for ink and has just started manufacturing pens. In order to assist its new venture, it starts selling its ink on the condition that the buyer also purchases the pen manufactured by Firm A.

In **Case No. 13/2013**,¹³⁴ the CCI held that Verifone's conduct amounted to leveraging as it sought to seek

¹³² Supra Note 49

¹³³ 410 U.S. 366, 377-79 (1973)

¹³⁴ Supra Note 99

sensitive information from its customers regarding its competitors in the downstream market. Verifone's SDK license agreement imposed three different disclosure requirements namely; a) disclose to licensor from time to time the activities relating to licensed software; b) what value added software it has created; and c) what licensee intends to create using the licensed software. The CCI concluded that by way of this restriction, Verifone was trying to get access to confidential commercial information from the VAS providers and to exploit the lucrative VAS market. Further, since Verifone was a large player and a manufacturer of POS terminals itself, its conduct with respect to seeking disclosure of sensitive business information from its customers in the downstream market with a view to protect/ enhance its presence in the downstream market of VAS services was abusive in terms of section 4(2)(e) of the Act.

In the **Automobile case**,¹³⁵ the CCI, while examining the conduct of car manufacturers in the market for their spare parts in India, held that the users of car wanting to purchase the spare parts have to necessarily avail the services of the authorized dealer of the OEM. It is therefore found that such OEMs use their dominance in

the relevant market of supply of spare parts to protect the other relevant market namely the market for after sales service and maintenance.

Similarly, in the **case of Eurofix-Bauco v Hilti**,¹³⁶ the accused undertaking was dominant in the market for nail cartridge. It ventured into the market for nails. It gave less discounts to customers for orders on nail cartridges without nails. It was held guilty of abusing its dominant position by the European Commission.

An abusive conduct cannot be justified on the ground that it was contractually or legally valid. While approving the order of the CCI in the **DLF case**,¹³⁷ the Competition Appellate Tribunal rejected the defence that the conduct was contractually valid and the relevant authorities had not questioned it. The Competition Appellate Tribunal in this case observed as under:

"It was also tried to be argued by Shri Salve that this increase was not objected to by the authorities of Directorate of Town and Country Planning, Haryana and it was within the framework of rules and therefore, no fault could be found with it. We are not here on the legality or validity of the construction, as we are on the impact that it made on the allottees, who did

¹³⁵ Case No. 3/ 2011.

¹³⁶ [1989] 4 CMLR 677.

¹³⁷ Case No. 19/2010.

not have even a ghost of idea, as to how many persons they would have to share lifts with or their common area, or for that matter their swimming pool and gymnasium. The unfairness lies in the sinister silence on the part of the appellant. The allottee should not have been kept on the suspended animation on the spacious and broad plea that the Appellant could add additional construction. Maybe the non-disclosure part thereof, does not strictly come within the mischief of section 4 of the Act, but when the Appellant had to take an action particularly after the advent of section 4 of the Act, the Appellant had a duty to disclose that it proposed to increase the exact number of floors and apartments to the extent that it did. The allottees could have taken valid objections, displaying their woes to share the amenities with hoards of other people. After all the allottees had been allured by the promise of the Appellant of all those luxurious facilities, in the absence of which, these apartments could not be termed as luxury apartments. Therefore, there was a duty on the part of the Appellant to let the allottees know about proposed increase and obtain their views about the same. If the Appellant had a duty not to be unfair, the allottees certainly had a right to expect fair behaviour from the Appellant. It is in this sense

that we are viewing this unfair action on the part of Appellant, in first not disclosing the number of floors, at least after section 4 of the Act came on the legal scene and then in proceeding with the construction of additional floors, increasing the number of apartments by 53% in case of Belaire, Park Place and Magnolia."

In the **JCB matter**,¹³⁸ the CCI has warned against vexatious litigation as abuse of dominant position and stated that 'predation through abuse of judicial processes presents an increasingly threat to competition, particularly due to its relatively low anti-trust visibility'.

The CCI has avoided getting into commercial disputes. In **Case No. 81/2012**,¹³⁹ the CCI was dealing with a franchisee agreement in respect of manufacturing and selling drinking water and soda packaged under trade name of & as per specifications of a party. The CCI held that the dispute between the parties was business/commercial dispute regarding implications of the franchisee agreement and no competition issue arose in the case. The CCI further held that issue of dominance would not arise in a franchisee agreement of this nature.

¹³⁸ *M/s Bull Machines Pvt. Ltd. v. M/s JCB India Ltd.*, Case No. 105 of 2013 (CCI)- The case is under investigation. JCB has filed writ petitions challenging the jurisdiction of CCI.

¹³⁹ *In Re: M/s. Official Beverage*, Case No. 81/2012 (CCI).

Regulation of Combinations

CHAPTER-5

CHAPTER COVERAGE

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5.1 Introduction

Article 39 of the Constitution of India, 1950 provides that the State shall direct its policies inter-alia to ensure that (a) the ownership and control of the material resources of the community are so

distributed as best to sub-serve the common good and (b) the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Thus, the need to regulate concentration of economic power has

been and continues to be one of the important ideals of a welfare state.

Competition law regimes not only seek to examine and assess anti-competitive agreements and abuse of dominance, but also seek to regulate anti-competitive effects arising from corporate transactions.

Generally speaking, in competition law parlance, assessing corporate transactions from a competition law viewpoint is referred to as 'merger control'. The objective of merger control is to ensure that no transaction which is likely to have any appreciable adverse effect on competition (AAEC) in a relevant market, should be allowed, unless adequate modifications can be put in place which would sufficiently mitigate the AAEC that would have otherwise occurred. Merger control provisions enable competition authorities to examine and assess corporate transactions from the standpoint of whether the transactions are likely to harm competition in a given market.

The competition issues are more generally associated with horizontal mergers where competitors at the same level of production and/or

distribution of a good or service, i.e., in the same relevant market, integrate with each other. Competition concerns may also arise in vertical mergers where two players, at different levels of the production chain in the relevant product market, merge. This may lead to foreclosure by the merged party that acquires market power, by foreclosing entry / access for other players in the distribution chain. The international test to assess the market power in a vertical relationship is the "ability, incentive and effect" of the merged entity to foreclose competition. Conglomerate mergers i.e. mergers between enterprises engaged in different businesses that are not connected at different levels of the production chain are generally found not to give rise to any competition concerns.

5.2 Scope of Sections 5 and 6 of the Competition Act

As per Section 5 of the Competition Act, acquisition of one or more enterprises or merger or amalgamation of enterprises, which exceeds the threshold prescribed therein shall be a 'Combination' for the purposes of the Act.

Merger

A merger is a corporate transaction where two or more corporate entities combine to form one corporate entity. In case of mergers, one of the pre-merger entities continues to exist and the other merging entity/entities gets subsumed into the entity which subsists.

Amalgamation

An amalgamation is a corporate transaction where two or more corporate entities combine to form a new corporate entity, and all the pre-merger entities cease to exist.

Acquisition

An acquisition is a corporate transaction where one corporate entity purchases or buys some/all shareholding/assets of another corporate entity.

5.3 Thresholds for Combinations

As stated above, section 5 of the Competition Act sets out thresholds for enterprises and groups, in terms of assets and turnover, which if exceeded triggers a requirement to notify to the CCI. The current thresholds¹⁴⁰ are as follows:

	Combined Assets ¹⁴¹		Combined Turnover ¹⁴²	
	In India	Worldwide	In India	Worldwide
Parties to a combination ¹⁴³	> INR 2000 crore	> USD 1 billion (including at least INR 1000 crore in India)	> INR 6000 crore	> USD 3 billion (including at least INR 3000 crore in India)
Group ¹⁴⁴ of the parties to a combination	> INR 8000 crore	> USD 4 billion (including at least INR 1000 crore in India)	> INR 24000 crore	> USD 12 billion (including at least INR 3000 crore in India)

If any of the above thresholds are met, that is, if even one of threshold figures mentioned in the eight (8) grey boxes is met, a notice is required to be filed with the CCI, unless an exemption or a benefit is available to the parties in terms of

¹⁴⁰ The original thresholds set out in the Competition Act have been revised twice - in 2011 and in 2016.

¹⁴¹ Explanation (c) to section 5 of the Competition Act states that the value of assets shall be determined by considering the book value of the assets as shown in the audited books of accounts of an enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls. The value of assets shall include (i) brand value, (ii) value of goodwill, and (iii) value of copyright, patent, permitted use, collective mark, registered proprietor, registered trademark, registered user, homonymous geographical indication, geographical indications, design or layout design, or similar other commercial rights, if any. While determining value of any intangible asset for the purposes of section 5, legislations mentioned in section 3(5) of the Competition Act have to be taken into consideration. The book value is required to be reduced by depreciation.

¹⁴² Turnover is the value of sales of goods or services

¹⁴³ Parties to a combination would be (a) acquirer plus the enterprise being acquired, (b) merging enterprises, or (c) amalgamating enterprises.

¹⁴⁴ Explanation (b) to section 5 of the Competition Act defines 'group' to mean two (or more) enterprises where one enterprise, directly or indirectly, is in a position to (i) exercise 26% or more of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

the Competition Act and/ or applicable regulations.

The Central Government can on consultation with the Commission, after every two years, 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 section 5.

While undertaking threshold analysis, the substance of a transaction must be looked at and any structure or step which enables enterprises to avoid filing a notice, must be disregarded¹⁴⁵. Regulation 5(9) of the Combination Regulations sets out an 'anti-circumvention rule' whereby in case of transactions involving transfer of assets by one enterprise to another enterprise to implement an acquisition, merger or amalgamation, the value of assets and turnover of the transferor enterprise will be attributed to the transferee enterprise for the purposes of threshold analysis.

In a transaction comprising a series of inter-connected steps where all the steps taken together amount to a single composite transaction, then a notice is required to be filed if any of the steps meets the prescribed thresholds.¹⁴⁶

5.4 Control

A transaction structured as an acquisition can involve acquisition of control, shares, voting rights, assets, or a combination of all or any of these. Acquiring minority shareholding in an enterprise, that is, acquisition of less than 25 per cent shareholding of an enterprise would not trigger a filing requirement, unless the acquirer is also acquiring some rights which amount to 'control'.

Section 5 of the Competition Act defines 'control' as controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise. This is an inclusive definition.

Control is assessed by the CCI on a case-to-case basis. Not every right would tantamount to 'control' as defined in the Competition Act. The CCI views both 'positive control' and 'negative control' as 'control' for the purposes of the Competition Act. Positive control essentially, emanates from majority shareholding. Negative control is where a minority shareholder has specific rights which are granted through agreements, and such rights include the right to appoint/

¹⁴⁵ Regulation 5(9) and 9(5) of the Combination Regulations

¹⁴⁶ Regulation 9(5) of the Combination Regulations

remove key managerial personnel,¹⁴⁷ the right to alter business plans¹⁴⁸ and the right to block special resolutions.¹⁴⁹

5.5 Exemptions

A 'combination' has to be notified to the CCI unless there is an exemption or similarly placed benefit made available in terms of the Competition Act and applicable regulations, or by the Central Government by way of notifications issued under section 54 of the Competition Act.

