Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI SILICON VALLEY BANGALORE SINGAPORE MUMBAI BKC NEW DELHI

Competition Law in India

Jurisprudential Trends and the way forward.

April 2013

ISBN [-]

COMPETITION LAW IN INDIA

A REPORT ON JURISPRUDENTIAL TRENDS AND WAY FORWARD INTRODUCTION

April 2013

Shalaka Patil, Payel Chatterjee, Shashank Gautam,
M S Ananth, Aditi Jha, Simone Reis, Pratibha Jain

Contents

Glossary

Abbreviations and terms used in this Paper:

Abbreviation	Full Form
"AAEC"	Appreciable Adverse Effect on Competition
"Act" or "Competition Act"	The Competition Act, 2002
"CD"	Currency Derivative
"CCI"	Competition Commission of India
"COMPAT"	Competition Appellate Tribunal
"DG"	Director General of Investigation
"Directors"	Directors of the Company
"DoJ"	Department of Justice
"Evidence Act"	Indian Evidence Act, 1872
"FRAND"	Fair, Reasonable And Non-Discriminatory
"F&O"	Futures and Options
"FTC"	Federal Trade Commission
"HMT"	Hypothetical Monopolist Test
"IDRA"	Industrial (Department and Regulation) Act of 1951
"INR" or "Rs."	Indian National Rupee
"IP"	Intellectual Property
"IPR"	Intellectual Property Right
"MCA"	Ministry of Corporate Affairs

"MCX"	MCX Stock Exchange Ltd.
"MIC"	Monopoly Inquiry Commission
"MLATs"	Mutual Legal Assistance Treaties
"MRTP Act"	Monopoly and Restrictive Trade Practices Act, 1969
"MRTPC"	Monopoly and restrictive Trade Practices Commission
"MTP"	Monopolistic Trade Practices
"NSE"	National Stock Exchange of India Ltd
"OECD"	Organization of Economic Cooperation and development
"OP"	Opposite Party
"OTC"	Over the Counter
"RBI"	Reserve Bank of India
"RTP"	Restrictive Trade Practices
"SEBI"	Security Exchange Board of India
"SEP"	Standard Essential Patents
"SOE"	State Owned Enterprise
"SSNIP"	Small but Significant and Non-transitory Increase in Price
"SSO"	Standard Setting Organizations
"Supreme Court"	The Honourable Supreme Court of India
"TFEU"	Treaty on the Functioning of the European Union
"UTP"	Unfair Trade Practices

Introduction

The Indian competition law regime is a nascent regime. It is barely four years since our new competition law- the Competition Act has become operational. Prior to the operationalization of the Competition Act in May 2009, MRTP Act was the operational law that regulated certain aspects of competition.

This Report discusses the legislative history of the Competition Act and analyzes salient jurisprudential trends in competition law enforcement over the period of last four years. This Report is divided into nine parts. Part I of this report deals with the trend analysis of cases brought before the Competition Commission of India CCI. Part II of this Report deals with the evolutionary history of competition law in India. Part III focuses on MRTP Act, Part IV of this report focuses on the competition law framework envisaged under the Competition Act. Part V and Part VI of this report discuss anticompetitive agreements and abuse of dominance, respectively. Part VII and Part VIII of this report discuss trends in the enforcement of the Competition Act. Part IX of this report summarizes some of the international trends in competition law jurisprudence This Report also includes an annexure that provides details, up to February, 2013, of all the orders passed by the CCI with respect to the information received by the CCI about alleged violation of Section 3 and 4 of the Competition Act and combination notifications filed under Section 6 (2) of the Competition Act.

1. Trend analysis

From the data available on the website of the CCI, the annual reports of the CCI and the CCI's quarterly magazine-Fair Play, we note that the CCI has received a total of 271 cases under section 19 (1)[1] of the Competition Act till February, 2013. A brief analysis of the cases brought during the last three financial years of the CCI's functioning is provided below.[2] We have also presented information pertaining to all the cases that have been brought before the CCI under Sections 3, 4 and 5 of the Competition Act as Annexure A to this Report.