As on date, the Central Government has provided for the exemptions under the following categories;

De Minimis exemption

Amalgamation of Regional Rural Banks

Reconstitution, transfer and amalgamation of nationalised banks

Combinations involving Central Public Sector Enterprises in the oil & gas sectors

amalgamation, if the enterprise being acquired, taken control of, merged or amalgamated has (i) assets less than INR 350 crore, or (ii) turnover less than INR 1000 crore. This exemption is valid for a period of 5 years from the date of publication of its notification in the official gazette.

Company X manufactures and sells toys in India. Company Y manufactures and sells video games in India. Y approached X with a proposal to acquire 100% shareholding of X.

For financial year 2017-18, sales turnover of X was INR 200 crore and sales turnover of Y was INR 7500 crore. Combined sales turnover of X and Y for financial year 2017-18 will be INR 7700 crore which is more than the threshold requirement of INR 6000 crore. However, X's sales turnover is below INR 1000 crore and hence, the acquisition can take the benefit of the De Minimis exemption.

5.5.2 Amalgamation of Regional Rural Banks

On 10 August 2017, the Central Government granted exemption¹⁵¹ to amalgamation of 'Regional Rural Banks' as per section 23A(1) of the Regional Rural Banks Act, 1976, from the application of sections 5 and 6 of

5.5.1 De Minimis

On 27 March 2017, the Central Government issued a notification¹⁵⁰ exempting any acquisition, merger or

¹⁴⁷ Case No. C-2015/09/308, Standard Life/ HDFC Standard Life Insurance

¹⁴⁸ Case No. C-2015/04/267, AXA India/ SociétéBeaujon/ Bharti AXA General Insurance

¹⁴⁹ Case No. C-2012/06/63, SPE Holdings/ MSM/ Grandway& Atlas

¹⁵⁰ Notification regarding de minimis exemption, <http://cci.gov.in/sites/default/files/notification/S.O.%20988%20%28E%29%20and%20S.O.%20989%28E%29.pdf> (last updated December 15, 2017)

¹⁵¹ Notification regarding exemption of Regional Rural Banks from Section 5 and 6 of the Competition Act, 2002, <http://cci.gov.in/sites/default/files/notification/Notificiation%20-%2010.08.2017.pdf> (last updated 15 December 2017)

the Competition Act, for a period of 5 years from the date of notification in official gazette.

5.5.3 Reconstitution, transfer and amalgamation of Nationalised banks

On 30 August 2017, the Central Government granted exemption¹⁵² to all cases of reconstitution, transfer and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of sections 5 and 6 of the Competition Act, for a period of 10 years from the date of notification in official gazette.

An earlier notification dated 8 January 2013 issued by the Central Government exempts a 'banking company' whose business has been suspended under section 45 of the Banking Regulation Act, 1949, from the application of sections 5 and 6 of the Competition Act, for a period of 5 years from the date of notification in official gazette.

5.5.4 Combinations involving Central Public Sector Enterprises in the oil & gas sectors

On 22 November 2017, the Central Government exempted¹⁵³ all cases of combinations involving Central Public Sector Enterprises including their wholly or partly owned subsidiaries, operating in the Oil and Gas sectors, under the Petroleum Act, 1934 or under the Oilfields (Regulation and Development) Act, 1948, and rules made under these two laws, from the application of sections 5 and 6 of the Competition Act, for a period of 5 years from the date of notification in official gazette.

5.6 Combinations ordinarily not notifiable

Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 ("**Combination Regulations**") states that certain transactions, listed in Schedule I of the Combination Regulations, are unlikely to have any AAEC and therefore, are not ordinarily notifiable. These transactions, listed below, do not enjoy absolute exemption and have to be assessed on a case-to-case basis.

- (1) An acquisition of less than 25% of shares or voting rights of an enterprise solely as an investment

¹⁵² Notification regarding exemption of nationalized banks from Section 5 and 6 of the Competition Act, 2002, <http://cci.gov.in/sites/default/files/notification/Notification%2030.08.2017.pdf> (last updated 15 December 2017)

¹⁵³ Notification regarding exemption of Combination under Section 5 of the Act involving Central Public Sector Enterprises operating in the Oil and Gas Sectors, <https://www.cci.gov.in/notification/111> (last updated 28 July 2018)

or in the ordinary course of business, not amounting to control.

- In 2016, an amendment to the Combination Regulations clarified 'solely as an investment' to mean any acquisition of less than 10% of the total shares or voting rights of an enterprise, provided the acquirer has (i) rights as that of ordinary shareholders, and (ii) neither has representation on the board of directors nor any intention to participate in the affairs or management of the enterprise being acquired.

(1A) An acquisition of additional shares or voting rights by an enterprise having at least 25% and less than 50% of shares and voting rights in another enterprise, provided such an acquisition does not result in change of control.

(2) An acquisition of shares or voting rights of an enterprise by an acquirer which already holds at least 50% shares or voting rights, unless the acquisition results in any change of control.

(3) An acquisition of assets (i) not directly related to the business activity of the acquirer, (ii) undertaken solely as an investment or in ordinary course of business, and (ii) does not

result in acquisition of control, except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise being acquired, irrespective of whether such assets are organised as a separate legal entity or not.

(4) An amended or renewed tender offer made in a combination where a notice has already been filed with the CCI by the party making the offer, prior to making the amended or renewed offer.

(5) An acquisition of stock-in trade, raw materials, stores and spares, and other similar current assets in ordinary course of business.

(6) An acquisition of shares or voting rights pursuant to a bonus issue or stock split or consolidation of face value of shares or buy-back of shares or subscription to rights issue of shares, not leading to acquisition of control.

(7) Acquisition of shares or voting rights by a person acting as a securities underwriter or a registered broker of a stock exchange, on behalf of clients, in the ordinary course of business.

(8) An acquisition of shares or voting rights or assets by a person/enterprise of another person/enterprise within the same group

(intra-group acquisition), except where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.

- (9) A merger or an amalgamation of two enterprises where (i) one enterprise has more than 50% shares or voting rights in the other, and/or (ii) 50% or more shares or voting rights in both enterprises are held by enterprise(s) belonging to the same group, provided there is no change from joint control to sole control.
- (10) An acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI in accordance with section 31 of the Competition Act.

5.7 Process of Filing

The combination regime in India is mandatory. A combination which exceeds the thresholds prescribed in the Competition Act has to be notified to the CCI (unless an exemption or benefit can be availed of).

The competition law regime in India is also suspensory in nature, that

is, no part of a combination can be consummated until the CCI approves the combination.¹⁵⁴

Section 6 of the Competition Act mandates filing of a notice within 30 days of a 'trigger event'¹⁵⁵. In terms of the Competition Act, a trigger event can be (i) approval of a merger or an amalgamation by the board of directors of the concerned parties, or (ii) execution of a binding agreement by the parties to an acquisition, or (iii) a public announcement made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Failure to file notice within the 30-day notice period could attract penalty in terms of section 43A read with section 6(2) of the Competition Act. On 29 June 2017, the 30-day time limit has been relaxed¹⁵⁶ by the Central Government for a period of 5 years.

5.7.1 Pre-filing consultation¹⁵⁷

The CCI has put in place an informal and verbal pre-filing consultation process to assist parties to a combination in identifying information and

¹⁵⁴ Section 6(2A) of the Competition Act.

¹⁵⁵ In terms of section 6 of the Competition Act, a 'trigger event'.

¹⁵⁶ Notification regarding exemption from notifying a combination within thirty days mentioned in Section 6(2) of the Competition Act, 2002, <http://cci.gov.in/sites/default/files/notification/S.O.%202039%20%28E%29%20-%2029th%20June%202017.pdf> (last updated December 15, 2017).

¹⁵⁷ Consultation prior to filing of notice of the proposed combination under sub section (2) of section 6 of the Competition Act, 2002, <https://www.cci.gov.in/sites/default/files/cci_pdf/ConsultationPrior250511.pdf>

documents that are required to prepare a complete and valid notice. Pre-filing consultations can be sought by parties to a combination on procedural as well as substantive issues. A request for pre-filing consultation can be made by sending an e-mail, on cci-consult@nic.in, to the Combination Division of the CCI.

5.7.2 Online guidance system

The CCI has brought in a Do-It-Yourself Notifiability Check¹⁵⁸ to provide assistance in determining whether a transaction is notifiable or not.

5.7.3 Filing responsibility

Regulation 9 of the Combination Regulations states that it is the responsibility of the acquirer to notify an acquisition or a hostile takeover. In case of a merger or an amalgamation, a joint notice is to be filed by the merging or amalgamating parties.

In case of formation of a joint venture, the responsibility to file a notice would lie with all the parties forming the joint venture.¹⁵⁹

5.7.4 Form of notice

The Competition Act provides for prescribed forms in which a notice has to be filed with the CCI – Form

I (short form) and Form II (long form). Notices are ordinarily filed¹⁶⁰ in Form I. Form II seeks fairly detailed and in-depth information as compared to Form I. A notice should preferably be made in Form II if the parties to a combination have (i) more than 15% combined market share in a relevant market in case of horizontal overlap, or (ii) more than 25% combined market share in a relevant market in case of vertical overlap.

Notices are required to be filed along with (i) requisite filing fees, (ii) a declaration page confirming that the contents of the form are correct and complete, (iii) a non-confidential 2000-word summary, and (iv) a non-confidential 500-word summary of the combination for publishing on the website of the Commission.

In a case where a notice has been filed in Form I and the CCI is of the view that the notice is required to be filed in Form II, the CCI can direct the parties to make a Form II filing.

5.7.8 Invalid/ Incomplete notice

Regulation 14 of the Combination Regulations states that a filing shall be complete and valid only if the notice contains all necessary information and conforms to the Combination Regulations.

¹⁵⁸ <https://www.efilingcci.gov.in/DIY/#/ImportantInstructions>

¹⁵⁹ Case No. C-2015/10/333, *Andhra Pradesh Gas Distribution Corporation Limited/ GDF Suez Energy International Global Developments B.V./ Shell Gas B.V./ GAIL (India) Limited*

¹⁶⁰ Regulation 15 of the Combination Regulations

If a notice filed is incomplete, then the CCI can direct the parties to provide complete information and/or remove any defects. Regulation 14(2A) of the Combination Regulations empowers the CCI to invalidate a notice if filing requirements are not met with.