Cases Before The CCI During The FY 2009-10[3]

Description	Information Received u/s 19 (1)	Cases Received from MRTPC On transfer	Suo moto cognizance	References received from Central Govt.	References received from State Govt.	References received from Local Authorities	Total
Number of matters pending at the beginning of the year	Nil	Nil	Nil	Nil	Nil	Nil	Nil
Number of matters received during the year	32	50	Nil	Nil	Nil	Nil	82
Total number of matters	32	50	Nil	Nil	Nil	Nil	82
Number of matters in which prima facie violations noticed	17	07	Nil	Nil	Nil	Nil	24
Number of matters in which no prima facie violation noticed	05	02	Nil	Nil	Nil	Nil	07
Investigation reports received on prima facie matters ordered for investigation	06	Nil	Nil	Nil	Nil	Nil	06
Inquiries Conducted	Nil	Nil	Nil	Nil	Nil	Nil	Nil

1. The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
(a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
(b) a reference made to it by the Central Government or a State Government or a statutory authority.

2. Compiled from the Annual Report published by the CCI.

3. Data collected from 2009-10 Annual report of the CCI.

Cases Before The CCI During The FY 2010-11[4]

Description	Information Received u/s 19 (1)	Cases Received from MRTPC On transfer	Suo moto cognizance	References received from Central Govt.	References received from State Govt.	References received from Local Authorities	Total
Number of matters pending at the beginning of the year	28	50	Nil	Nil	Nil	Nil	78
Number of matters received during the year	71	0	5	Nil	Nil	01	77
Total number of matters	99	50	5	Nil	Nil	01	155
Number of matters in which prima facie violations noticed	44	22	5	Nil	Nil	Nil	71
Number of matters in which no prima facie violation noticed	28	19	Nil	Nil	Nil	Nil	47
Investigation reports received on prima facie matters ordered for investigation	42	24	Nil	Nil	Nil	Nil	66
Inquiries Conducted	Nil	Nil	Nil	Nil	Nil	Nil	Nil

Cases Before The CCI During The FY 2011-12[5]

Description	Information Received u/s 19 (1)	Cases Received from MRTPC On transfer	Suo moto cognizance	References received from Central Govt.	References received from State Govt.	References received from Local Authorities	Total
Number of matters pending at the beginning of the year	61	28	05	Nil	Nil	Nil	94
Number of matters received during the year	89	Nil	Nil	02	01	01	93
Total number of matters	150	28	05	02	01	01	187
Number of matters in which prima facie violations noticed	40	01	Nil	02	Nil	Nil	43

4. Data collected from 2010-11 Annual report of the CCI.

5. Data collected from 2011-12 Annual report of the CCI.

Description	Information Received u/s 19 (1)	Cases Received from MRTPC On transfer	Suo moto cognizance	References received from Central Govt.	References received from State Govt.	References received from Local Authorities	Total
Number of matters in which no prima facie violation noticed	48	01	Nil	Nil	01	01	51
Investigation reports received on prima facie matters ordered for investigation	27	05	05	01	Nil	Nil	38
Inquiries Conducted	Nil	Nil	Nil	Nil	Nil	Nil	Nil

We find following trends on the basis of collected data –

I. Steady increase in the number of complaints

During the first FY of the CCI working i.e FY 2009-10, the CCI received 32 complaints under Section 19 of the Competition Act. The CCI also received 50 cases that were pending under the MRTP Act. The MRTP cases were transferred to the CCI in accordance with the provisions of Section 66 of the Competition Act. The number of complaints received in the FY 2010-11 shot to 77 and in the subsequent FY 2011-2012 the number of information received further increased to 93. Comprehensive data for the current FY 2012-13 is not publicly available however till the month of February, 2013 the CCI has already issued final orders in 79 cases. The steady increase in the number of complaints to the CCI clearly shows that the level of awareness about the Competition Act is increasing. The increase in awareness may also be attributed to big ticket fines imposed by the CCI and the advocacy effort undertaken by the CCI, legal fraternity and the chamber of commerce across India. It may also be the case that as compared to other quasi-judicial forums, the platform of the CCI has been perceived to be a quicker and a more efficient means to address issues.