5.8 Review of Combinations

The CCI has 30 working days from the date of filing of a complete and valid notice, to form a *prima facie* opinion as to whether a combination is likely to have any AAEC in a relevant market (**"Phase I"**). During Phase I investigation, the CCI can seek additional information or modification from the parties¹⁶¹ to the combination that is being examined.

The CCI can also seek information from third parties during a Phase I investigation for which it has an additional 15 working days' time limit.¹⁶²

Phase I investigation terminates either with the CCI approving a combination (with or without modifications), or with the CCI forming a *prima facie* view that a combination is likely to have AAEC in a relevant market.

If the *prima facie* opinion of the CCI is that a combination is likely to cause an AAEC in any relevant market in India, the CCI issues a notice under section 29 of the Competition Act, requiring the parties to the proposed combination, to explain how the combination would not adversely affect the market.

If the response of the parties is not found to be satisfactory, the CCI can initiate an in-depth investigation into the combination (**"Phase II"**), following which the parties have to publish details of the combination.¹⁶³ The CCI may also invite any person who is affected or is likely to be affected by the combination, to file written objections within 15 working days from the date on which details of the combination were published.¹⁶⁴ The CCI may, within 15 working days of receiving written objections from affected parties¹⁶⁵, seek further information from parties to the combination¹⁶⁶. During Phase II investigation of a combination, the CCI can even call for a report from the Director General ("DG")¹⁶⁷.

For the assessment of AAEC in case of a combination, the CCI considers all or any of the following factors¹⁶⁸:

¹⁶¹ Regulation 19 of the Combination Regulations.

¹⁶² Regulation 19(3) of the Combination Regulations.

¹⁶³ Section 29(2) of the Competition Act.

¹⁶⁴ Section 29(3) of the Competition Act.

¹⁶⁵ Section 29(4) of the Competition Act.

¹⁶⁶ Section 29(5) of the Competition Act.

¹⁶⁷ Regulation 20 of the Combination Regulations.

¹⁶⁸ See sub-section(4) of Section 20 of the Competition Act.

- (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) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Upon assessment of a combination based on the factors stated above, the CCI may: (a) approve the combination; (b) block the combination; or (c) approve the combination subject to certain conditions, which are generally referred to as modifications.¹⁶⁹ The modifications are merger remedies that are intended to remedy the potential anti-competitive outcome of the proposed merger.

The CCI has 210 days to approve a combination. In case the CCI does not pass a final order within 210 days from the date of filing of a notice, the combination is deemed to have been approved by the CCI.¹⁷⁰

The time limits mentioned above are not absolute. The CCI can 'stop the clock' to seek information, clarification or response from the parties, as may be required. Time taken by parties in providing any information or response

¹⁶⁹ Section 31 of the Competition Act deals with the order of the Commission in combination cases including the aspects of undertaking modifications from the parties to the combination.

¹⁷⁰ Certain time periods (such as the time taken by the parties to provide additional information, remove defects from the filing, provide additional details when an incomplete notification has been filed, the time taken by the CCI to consider validity of the merger filing or voluntary modifications offered by parties, etc.) shall be excluded from the 210-day timeline mentioned under Section 6(2A) of the Act, which requires parties to wait until the expiry of 210 days from the date of notification, before giving effect to notifiable transactions/combinations.

is not included in the above mentioned prescribed time limits.

Certain economic tools may be used by the CCI for assessing the concentration in the market. A highly concentrated market i.e. a market where the market power is consolidated in the hands of a few enterprises, generally causes more competition concerns than the less concentrated or fragmented markets. The commonly used economic tools are:

- a) Concentration Ratio (CR) – It is the ratio of the combined market shares of a given number of firms to the whole market size. The most commonly used Concentration Ratio is CR3 and CR4 i.e. the concentration ratio of the top 3/4 firms.
- b) Herfindahl-Hirschman Index (HHI) – It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, in a market consisting of three firms with a market share of 60, 30 and 10 percent, the HHI will be 4600 (3600+900+100). HHI approaches towards zero when there are large number of firms in the market. HHI reaches to its maximum of 10,000 (square of

100% market share) when there is a single firm in the market. A market with an HHI between 1,500 and 2,500 points is considered moderately concentrated and a market with an HHI in excess of 2,500 points to considered highly concentrated.

5.8.1 Remedies

If a combination is likely to have AAEC in a relevant market, the CCI can (i) direct enterprises which are parties to a combination¹⁷¹, to not give effect to the combination, or (ii) implement certain remedies to ensure that the relevant market remains competitive¹⁷². Remedies can be categorised as – behavioural (e.g. grant of license) and structural (e.g. divestiture).

In *Sun Pharma/Ranbaxy*, the CCI approved the acquisition of Ranbaxy by Sun Pharma subject to divestiture of products relating to seven (7) relevant markets for formulations.

In cases of divestitures, two divestiture periods may be set out¹⁷³. During the first divestiture period, the purchaser of (to-be-divested) assets has to be identified by the parties to the combination and has to approved by the CCI. Depending on the nature of the industry and the market position of the

¹⁷¹ Section 31(2) of the Competition Act.

¹⁷² Section 31(3) of the Competition Act

¹⁷³ Case No. C-2014-05-170, *Sun Pharmaceuticals/ Ranbaxy*; Case No. C-2014/07/190, *Holcim/ Lafarge*

parties, the CCI can impose embargo on acquiring interest in the divested business in future by the parties to the combination. A monitoring agency is appointed by the CCI to preserve the divested business till closing and to discharge 'hold-separate'¹⁷⁴ obligations. Parties to the combination are required to submit periodic reports to the monitoring agency. The agency, in turn, is required to submit written reports and recommendations to the CCI. In case the first divestiture period fails, a divestiture agency can be appointed by the CCI in the second divestiture period. A divestiture agency shall have a power of attorney from the parties to a combination to act on their behalf, and take such steps as it may deem fit and necessary in relation to the combination in question.

5.8.2 Failure to report a transaction

Section 20(1) of the Competition Act empowers the CCI to initiate suo-motu inquiry into a combination. Under section 43A of the Competition Act, the CCI can impose a fine of up to 1% of the worldwide turnover or assets of the combination, whichever is higher, on enterprise(s) for failure to notify a transaction. This fine is imposed on the party responsible for the filing.

Section 43A would also be attracted in case of gun-jumping. Gun-jumping essentially, translates as 'acting before appropriate time', and it refers to situations where a party or parties to a combination consummate a transaction wholly or partly before the CCI approves the transaction.

¹⁷⁴ Employees of parties to the combination may be appointed as 'hold-separate' managers to supervise a divestiture process.

Practice and Procedure

CHAPTER-6

CHAPTER COVERAGE

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6.1 Duties of the Commission

The Commission under Section 18 is duty bound to eliminate practices and actions having adverse effect on competition. Further, it is also the duty of the Commission to promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India. The

wordings of Section 18 are similar to that mentioned in the preamble of the Act.

The Commission, in order to achieve these objectives is also empowered to enter into co-operation arrangements with competition authorities of foreign countries. The Commission has till date entered into Memoranda of Understanding (MOU) with five

competition authorities apart from one MoU with BRICS Competition Authorities.¹⁷⁵

6.2 Procedure and manner of Inquiry

6.2.1 Inquiry into anti-competitive agreements and dominant position of enterprise

Under Section 19 of the Act, the Commission may either suo-motu or on receipt of any information from any person, consumer or their association or trade association, initiate inquiry into any alleged anti-competitive agreement as defined in Section 3 or any abuse of dominant position by an enterprise as defined in Section 4 of the Act. The manner of providing information along with the fees has been laid out in the general regulations. Reference can also be made by the Central Government or a State Government or a Statutory Authority to the Commission¹⁷⁶.

6.2.1.1 Procedure to file information

*Format of information or the reference*¹⁷⁷:

The information or reference shall separately and categorically state the following seriatim :-

- a) legal name of the person or the enterprise giving the information or the reference;
- b) complete postal address in India for delivery of summons or notice by the Commission, with Postal Index Number (PIN) code;
- c) telephone number, fax number and also electronic mail address, if available;
- d) mode of service of notice or documents preferred;
- e) legal name and address(es) of the enterprise(s) alleged to have contravened the provisions of the Act; and
- f) legal name and address of the counsel or other authorised representative, if any;

*Contents of information or the reference*¹⁷⁸:

The information or reference shall contain-

- a) a statement of facts;
- b) details of the alleged contraventions of the Act together with a list enlisting all documents, affidavits and evidence, as the case may be,

¹⁷⁵ Federal Trade Commission (FTC) / Department of Justice (DOJ), USA, Director General Competition, European Union (EU), Federal Antimonopoly Service (FAS), Russia, Australian Competition and Consumer Commission (ACCC), and Competition Bureau (CB) Canada, apart from BRICS competition authorities.

¹⁷⁶ Section 19, The Competition Act, 2002.

¹⁷⁷ Regulation 10, Competition Commission of India (General) Regulations, 2009

¹⁷⁸ *Id.*

in support of each of the alleged contraventions;

- c) a succinct narrative in support of the alleged contraventions;
- d) relief sought, if any;
- e) Such other particulars as may be required by the Commission.

*Signing of information or reference*¹⁷⁹:

An information or a reference or a reply to a notice or direction issued by the Commission shall be signed by the parties or entities specified in the table below:

Table 6.2.1.1 Signing authority for filing information

Individual	individual himself or herself, including a sole proprietor of a proprietorship firm
Hindu Undivided Family (HUF)	the Karta
Company	the Managing Director and in his or her absence, any Director, duly authorized by the board of directors
Association or society or similar body	the President or the Secretary or the person so authorized by the legal instrument that created the association or the society or the body;
Partnership firm	Partner
Co-operative society or local authority	Chief Executive Officer

A reference shall be signed and authenticated by an officer not below the rank of a Joint Secretary to the Government of India or equivalent in the State Government or the Chief Executive Officer of the Statutory Authority, if the same has been received from the Central Government or State Government or Statutory Authority.

*Procedure for filing of information or reference*¹⁸⁰

- a) Information or reference or responses thereto to the Commission shall be presented to the Secretary or to an officer authorised in this behalf by the Secretary, in person or sent by registered post, or courier service, or facsimile transmission addressed to the Secretary or to such authorised officer.

- b) Any separate or additional document(s) that a party to the proceedings wishes to rely upon in support of its information, or reference shall be filed in the form of a "Paper Book", at least seven days prior to the date of the ordinary meeting, after serving the copies of the said document(s) on the

¹⁷⁹ Regulation 11, Competition Commission of India (General) Regulations, 2009.

¹⁸⁰ Regulation 20 of the Combination Regulations

other parties to the proceedings, with documentary proof of such service. Such documents shall be serially numbered, prefaced by an index and shall be supported by a verification.

- c) An information(s) or reference sent by post or courier service or facsimile transmission under sub-regulation (1) shall be deemed to have been presented to the Secretary or to the officer authorised by the Secretary, on the day on which it is received in the office of the Secretary or the authorised officer, as the case may be.
- d) Information or a reference to the Commission may be sent by a person or an enterprise to the Secretary in an electronic form duly authenticated with digital signature by the subscriber as and when so desired by the Commission through a public notice.¹⁸¹

*Clubbing of information*¹⁸²

If the Commission is satisfied that the matter raised in any information, or reference, or application, received subsequently is directly and substantially similar, it may at any time after receipt of an information, or a reference, or an application, consolidate

two or more similar information, or references, or applications, as the case may be, for consideration.

*Amendment of information*¹⁸³

The Commission may permit amendment of any information, upon an application made in this regard but such amendment shall not be allowed if it substantially changes the nature and scope of the information.

*Fee*¹⁸⁴

Each information received under clause (a) of sub-section (1) of section 19 of the Act from any person shall be accompanied by proof of having paid the fee as under, —

- (a) Rs. 5,000 in case of individual or Hindu undivided family (HUF), or Non-Government Organisation (NGO), or Consumer Association, or a Co-operative Society, or Trust, or
- (b) Rs. 20,000 (twenty thousand) in case of firm or company having turnover in the preceding year up to rupees one crore, or
- (c) Rs. 50,000 in the cases not covered under clause (a) or (b).

*Payment of fees*¹⁸⁵

The fee can be paid either by

¹⁸¹ Regulation 13, Competition Commission of India (General) Regulations, 2009

¹⁸² Regulation 27, Competition Commission of India (General) Regulations, 2009

¹⁸³ Regulation 28, Competition Commission of India (General) Regulations, 2009

¹⁸⁴ Regulation 49, Competition Commission of India (General) Regulations, 2009

¹⁸⁵ *Id.*

tendering demand draft or pay order or banker's cheque, payable in favour of Competition Commission of India (Competition Fund), New Delhi or through Electronic Clearance Service (ECS) by direct remittance to the Competition Commission of India (Competition Fund), Account No. 1988002100187687 with "Punjab National Bank, Bhikaji Cama Place, New Delhi- 110066.

6.2.1.2 Step wise procedure for inquiry under Section 19¹⁸⁶

1. *Preliminary scrutiny*¹⁸⁷: Each information of reference received in the Commission shall be scrutinized by the Secretary of the Commission to check whether it conforms to the regulations and defects, if any, shall be communicated to the party within a reasonable time. If the defects are not removed within the time specified, the information or the reference shall be treated as invalid and the fee paid on such information shall stand forfeited. The Commission, may however, allow filing of fresh information or reference with applicable fees.

2. *Existence of prima facie case and direction to the Director General*: If the Commission, 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, 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. The Secretary shall convey the directions of the commission within seven days to the Director General to investigate the matter.¹⁸⁸ However, if the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government, or the State Government, or the Statutory Authority, or the parties concerned, as the case may be. There is no requirement to refer the matter to Director General for investigation if no prima facie case is made out. The Commission may call for a preliminary conference and invite the information provider and such other person as is necessary to form an opinion whether a prima facie case exists.¹⁸⁹ There is no absolute right to claim notice under section 26(1) of the Act.¹⁹⁰ The Supreme Court in the case of **SAIL**,¹⁹¹ has observed:

"The jurisdiction of the Commission, to act under this provision, does not

¹⁸⁶ Section 26, The Competition Act, 2002.

¹⁸⁷ Regulation 15, Competition commission of India (General) Regulations, 2009.

¹⁸⁸ Regulation 18, Competition commission of India (General) Regulations, 2009.

¹⁸⁹ Regulation 17, Competition commission of India (General) Regulations, 2009.

¹⁹⁰ Competition Commission of India v. SAIL, (2010) 10 SCC 744. See also, Chettinad International Coal Terminal Pvt. Ltd. v. CCI, TN Power Producers Association, Kamarajar Port Ltd., W.P. No. 7233 OF 2016

¹⁹¹ Competition Commission of India v. SAIL, (2010) 10 SCC 744.

contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of audi alteram partem is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is

vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose: (a) to collect material and verify the information, as may be, directed by the Commission; (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously."

The Director General cannot conduct investigation on its own. The Commission has to first form a prima facie opinion before directing the Director General to conduct investigation. However, while forming such an opinion, Commission is not mandated to hear the person/enterprise referred/informed against it.¹⁹² Further, no appeal is prescribed against the order of the Commission section 26(1) of the Act.¹⁹³

¹⁹² Supra Note 2.

¹⁹³ Id.

6.2.1.3 Investigation by Director General

Powers of the Director General are specified under Section 41 of the Act. The DG will have all the powers of Civil Court which are necessary for conducting investigation. The provisions relating to production of documents and evidence and search and seizure of documents by inspector under the Companies Act shall, so far as may be, apply in conducting the investigations by the Director General, or any other person investigating under his authority as they apply to an inspector appointed under that Act. General Regulations lay down the following procedure for investigation by the Director General¹⁹⁴ :

- i. The Secretary shall, while conveying the directions of the Commission under regulation 18, send a copy of the information, or reference, as the case may be, with all other documents, or materials, or affidavits, or statements, which have been filed either along with the said information, or reference, or at the time of preliminary conference, to the Director General.
- ii. The Commission shall direct the Director General to submit a report within such time as may be specified by the Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission.
- iii. The Commission may, on an application made by the Director General, giving sufficient reasons extend the time for submission of the report by such period as it may consider reasonable.
- iv. The report of the Director General shall contain his findings on each of the allegations made in the information, or reference, as the case may be, together with all evidences, or documents, or statements, or analyses collected during the investigation. If the Director General finds it necessary, he may, for maintaining confidentiality, submit his report in two parts. One of the parts shall contain the documents to which access to the parties may be accorded and another part shall contain confidential and commercially sensitive information and documents to which access may be partially or totally restricted.
- v. The report of the Director General shall be forwarded to the Secretary within the time specified by the Commission
- vi. If the Commission, on consideration

¹⁹⁴ Regulation 20, The Competition Commission of India (General) Regulations, 2009.

of the report, is of the opinion that further investigation is called for, it may direct the Director General to make further investigation and submit a supplementary report on specific issues within such time as may be specified by the Commission but not later than forty-five days,

3. *Submission of report by Director General:* Once the Director General receives the direction from the Commission, he has to submit a report on his findings within the time frame as specified by the Commission, which ordinarily does not exceed 60 days from the date of receipt of direction from the Commission.¹⁹⁵ The Commission may however extend the time for submission of the report on an application made by the DG.¹⁹⁶ The Director General may, if necessary for maintaining confidentiality, submit his report in two parts. One of the parts shall contain the documents to which access to the parties may be accorded and another part shall contain confidential and commercially sensitive information and documents to which access may be partially or totally restricted.¹⁹⁷

4. *Information to the parties:* The

Commission may forward a copy of the Director General's report to the parties concerned. The Commission shall also forward a copy to the Central Government, or the State Government, or the statutory authority, if the investigation is caused based on their reference.

5. *Report of no-contravention and inviting objections:* If the report of the Director General suggests that there is no contravention of the provisions of the Act, the Commission shall invite objections or suggestions from the Central Government, or the State Government, or the statutory authority, or the parties concerned, as the case may be, on such report of the Director General.
6. *Action by Commission:* It has to be noted here that the report of the Director General is not binding on the Commission and it may reject the findings of the DG.
 - a. *Closing the matter:* If after consideration of the objections or suggestions, the Commission agrees with the recommendation of the *Director General*, it shall close the matter forthwith and pass such orders as it deems

¹⁹⁵ *Id*

¹⁹⁶ *Id*

¹⁹⁷ *Id*

fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

- b. Calling for further investigation or inquiry: If after consideration of the objections or suggestions, if any, the Commission is of the opinion that further investigations are called for, it may direct further investigations in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
7. *Report of Contravention*: 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.
8. *Orders by Commission*: Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in dominant position is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any or the orders as specified in Section 27 of the Act.

6.2.2 Procedure of Inquiry of combinations

In accordance with the provisions of Regulation 19(1) of the Combination Regulations, the Commission is required to form its prima facie opinion as to whether a combination is likely to cause or has caused an AAEC within the relevant market in India within 30 working days of receipt of the notice. Further, under the Act, the Commission should pass an order on a combination under Section 31 of the Act within two hundred and ten days from the date of the notice given to Commission under Section 6(2) of the Act. The said timeline includes both Phase I and Phase II assessment of combinations by the Commission.

6.2.2.1 Step wise process

- i. Issue of notice to show cause: As per section 29 of the Act, 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. For the purpose of forming its prima facie opinion, the Commission may, if

considered necessary, require the parties to the combination to file additional information or accept modification, if offered by the parties to the combination before the Commission has formed prima facie opinion.¹⁹⁸ The Commission may also call for information from any other enterprise while inquiring as to whether a combination has caused or is likely to cause an appreciable adverse effect on competition in India.¹⁹⁹

- ii. Call for Director General's report: 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 the timeframe prescribed by the Commission. The Secretary shall convey the direction of the Commission to the Director General, along with copy of the notice filed by the parties to the combination with all other documents, materials, affidavits, statements, which have been filed or are otherwise available with the said notice, the notice to show cause to the parties to the combination and response of the parties to the same.²⁰⁰

- iii. Publication of combination: If the Commission is of prima facie 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 Director General, whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The details of combination shall be published by the parties in Form IV, as specified in Schedule II to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. The parties shall submit the details of combination to be published to the Commission before its publication and the Commission may host the same on its official website. The details of the combination to be published, also be hosted by the

¹⁹⁸ Regulation 19(2), The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

¹⁹⁹ Regulation 19(3), *Id.*

²⁰⁰ Regulation 20(2), The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

parties on the websites of their respective enterprises. The parties shall also publish the details of the combination in all India editions of four leading daily newspapers including at least two business newspapers.²⁰¹

- iv. Inviting objections: The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published.
- v. Call for additional information: The Commission may, within fifteen working days from the expiry of the period, call for such additional or other information as it may deem fit from the parties to the said combination. The additional or other information called for by the Commission shall be furnished by the parties within fifteen days.
- vi. After receipt of all information and within a period of forty-five working days from the expiry of the period mandated to provide additional information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31

(orders of Commission on certain combinations).

6.2.3 Power to regulate its own procedure²⁰²

In exercise of its powers and discharge of its functions, the Commission shall be guided by the rules of natural justice. Further, the Commission shall have the powers to regulate its own procedure. The Commission for the purpose of discharge of its functions has also been vested with the 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 the 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 affidavit;
- d) issuing commissions for the examination of witnesses or documents;
- e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such record or document from any office.

²⁰¹ Regulation 22, *Id.*

²⁰² Section 36, *Competition Act, 2002.*

6.2.4 Calling of experts for the purposes of inquiry

The Commission, may under section 36(3) of the Act, call upon such experts, from the field 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 by it.