II. Diverse nature of informants

As discussed below in the Part V of this report the CCI can begin inquiry of the alleged anti-competitive practice either on the basis of information received from private parties or on reference received from the Central or the State Government or by taking suo moto cognizance. During the first two FYs the CCI did not take suo moto cognizance of any anticompetitive matter, however in FY 2011-12, the CCI started 5 investigations by taking suo moto cognizance. The CCI received information by reference for one matter in FY 2010-11, references increased to 4 in subsequent FY 2011-12. As far as other informants are concerned, it shows a healthy mix of private individuals, trade associations, chambers of commerce, direct competitors in the market, enterprises engaged in distributing activity for a domi-

nant manufacturer, non-government organization etc.[6] The mix of informants shows that the aims and objectives of the Competition Act have permeated through different strata of society and citizens and enterprises are coming forward to provide information about anti-competitive practices.

III. Industries in which Opposite Parties are engaged

The opposite parties in the investigations handled by the CCI belong to diverse industries. Major complaints have been received in the enterprises engaged in real estate, pharmaceutical and chemical and drugs, travel and tourism, film distribution and media, aviation and telecommunication sectors[7]. This however is not an indication that these sectors indulge in rampant anti-competitive activity. The primary reason behind receiving more complaints in these sectors may be attributed to the fact that in each of these sectors the CCI has in one or more cases issued heavy penalties or has passed cease and desist orders. The wide reporting of the orders issued by the CCI has resulted in other informants coming forward to report on the specific industry sector in which the CCI has passed the order imposing penalty or ceases and desist orders.

IV. Complaints received against state owned enterprise

As discussed below the Competition Act also extends to State Owned Enterprise (SOE) as well as State departments engaged in commercial activity as opposed to discharging its sovereign obligation. Our data shows that the CCI has received a healthy number of complaints against the SOEs such as Railways, Coal India, Public Sector Undertaking Banks, State owned mining companies, Central Government Ministries (Health and Agriculture Ministry), Oil PSUs, State Governments (the State of Andhra Pradesh and Goa), State industrial corporation, Metro rail corporations, Steel PSU etc.[8]. The CCI had found prima facie ground to initiate an inquiry in many of the complaints received against State departments and SOEs, however the CCI has yet not found any violation implicating SOEs. The initiation of various inquiries against the SOEs is evident that the CCI is determined to enforce the law to the extent that these SOEs are engaged in commercial economic activities. This is also a heartening sign that unlike challenges faced in various countries[9] the SOEs in India will stand at same footing if it comes to the violation of Competition Act and the status of SOE may not be a mitigating factor.[10] Another interesting point that comes across is that SOEs are not only complained against, i.e. joined as

6. See Annexure A to this Report.

7. *Ibid.*

8. *ibid.*

9. OECD policy roundtable on State Owned Enterprises and the Principle of Competitive Neutrality 2009. It was observed during the policy round table discussion that due to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises. Although enforcing competition rules against SOEs presents enforcers with particular challenges, competition rules should, and generally do, apply to both private and state-owned enterprises, subject to very limited exceptions.

10. *Ibid.*

opposite parties before the CCI but they have also been informants / complainants in various cases[11]. The railways and various other PSUs have been informants in multiple cases.

V. Inquiry by the CCI

On the basis of data collected by us we have found that in more than 60% of the cases CCI has looked into, the CCI has not found a prima facie case to refer the matter to the DG. A perusal of a sample of such rejected cases indicates that such cases are either in the nature of consumer or unfair trade practice cases and the consumer courts would have been the correct forum to present these cases or that the informants were indulging in forum shopping against the opposite party. From the publicly available data and media reports we have also found that informants have gone into appeal against the CCI's orders pertaining to finding no prima facie case to refer the matter for investigation. However we have not come across any case where the CCI has been directed by COMPAT to initiate investigations. This trend is alarming, since the capacity of CCI in terms of employee and the bench strength is limited. Such a high number of frivolous cases consumes precious time of the CCI and its staff.