6.2.5 Power to issue directions for furnishing information, production of books, other documents

Under Section 36(4) of the Act, the Commission may direct any person to produce before the Director General or the Secretary or an Officer authorised by it, such books, 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 or to furnish, 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.

6.3 Orders by the Commission

6.3.1 Power to issue interim orders²⁰³

The Commission has the power to issue interim orders when during an

inquiry, it is satisfied that an act in contravention of sub-section (1) of section 3 [Anti-competitive Agreement] or sub-section (1) of section 4 [Abuse of dominance] or section 6 [Regulation of Combinations] 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 such party, where it deems it necessary. The word 'inquiry' has not been defined in the Act. However, regulation 18(2)²⁰⁴ explains what 'inquiry' is. 'Inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of regulation 18(2). In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under section 26(1) of the Act, issues a direction to the Director General. The Director General is expected to conduct an investigation only in terms of the directions of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General. Then the Commission has to consider such report as well as consider the objections and submissions made

²⁰³ Section 33, Competition Act, 2002

²⁰⁴ The Competition Commission of India (General) Regulations, 2009

by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under the Act continues.

Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an *ex parte* order. Even at that stage, the Commission is required to record a satisfaction. The satisfaction under Section 33 has to be understood differently from what is required while expressing a *prima facie* view in terms of section 26(1) of the Act. The former is an expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. It must be kept in mind that the *ex parte* restraint orders can have far-reaching consequences and, therefore, it is desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously.²⁰⁵

The Commission, while recording a reasoned order, *inter alia*, should

record: (a) its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.²⁰⁶ Therefore, where the Commission is not satisfied that breach would result into an appreciable adverse effect on competition²⁰⁷ or there is no irreparable or irretrievable harm²⁰⁸ or where the application has become infructuous²⁰⁹, interim order will not be passed by the Commission.

6.3.2 Orders by the Commission after inquiry into agreements or abuse of dominant position²¹⁰

The Commission is empowered to pass appropriate orders to prohibit any behaviour or conduct which is

²⁰⁵ Para 86-90, *Supra* Note 2

²⁰⁶ *Id*

²⁰⁷ *M/s. India Glycols Ltd. v. Competition Commission of India*, IA 45 of 2013 in Appeal No. 25 of 2013, decided on 12 November 2013.

²⁰⁸ *Sh. Dhanraj Pillay v. M/s. Hockey India*, 2013 CompLR 543 (CCI); *Fast Track Call Cab Private Ltd. v. ANI Technologies Pvt. Ltd.*, Case No. 06 of 2015.

²⁰⁹ *M/s. Shri Ashtavinayak Cine Vision Limited Ltd. v. v PVR Picture Ltd.*, 2013 CompLR368 (CCI).

²¹⁰ Section 27, Competition Act, 2002

considered to be anti-competitive or abuse of dominance. Therefore, where after inquiry the Commission finds that any agreement referred to in section 3 (anti-competitive agreement) or action of an enterprise in a dominant position is in contravention of section 4 (abuse of dominance), as the case may be, it may pass all or any of the following orders:

- a. *Cease and desist*: The Commission can 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. *Penalty*: Impose such penalty, as it may deem fit which shall be not more than ten percent 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. In case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included

in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher. The imposition of penalty would depend on the aggravating and mitigating factors.²¹¹ Penalty is imposed to cause deterrence in future among erring entities engaged in such action. Thus, degree of punishment is scaled to the severity of the violation.²¹² The Supreme Court in the case of **Excel Corp. Care**,²¹³ has laid down that in case of multi-product companies, the Commission must not take average of the turnover of the last three preceding years in respect of all products, goods or services of an enterprise or associations of enterprises or a person or associations of persons, but must impose penalties only on the turnover of such products or services, which have been affected by the contravention. The Court, thus, has ruled in favour of relevant turnover rather than total turnover in case of multi-product companies.

- c. *Modification of agreement*: The Commission may direct that the agreements shall stand modified

²¹¹ *M/S Maharashtra State Power Generation Co. Ltd. v. M/s Mahanadi Coalfields Ltd.*, 2016 Comp LR 910.

²¹² *Re Bengal Chemist and Druggist Association*, [2014] 121 CLA 196 (CCI).

²¹³ AIR 2017 SC 2734.

to the extent and in the manner as may be specified in the order by the Commission. Direction to 'suitably' modify the unfair terms and conditions is interminably linked to the question whether the terms and conditions are indeed unfair, and therefore needs to be modified.²¹⁴

- d. The Commission may direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
- e. Pass such other order or issue such directions as it may deem fit.

6.3.3 Division of enterprise enjoying dominant position²¹⁵

The Commission has the power to direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. Such order 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.

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.

6.3.4 Orders of Commission on certain combinations²¹⁶

Where the Commission deems it necessary to give an opportunity of being heard to the parties to the combination before deciding to deal with the case in accordance with the provisions contained in section 31 of the Act, the Secretary shall convey its directions to the said parties, to appear before it by giving a notice

²¹⁴ *Supra* Note 211, *Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce*, 2012 CompLR 20 (CCI).

²¹⁵ Section 28, *Competition Act*, 2002.

²¹⁶ Section 31, *Competition Act*, 2002.

of such period as directed by the Commission. The Commission can pass the following orders with respect to combinations.²¹⁷

- Approve the combination: When in the opinion of the Commission, the combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall approve the combination.
- Does not approve combination: When the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it may order that the acquisition or the acquiring of control or the merger or amalgamation referred to in section 5, shall not be given effect to.
- Approval with Modification: Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination; it may propose appropriate modification to the combination, to the parties to such combination. In such a case, the parties, who accept the modification proposed by the Commission, shall carry out such modification

within the period specified by the Commission. 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.

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

²¹⁷ Regulation 24, *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.*

adverse effect on competition and be dealt with in accordance with the provisions of this Act.

Where the combination is deemed to have an appreciable adverse effect on competition, then, without prejudice to any penalty which may be imposed under the Act, the Commission may order that the acquisition, or the acquiring of control, or the merger, or amalgamation referred to in section 5, shall not be given effect to. The parties to the combination shall, upon completion of modification, file a compliance report for the actions required for giving effect to the combination before the Secretary within seven days of such completion. In case the parties to the combination fail to file the compliance report, the Secretary, CCI shall place the matter of such non-compliance before the Commission for appropriate directions.²¹⁸

6.3.5 Appointment of independent agencies to oversee modification

Where the Commission is of the opinion that the modification proposed by it and accepted by the parties to the combination needs supervision, it may appoint agencies, to oversee the modification. The agencies appointed shall be independent

of the parties to the combination having no conflicts of interest and may include an accounting firm, management consultancy, law firm, any other professional organization, or part thereof, or independent practitioners of repute. The agencies appointed shall submit a report to the Commission upon completion of each of the actions required for carrying out the modification.²¹⁹

If the Commission does not, on the expiry of a period of two hundred and ten days from the date of notice given to the Commission under section 6(2), pass an order or issue direction, the combination shall be deemed to have been approved by the Commission in terms of section 6(2A).

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.

6.3.6 Rectification of orders

As per section 38 of the Act, with a view to rectifying any mistake apparent

²¹⁸ Regulation 26, *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.*

²¹⁹ Reg. 27, *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.*

from the record, the Commission may amend any order passed by it under the provisions of this Act. The Commission may make an amendment of its Order either of its own motion or on bringing any such mistake to its notice by any party to the order. The Commission, however, shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.²²⁰

6.4 Penalties Other than Section 27

6.4.1 Penalty for the contravention of orders of the Commission

As per Section 42 of the Competition Act, the Commission may cause an inquiry as to the compliance of its orders or directions. This section provides that if any person has contravened or failed to comply with any order or direction of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, and has no reasonable cause to justify the same, he shall be punishable with fine extending up to Rs. 1 lakh for each day during which such non-compliance occurs, subject to a maximum fine of Rs. 10 crore.

Further, the section also provides that if any person fails to comply with the orders or directions of the Commission or fails to pay the fine imposed by the Commission for contravention or

non-compliance of the orders of the Commission, he shall be punishable with imprisonment up to 3 years, or with fine up to Rs. 25 crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit. The Chief Metropolitan Magistrate, Delhi, however, cannot take cognizance of any offence under this section other than on a complaint filed by the Commission or any of its officers authorised by it.

6.4.1.1 Compensation in case of contravention of orders of Commission

Under Section 42 A of the Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under Section 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under the Act or delaying in carrying out such orders or directions of the Commission.

²²⁰ Section 38, The Competition Act, 2002

6.4.2 Penalty for failure to comply with directions of Commission and Director General

As discussed earlier, the Commission, under section 36(2), for the purposes of discharging its functions under this Act, has been provided with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavit; issuing commissions for the examination of witnesses or documents; or requisitioning any public record or document or copy of such record or document from any office. The Director General also has been conferred similar powers under Section 41(2). The Commission has also power to direct any person to produce and furnish certain books or documents or information under section 36(4) of the Act.

Failure to comply with any direction issued by the Commission in pursuance of its exercise of powers under Section 36(2) or 36(4) or directions issued by the Director General under Section 41(2) of the Act, without reasonable cause, will attract penalty under Section 43, which may extend to rupees one lakh for each day during which such failure continues

subject to a maximum of rupees one crore, as may be determined by the Commission.

6.4.3 Penalty for non-furnishing of information on combinations

The Commission is empowered to impose penalty on any person or enterprise for not giving notice to the Commission under sub-section (2) of section 6 of the Act. The penalty may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination. The section envisages a breach of civil obligation and there is no requirement to prove or establish mens rea. Penalty is attracted as soon as contravention of the statutory obligation as contemplated by the Act is established and therefore, the intention of the parties committing such violation becomes immaterial. In this context, the Supreme Court has held as under;

"There is no requirement of mens rea or an intentional breach as an essential element for levy of penalty under Competition Act. The Act does not use the expression "the failure has to be willful or mala fide" for the purpose of imposition of penalty. The breach of the provisions of the Act is punishable and considering the nature of the breach, it is discretionary to impose the extent of penalty. The imposition of penalty under section 43A is on account of breach of a civil obligation, and the proceedings are neither criminal nor

quasi-criminal. Thus, a penalty has to follow. Discretion in the provision under section 43A is with respect to quantum."²²¹

6.4.4 Penalty for making false statement or omission to furnish material information

Section 44 of the Competition Act provides for the penalty for making false statements or omission to furnish material information by any person being a party to a combination. Such penalty shall not be less than rupees fifty lakh but it may extend up to rupees one crore, as may be determined by the Commission.²²²

6.4.5 Penalty for offences in relation to furnishing of information

Section 45 provides for imposition of a fine up to Rs. one crore, if a person makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or omits to state any material fact knowing it to be material; or willfully alters, suppresses or destroys any document which is required to be furnished. This is without prejudice to power of the Commission to impose penalty for

making false statement or omission to furnish material information under Section 44.

6.4.6 Power to impose lesser penalty

The Competition Commission of India has been conferred power under section 46 of the Act to impose lesser penalty in the following circumstances:

- The Commission if satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:
- Lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure. Timing of disclosure is an essential determinant.²²³
- Lesser penalty shall be imposed by the Commission only in respect of

²²¹ *SCM Solifert Limited v. Competition Commission of India*, Civil Appeal No. 10678 of 2016, decided on 17 April 2018 (SC); *Competition Commission of India v. Tomas Cook (India) Ltd. &Anr.*, Civil Appeal No. 13578 of 2015, decided on 17 April, 2018 (SC).

²²² Section 44, The Competition Act, 2002

²²³ *In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, Suo Moto Case No. 03 of 2014 [CCI], decided on 18th Jan, 2017

a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission. In case, the Commission is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, -

- a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
 - b) had given false evidence; or
 - c) the disclosure made is not vital,
- such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

Section 64 empowers the Commission to make regulations. In pursuance of the powers conferred by section 64, read with section 46 and clause (b) of section 27 of the Act, the Commission has formulated the Competition Commission of India

(Lesser Penalty) Regulations, 2009. The 2009 Regulations lays down the following:²²⁴

1. An applicant, seeking the benefit of lesser penalty under section 46 of the Act, shall -
 - a. cease to have further participation in the cartel from the time of its disclosure unless otherwise directed by the Commission;
 - b. provide vital disclosure in respect of [contravention of the provisions]²²⁵ of section 3 of the Act;
 - c. provide all relevant information, documents and evidence as may be required by the Commission;
 - d. co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and
 - e. not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of a cartel.
2. Where the applicant is an enterprise, it shall also provide the names of individuals who have been involved in the cartel on its behalf and for whom lesser penalty is sought by such an enterprise.²²⁶

²²⁴ Regulation 3, CCI (Lesser Penalty) Regulations, 2009.

²²⁵ The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017, No. L-3(4)/

²²⁶ Id

3. Where an applicant fails to comply with the conditions mentioned above, the Commission shall be free to use the information and evidence submitted by the applicant, in accordance with the provisions of section 46 of the Act.
4. The Commission may subject the applicant to further restrictions or conditions, as it may deem fit, after considering the facts and circumstances of the case.
5. The discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to:
 - a. the stage at which the applicant comes forward with the disclosure;
 - b. the evidence already in possession of the Commission;
 - c. the quality of the information provided by the applicant; and
 - d. the entire facts and circumstances of the case.

6.4.6.1 Grant of lesser penalty²²⁷

The Commission in cases of lesser penalty applications may decide, in the following manner:

- (a) The applicant and individual may be granted benefit of reduction in penalty up to or equal to one

hundred percent, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the Commission to form a prima-facie opinion regarding the existence of a cartel which is alleged to have contravened the provisions of section 3 of the Act and the Commission did not, at the time of application, have sufficient evidence to form such an opinion.

The Commission may also grant benefit of reduction in penalty up to or equal to one hundred per cent, to the applicant, if the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of the provisions of section 3 of the Act, by a cartel, in a matter under investigation and the Commission, or the Director General did not, at the time of application, have sufficient evidence to establish such a contravention.

- (b) The applicants who are subsequent to the first applicant may also be granted benefit of reduction in penalty on making a disclosure by submitting evidence, which in the opinion of the Commission, may provide significant added value to the evidence already in possession of the Commission or the Director General, as the case

²²⁷ Regulation 4, CCI (Lesser Penalty) Regulations, 2009.

may be, to establish the existence of the cartel, which is alleged to have contravened the provisions of section 3 of the Act.

- (c) The reduction in monetary penalty shall be in the following order-
- a. the applicant and individual marked as second in the priority status may be granted reduction of monetary penalty up to or equal to fifty percent of the full penalty leviable; and
 - b. the applicant and individual marked as third or subsequent in the priority status may be granted reduction of penalty up to or equal to thirty percent of the full penalty leviable.²²⁸

6.4.6.2 Procedure for grant of lesser penalty²²⁹

1. For the purpose of grant of lesser penalty, the applicant or its authorized representative may make an application containing all the material information as specified in the Schedule, or may contact, orally or through e-mail or fax, the designated authority for furnishing the information and evidence relating to the existence of a cartel. The designated authority shall, thereafter, within five working days, put up the matter before the

Commission for its consideration.

2. The Commission shall thereupon mark the priority status of the applicant and the designated authority shall convey the same to the applicant either on telephone, or through e-mail or fax. If the information received under sub-regulation (1) is oral or through e-mail or fax, the Commission shall direct the applicant to submit a written application containing all the material information as specified in the Schedule within a period not exceeding fifteen days.
3. The date and time of receipt of the application by the Commission shall be the date and time as recorded by the designated authority or as recorded on the server or the facsimile transmission machine of the designated authority.
4. Where the application, along with the necessary documents, is not received within a period of fifteen days from the date of communication of direction under sub-regulation (2) or during the further period as may be extended by the Commission, the applicant may forfeit its claim for priority status and consequently for the benefit of grant of lesser penalty.
5. The Commission, through its

²²⁸ *Supra* Note 225

²²⁹ Regulation 5, CCI (Lesser Penalty) Regulations, 2009

designated authority, shall provide written acknowledgement on the receipt of the application informing the priority status of the application but merely on that basis, it shall not entitle the applicant for grant of lesser penalty.

6. Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.
7. Where the Commission is of the opinion that the applicant or its authorised representative, seeking the benefit of lesser penalty or priority status, has not provided full and true disclosure of the information and evidence as referred and described in the Schedule or as required by the Commission, from time to time, the Commission may take a decision after considering the facts and circumstances of the case for rejecting the application of the applicant, but before doing so the Commission shall provide an opportunity of hearing to such applicant.
8. Where the benefit of the priority status is not granted to the first applicant, the subsequent applicants shall move up in order of priority for grant of priority status by the Commission and the procedure

prescribed above, as in the case of first applicant, shall apply *mutatis mutandis*.

9. The decision of the Commission of granting or rejecting the application for lesser penalty shall be communicated to the applicant.

6.4.7 Recovery of Penalties²³⁰

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. As per the Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011, a demand notice shall be issued in a prescribed form through the Recovery Officer to the enterprises and officers on whom penalty is imposed. The demand notice provides the enterprise a period of thirty days from the date of service to deposit the penalty in the manner specified. The period of thirty days may be reduced by the Commission, if it deems fit.

The party that is penalized has to make payments through a challan in favour of Pay & Accounts Officer (PAO), Ministry of Corporate Affairs, Head No. 1475.00.105.05. Sub-Head-05 – 'penalties imposed by Competition Commission of India.' A copy of the challan is to be provided to the designated recovery Officer as

²³⁰ Section 39, Competition Act, 2002

soon as possible and not more than week of the payment. The penalised enterprise may seek extension of time in payment of penalties and may also seek to make the payments by way of installments from the Commission. If the extension or the installments have not been adhered by the penalised party, it risks being in default.

The amount of penalty that has not been paid in the demand notice shall also accrue simple interest, which is to be paid by the penalised party over the penalty amount.

In case of non-payment of penalty, when there is no stay of the order of the Commission by any court of Tribunal, the Commission shall proceed to recover such penalty in such manner as may be prescribed by the Recovery of Monetary Penalty Regulations, 2011. The Secretary of the Commission shall issue a recovery certificate to be executed by the Recovery Officer.

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.

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 and the Second Schedule to that Act and any rules made thereunder shall in so far as may be, apply as if the said provisions were the provisions of this Act.

6.5 Penalties on Directors and Office Bearers of the Contravening Entities

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

Where a contravention of any of the provisions of this Act, or of any rule, regulation, order made or direction

issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary, or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Company herein means a body corporate, and includes a firm, or other association of individuals, and director in relation to a firm, means a partner in the firm.

6.6 Maintaining confidentiality²³¹

Section 57 of the Act provides for restriction on disclosure of information. No information relating to any enterprise without the previous permission in writing of the enterprise can be disclosed otherwise than in compliance with or for the purposes of the Act or any other law being in force.

6.6.1 Confidentiality as per General Regulations

On the request made by the informant in writing, the Commission shall maintain confidentiality of the identity of an informant. Further, any party may submit a request in writing to the

Commission or the Director General, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential. Such application will however be entertained only if making the document, or documents, or a part or parts thereof public will result in disclosure of trade secrets, or destruction, or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.

*Procedure to make application for confidentiality*²³²

1. Request shall be accompanied with a statement setting out cogent reasons for such treatment and to the extent possible the date on which such confidential treatment shall expire.
2. Where such document or documents, or a part or parts thereof, form part of the party's written submissions, the party shall file a complete version with the words "restriction of publication claimed" in red ink on top of the first page and the word 'confidential' clearly and legibly marked in red ink near the top on each page together with a public version, which shall not contain such document or documents, or part or parts thereof.
3. The public version of such written

²³¹ Regulation 35, Competition Commission of India (General) Regulations, 2009

²³² *Id.*

submissions shall be an exact copy of the confidential version with the omissions of the confidential information being indicated in a conspicuous manner.

On receipt of a request, the Commission or the Director General, as the case may be, if satisfied, shall direct that the document, or documents, or a part or parts thereof shall be kept confidential for the time period to be specified. The Commission or the Director General, may however, as the case may be, if satisfied, may give such confidential treatment to any other information, or document, or part thereof also in respect of which no request has been made by the party which has furnished such information or the document.

Factors taken into account while arriving at a decision regarding confidentiality

The Commission or the Director General, as the case may be, may consider the following while arriving at a decision regarding confidentiality:

- a) the extent to which the information is known to outside public;
- b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business
- c) the measures taken by the party to guard the secrecy of the information
- d) the ease or difficulty with which the information could be acquired or duplicated by others.

Rejection of application

In case the Director General has rejected the request of the party, the party may approach the Commission for a decision regarding confidential treatment. Where the Director General or the Commission has rejected the request for confidential treatment of a document, or documents, or a part or parts thereof and has informed the party of its intention, such document, or documents, or part or parts thereof shall not be treated as confidential.

Treatment of confidential documents

The document, or documents, or a part or parts thereof, that have been granted confidential treatment under this regulation shall be segregated from the public record and secured in a sealed envelope or any other appropriate container, bearing the title, the docket number of the proceeding, the notation "confidential record under regulation 35" and the date on which confidential treatment expires.

If the Commission includes in any order or decision or opinion, information that has been granted confidential treatment under this regulation, the Commission shall file two versions of the order or decision or opinion. The public version shall omit the confidential information that appears in the complete version, be marked "subject to confidentiality

requirements under regulation 35” on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding. The complete version shall be placed in the confidential record of the proceeding.

Maintenance of confidentiality by Officers

Any person or party, including any officer or employee appointed by the Commission and any expert or professional engaged by the Commission or any expert called upon to assist the Commission privy to the contents of the document or documents or a part or parts thereof that have been granted confidential treatment shall maintain confidentiality of the same and shall not use or disclose or deal with such confidential information for any other purpose other than the purposes of the Act or any other law for the time being in force. Breach of confidentiality by any officer or employee of the Commission appointed under subsection (1) of section 17 of the Act shall constitute a ground for initiation of disciplinary proceedings under the relevant rules or regulations, as the case may be. Also, such breach shall be sufficient ground for termination of the engagement or contract, as the case may be.

6.6.2 Confidentiality as per Lesser Penalty Regulations²³³

Under Lesser Penalty Regulations, there are additional safeguards in form of strict confidentiality provided to the identity of the Lesser Penalty Applicants and details furnished by them. The regulations provide that the Commission or the Director General shall treat as confidential-

- a) the identity of the applicant; and
- b) the information, documents and evidence furnished by the applicant under regulation 5 of Lesser Penalty Regulations.

However, the identity of the applicant or such information or documents or evidence may be disclosed if:

- a. the disclosure is required by Law; or
- b. the applicant has agreed to such disclosure in writing; or
- c. there has been a public disclosure by the applicant:

Further, where the Director General deems it necessary to disclose the information, documents and evidence furnished to any party for the purposes of investigation and the applicant has not agreed to such disclosure, the Director General may disclose such information, documents and evidence to such party for reasons to

²³³ Regulation 6, CCI (Lesser Penalty) Regulations, 2009

be recorded in writing and after taking prior approval of the Commission.²³⁴

6.7 Consultation with Sectoral Regulators

If in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of the Act, whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority. The Commission, may also, suo-motu, make such a reference to the statutory authority. On receipt of such reference, the statutory authority shall give its opinion, within sixty days of receipt of such reference to the Commission, which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.²³⁵

A sectoral regulator may also consult the Commission, if 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 of the provisions of the Act. In such a case, such statutory authority may make a reference in respect of such issue to the Commission. A statutory authority may also suo-motu make a reference to the Commission. On receipt of a reference, the Commission shall give its opinion to such statutory authority, which shall consider the opinion of the Commission and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion. The Commission shall give its opinion within sixty days of receipt of such reference.²³⁶

6.8 Appeal

Earlier Competition Appellate Tribunal used to be the appellate body to hear and dispose of appeals against any direction issued by the Competition Commission of India. The Finance Act, 2017 however has now conferred the appellate function to National Company Law Appellate Tribunal (NCLAT).^{237 and 238}

6.8.1 Appeal provisions

The right to prefer an appeal is available to the Central Government, State Government, or a local authority, or enterprise, or any person aggrieved

²³⁴ *Id.*

²³⁵ Section 21A, *The Competition Act, 2002*.

²³⁶ Section 21, *The Competition Act, 2002*.

²³⁷ Part XIV, Chapter VI *Finance Act, 2017*.

²³⁸ Web Site of NCLA- [Thttps://nclat.nic.in/?page_id=113](https://nclat.nic.in/?page_id=113)

by any direction, decision or order referred to in Clause (a) of Section 53A of the Act. The appeal is to be filed within the period specified. Section 53B (3) further requires the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal. Section 53S contemplates that before the Tribunal a person may either appear in person, or authorise one or more chartered accountants, or company secretaries, cost accountants, or legal practitioners, or any of its officers to present its case before the Tribunal. However, the Commission's right to legal representation in any appeal before the Tribunal has been specifically mentioned under Section 53S (3). It provides that the Commission may authorize one or more of chartered accountants, or company secretaries, or cost accountants, or legal practitioners, or any of its officers to act as presenting officers before the Tribunal. NCLAT shall:

- a. hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38,

section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act; and

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

No other direction, decision or order of the Commission is appealable except those expressly stated in Section 53A (1) (a) of the Act. Right to appeal, being a statutory right, is controlled strictly by the provision and the procedure prescribing such a right. The Supreme Court in the case of **CCI v. SAIL**,²³⁹ has held that in terms of Section 53A(1)(a) of the Act, appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated as appealable by implication. For example, taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A. The appeals preferred before the Tribunal

²³⁹ *Supra* Note 2

under Section 53A of the Act are to be heard and dealt with by the Tribunal as per the procedure spelt out under Section 53B of the Act.

6.8.2 Procedure of Appeal

As per Section 53B (1), the aggrieved party (the Central Government, or the State Government, or a local authority, or enterprise, or any person) has a right of appeal against any direction, decision or order referred to in Section 53A (1) (a). Every appeal shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the aggrieved person and shall be in such form and be accompanied by such fee as may be prescribed.

Section 53B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against.

6.8.2.1 Speedy disposal

The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

6.5.2.2 Condonation of delay

The Appellate Tribunal may entertain an appeal after the expiry of the period of sixty days if it is satisfied that there was sufficient cause for not filing it within the prescribed period.

6.8.2.3 Commission as a party to appeal

The right of hearing is available to the Commission along with the parties to appeal. The Supreme Court in the **SAIL**²⁴⁰ case observed:

"78.....The Commission a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be able to effectively exercise its right to appeal in terms of Section 53 of the Act. Furthermore, Regulations 14(4) and 51 support the view that the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of Section 19 read with Section 26 of the Act, is entitled to commence proceedings suo moto and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it are passed in such cases. The Tribunal has taken

²⁴⁰ *Supra* Note 2

this view and we have no hesitation in accepting that in cases where proceedings are initiated suo moto by the Commission, the Commission is a necessary party. However, we are also of the view that in other cases the Commission would be a proper party. It would not only help in expeditious disposal, but the Commission, as an expert body, in any case, is entitled to participate in its proceedings in terms of Regulation 51. Thus, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it.

79. Regulations 24 to 26 define powers of the Commission to join or substitute parties in proceedings, permit person or enterprises to take part in proceedings and strike out unnecessary parties. Out of these provisions regulation 25(1) has a distinct feature as it lays down the criteria which should be considered by the Commission while applying its mind in regard to application of a party for impleadment. The person or enterprise sought to be impleaded should have substantial interest in the outcome of the proceedings and/or that it is necessary in the public interest to allow such an application. In other words, substantial interest in proceedings and serving of larger public interest, amongst others, are the criteria which could be considered by

the Commission. This principle would obviously stand extended for exercise of jurisdiction by the Tribunal. In our view, the Commission would have substantial interest in the outcome of the proceedings in most of the cases as not only would the judgments of the Tribunal be binding on it, but they would also provide guidelines for determining various matters of larger public interest and affect the economic policy of the country.

6.8.3 Powers of Appellate Tribunal²⁴¹

The Appellate Tribunal is not bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice. It shall have power to regulate its own procedure including the places at which they shall have their sittings. The Appellate Tribunal shall have, for the purposes of discharging its functions under the Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:

- summoning and enforcing the attendance of any person and examining him on oath;
- requiring the discovery and production of documents;
- receiving evidence on affidavit;

²⁴¹ Section 530, Competition Act, 2002

- o 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;
- o issuing commissions for the examination of witnesses or documents;
- o reviewing its decisions;
- o dismissing a representation for default or deciding it ex parte;
- o setting aside any order of dismissal of any representation for default or any order passed by it ex parte;
- o any other matter which may be prescribed.

Every proceeding before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes (48) of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

6.8.4 Execution of orders of Appellate Tribunal²⁴²

The Appellate Tribunal has been given the powers to execute any order made by it similar to a court decree. The

Tribunal may, in case of its inability to execute such order, send to the court within the local limits of whose jurisdiction a) in the case of an order against a company, the registered office of the company is situated; or b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated. The Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

6.8.5 Contravention of orders of Appellate Tribunal²⁴³

If any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit. The Chief Metropolitan Magistrate, Delhi, however, shall not take cognizance of any offence punishable unless a complaint is made by an officer authorized by the Appellate Tribunal.

6.8.6 Power to Punish for contempt²⁴⁴

The Appellate Tribunal has similar powers as a High Court in respect of contempt of itself and it may exercise

²⁴² Section 53P, The Competition Act, 2002

²⁴³ Section 53Q, Competition Act, 2002

²⁴⁴ Section 53U, Competition Act, 2002

for this purpose, the provisions of the Contempt of Courts Act, 1971.

6.8.7 Award of Compensation²⁴⁵

The Commission does not entertain private applications for any claim of compensation. Claim for compensation, however, may be made to the Appellate Tribunal that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A [Compensation in case of contravention of orders of Commission] or under sub-section (2) of section 53Q [Contravention of orders of the Appellate Tribunal] of the Act. Any person or an enterprise or Central Government or a State Government or a Local Authority may also make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by them as a result of the said enterprise contravening provisions of Chapter II (provisions relating to anti-competitive agreements, abuse of dominance and regulation of combinations) of the Act.

Every application shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed.

The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realizable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of the Act having been committed by such enterprise. The Appellate Tribunal may however, obtain the recommendations of the Commission before passing an order of compensation.

6.8.8 Appeal to Supreme Court²⁴⁶

The Central Government, or any State Government, or the Commission, or any statutory authority, or any local authority, or any enterprise, or any person aggrieved by any decision, or order of the Appellate Tribunal, may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them. Condonation of delay may be done by the Court if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period.

²⁴⁵ Section 53N, Competition Act, 2002

²⁴⁶ Section 53U, Competition Act, 2002

6.9 Competition Act to have overriding effect

As per Section 60, the provisions of the Competition Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 60 emphasises that notwithstanding agreements, arrangements, practices and conduct which may otherwise be legitimate under the general laws would nonetheless be subject to the rigors of the Competition Act.²⁴⁷ Section 60 has to be read, however, harmoniously with Section 62²⁴⁸ of the

Act. The Act is in addition to and not in derogation to provisions of any other Act.

6.10 Exclusion of jurisdiction of Civil Courts²⁴⁹

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

²⁴⁷ *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India and Another*, W.P.(C) 464 of 2014 & CM Nos. 911 of 2014 & 915 of 2014 & W.P.(C) No. 1006 of 2014 & CM Nos. 2037 of 2014 & 2040 of 2014 (Del.)

²⁴⁸ Section 62 provides that the provisions of the Competition Act shall be in addition to the provisions of any other law.

²⁴⁹ Section 61, The Competition Act, 2002.

Competition Advocacy

CHAPTER-7

CHAPTER COVERAGE

7.1 Competition Advocacy- An Introduction

7.2 Competition Advocacy in India

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7.3.4 Focussed Group Discussions

7.3.5 Market Research

7.4 Competition Assessment of Legislations and Bills

7.5 Advocacy Through Social Media

7.6 Conclusion

7.1 Competition Advocacy – An Introduction

Competition advocacy connotes all the activities, endeavours undertaken by an antitrust agency to reach out to stakeholders in order to establish a robust competition culture through dissemination of information about extant competition laws, benefits of competition and implications of resorting to anti-competitive practices.

It refers to those activities conducted by a competition authority with the ultimate objective of promotion of

culture of compliance in all spheres of economic, by means of non-enforcements.

Competition advocacy can also be looked at as enforcement of law without intervention. It yields maximum positive impact in the concern stakeholders with least intervention and an effective way to garner support to attain competition policy objectives. Successful implementation of competition law and policy largely depends upon the willingness of the people to accept these. Advocacy plays a vital role in achieving this goal. It reinforces the value of competition

by educating citizens, businesses and policy makers.

7.2 Competition Advocacy in India

Importance given to competition advocacy in India can be gauged from the fact that it is only the Competition Act, amongst all the statutes, which has a specific provision under section 49 for advocacy. In an economy like India with shadows of control and regulation, making in-roads for implementation of competition culture is a formidable task. Besides, competition law is an economic law which cuts across all the sectors. As such it becomes imperative to enhance outreach among all the stakeholders, more so, given the size and diversity of the country.

Section 49(3) of the Act envisages taking suitable measures for the promotion of competition advocacy, creating awareness and imparting

training about sector/industry specific competition issues. In this pursuit, the Commission proactively engages with various stakeholders through well-structured customized advocacy programmes. This, while creating awareness about competition law resolves doubts/queries harbored by target stakeholders group on one hand, it also supplements Commission's enforcement efforts on the other.

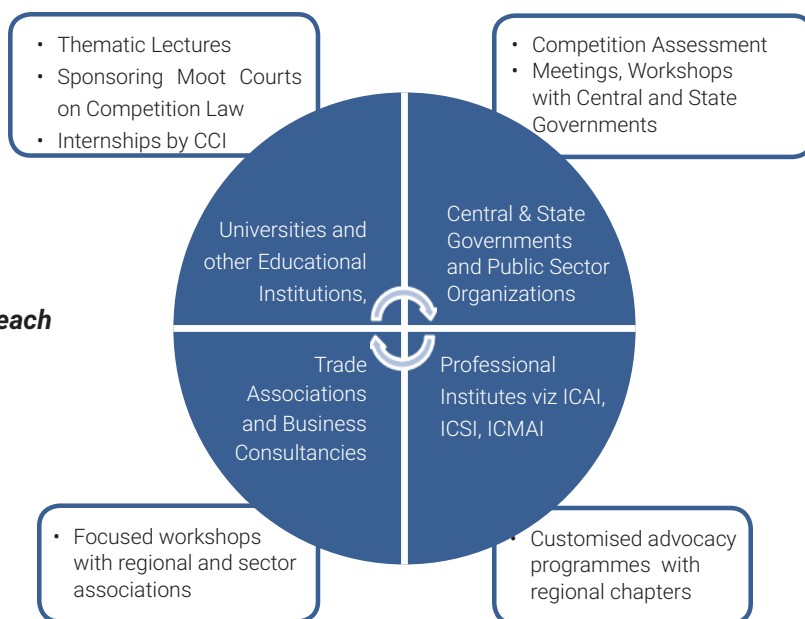
Competition advocacy initiatives in India are primarily focused -

- To help enterprises to pre-empt violation of law
- To supplement and lend credibility to the enforcement
- To enhance acceptability of law
- To garner support from government industry and other stakeholders
- To facilitate establishment of sustainable competition culture

Key Stakeholders



Figure 7.2 (a) Key stakeholders of Competition Advocacy

Targeted outreach**Figure 7.2 (b) Targeted outreach for Competition Advocacy****7.3 Advocacy with Stakeholders****7.3.1 Central / State Governments and PSUs**

Recognizing that the Central/State Government and PSUs are the biggest procurers of goods and services; the Commission proactively conducts advocacy programmes with them. The Commission conducts various workshops, seminars, roadshows and other interactive sessions with senior government and PSU functionaries to enable them to evolve competition compliant policies and design tenders to have best value for money.

Keeping in view the fact that the states in India have their own policies emanating from peculiarities on account of language, geographical location, state of economy etc.,

the Commission makes special endeavor to reach out to various state governments for competition advocacy to address various competition issues/ concerns that may exist due to inadvertent anti-competitive components prevailing in their various legislations, policies, laws and regulations. In this pursuit, the Commission has held meetings with Chief Secretaries of States and many workshops have been conducted in past and are being conducted on regular basis with key functionaries of state governments involved in framing economic policies and in matters of public procurement. To institutionalize the mechanism of advocacy with state governments, nodal officers have been appointed in each States.

7.3.2 Trade Chambers/Associations

Since trade chambers and associations play an active and vital role in formulation of various economic policies, it has been the endeavor of the Commission to interact with them on regular basis. Interaction with them is very useful as not only they are in a position to influence the behaviour of their individual members but also play a vital role in policy making as pressure groups.

Recognizing that there are some sector/industry specific competition issues, having their own peculiarities, the Commission reaches out to them to address the same and encourages them to have competition compliant policies. Utility of interaction with such groups goes beyond mere telling them about competition law, as many doubts and misconceptions are resolved and fears are allayed in such interactions.

Importantly more often than not the forum of Trade Associations is used by their members as platform for sharing crucial information on price, market share etc. which undermine and disrupt the competition in markets. These aspects are discussed with them and members of associations are warned of ramifications if they resort to anti-competitive practices. Certain cases, wherein such forums have been used by the competitors to indulge in anti-competitive practices resulting in imposition of penalties by

the CCI are also brought to their notice to dissuade them from adopting such practices.

Compliance Manual for Enterprises:

To ensure better compliance by enterprises and to have a comprehensive Competition Compliance Programme (CCP) in place, the Commission has brought out a 'Compliance Manual for Enterprises' which supplements the advocacy efforts of the Commission and serve as a ready reckoner. The manual provides an indicative list of Dos and Don'ts for enterprises to enable them to have competition compliant corporate culture in place.

7.3.3 Academia

The Commission regularly deputes its officers to various universities/institutes to participate in their various events to train and educate students on various aspects of competition law. In this regard the Commission has also been sponsoring moot court competitions in various law universities of the country.

Besides, to afford students deeper insights into various aspects of competition law and functioning of the Commission, the Commission provides internship to the students of universities/institutes across the country pursuing courses in Law, Management, Finance and Regulatory Governance. The internship is offered

for a calendar month during which the students work on a specific competition related topic under respective guides to bring out newer ideas in the realm of competition law.

Also to enable to explore newer vistas and to encourage path-breaking research in the realm of competition law & practice, the Commission offers internship to students pursuing Ph.D. in competition law. This programme has in-built flexibility, in as much as, the candidate has choice to choose tenure of internship from the prescribed options that suits his/her magnitude and depth of research that proposed topic entails.

7.3.4 Focused Group Discussions

To understand extent of the general awareness among the people about competition law, efforts have been undertaken through the 'Focused Group Discussion' (FGD) in various cities of country. The target group also comprises of consumer associations. The FGDs are conducted by a person, who happens to be a finance or law professional, appointed by the Commission in target region. This provides a very valuable feedback on various aspects of competition law and how a common man thinks about its scope and efficacy.

Quarterly Newsletter 'FAIR PLAY':

CCI brings out its quarterly newsletter 'FAIR PLAY' to reach out to vast number of stakeholders about various activities, orders and updates on competition law. It also serves as a very good reference material for students and research scholars.

For wider penetration among stakeholders Advocacy Booklets in English, Hindi & Telugu, on Competition Compliance, How to file information, Cartels, Bid-Rigging, Public Procurement, Abuse of Dominance, Combinations, Leniency and FAQs have been published.

7.3.5 Market Research

The CCI also commissions market Studies/research Projects as a part of its advocacy mandate. Since inception of the research study programme in 2003-04, 19 studies have been commissioned till date, out of which, 13 are sector specific, covering, sectors like manufacturing, service, transport, energy, telecommunications. Market Studies/Research Projects have been commissioned with a view to:

- Gain insight into the structure of various sectors of the market and the business practices prevailing therein;
- Assist the Commission in its role of undertaking competition advocacy

and public awareness and training. The studies/research projects could help in generating greater awareness about competitive issues and anti-competitive practices;

- Identify policies and practices of Central and State Governments and Statutory Authorities that are having appreciable adverse effect on competition in markets in India; and
- Building capacity in the area of competition law and policy for researchers.

Findings of the research studies undertaken are expected to create strong public opinion in favour of eliminating anti-competitive practices prejudicial to the interest of trade, industry, commerce, and consumers.

7.4 Competition Assessment of Legislation and Bills

Competition Assessment has been defined by the Organisation for Economic Cooperation and Development (OECD) as a process through which existing and proposed policies/regulations/rules are identified and assessed from a competition perspective. OECD has observed that assessment of legislations

from competition perspective has benefitted both developing and developed economies. In countries like Australia, Greece, Romania and Mexico, Competition Act has resulted in substantial improvement in their GDP.

Recognizing that legislation, regulations and policies may potentially, restrict competition, the Commission in its mandate of promoting and sustaining competition, has initiated the process of creating an institutional framework for assessing select economic legislation and policies- both existing and upcoming- from a competition perspective and sharing the findings with concerned stakeholders.

The Commission has empaneled 14 institutions of repute, in terms of the Competition Commission of India (Competition Assessment of Legislations and Bills) Guidelines, 2015, as partners in this exercise and have organized workshops to train their nominees and explain rationale of competition assessment.

7.3 Advocacy Through Social Media

To be in constant touch with its wide spectrum of stakeholders, the Commission is present on Social Media – Facebook, Twitter and LinkedIn.

Competition Assessment Toolkit:

To provide roadmap for comprehensive Competition Assessment of policies, legislations, rules and regulations in India, the Commission has brought out a 'Competition Assessment Toolkit'. This Toolkit is very handy and useful to—(a) identify competition concerns in various legislations/policies in India; (b) promote a competition culture by way of non-enforcement mechanism; (c) sensitise policy-makers towards competition issues; (d) encourage introspection at the level of policy formulation; (e) serve as a tool for building capacities of various institutions for Competition Assessment.

7.4 Conclusion

Even though Competition Advocacy may not have the punitive force that penal provisions through enforcement measures may have, yet its strength lies in its efficacy to create awareness among the stakeholders and people at large in a proactive manner for building a competition compliant culture for the benefit of entire economy. An effective competition compliance programme while obviates enforcement measures against enterprises, it also accrues static, productive and dynamic efficiency for them, translating into overall economic development of the country.

Various Publications of Commission on Advocacy