VI. Cartel v/s Abuse of Dominance

In the period of review beginning FY 2009-10 to February 2013, we have found that there is almost an equal number of anti-competitive agreements and abuse of dominance cases. Our consolidated data presented as Annexure A to this Report shows that in the orders passed by the CCI, 63 cases were section 4 cases relating to the abuse of dominance, whereas 58 cases were section 3 cases relating to cartels and other anti-competitive agreements. In 40 other cases informants have raised issues under both Sections 3 and 4 of the Competition Act. The competition enforcement agencies across the world generally adjust their enforcement actions to prioritize between the cartelization cases or the abuse of dominant cases[12], however it is not discernible yet from the collected data as to what is the priority of the CCI in terms of enforcement actions.

VII. Dissenting opinion in CCI Orders

Recently there have been media reports that the CCI is debating whether or not the CCI should continue to make dissenting orders public[13]. The argument of experts advocating against making these reports public is that the CCI being an expert body created under the Act is not required to publish

11. Coal India Limited v. GOCL Hyderabad and Ors (Case No 06/2011, decided on 16.04.2012); DDRS (G)-II, Railway Board, Ministry of Railways vs M/s RMG Polyvinyl India Ltd, New Delhi & Ors (Case No C-145/2008/ DGIR, decided on 06/04/2011); Sh. S.K. Sharma, Deputy. CMM-IV, North Western Railway, Hasanpura, Jaipur vs M/s RMG Polyvinyl India Ltd, New Delhi & Ors. (Case No RTPE 31/2008 decided on 06/04/2011); Ref. Case filed by by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. vs M/s Orissa Concrete and Allied Industries Ltd. & Ors. (Ref Case No. 05/2011 decided on 21/02/2013)

12. ICN work products Catalogue available at http://www.internationalcompetitionnetwork.org/uploads/ain/revised%20icn%20work%20products%20catalogue_feb.%202013.pdf

13. Media report available at mint. http://www.livemint.com/Home-Page/jwli4qQsFKuAFHWecry6aP/CCI-debates-whether-dissenting-orders-should-be-made-public.html?facet=print

dissenting opinions. Other sectoral regulators such as SEBI and Telecom Regulatory Authority of India also do not make their dissenting opinion public. As can be gathered from the data provided in Annexure A that in almost 20% of the cases, members of the CCI have written either a separate opinion or dissenting opinion. The existence of separate and dissenting opinions indicate that there is ample scope for interpretation and a clearer understanding of this new piece of legislation. Competition law jurisprudence in India is at a nascent stage therefore in the benefit of every stake holder, it is absolutely imperative that the order of CCI should include a dissenting opinion which will help in the growth and strengthening of competition law jurisprudence in this country.

VIII. Imposition of penalty

On the basis of data collected by us we have not been able to find any trend in the imposition of penalty by the CCI. In some cases like Builders Association of India v. Cement Manufacturers Association & Ors[14] the CCI imposed a penalty equivalent to 0.5% of the profit of cartelizing cement companies. In other cases varying degree of penalties have been imposed which fails to indicate to any trend. To illustrate, in the NSE case 5% of the average turnover, in the DLF case 7% of turnover and in BCCI case penalty at the rate of 6% of average turnover was imposed. In the Vadodra Drug Association case penalty at the maximum rate of 10% of average turnover totaling to Rs. 53,387 was imposed but the members of the association who benefitted from the drug association's anti-competitive practice were allowed to go scot free. In some cases despite the presence of clear evidence the CCI has merely imposed a token penalty. In the Film Distribution case the CCI imposed a token penalty of Rs. 1,00,000 only.

14. CCI Case No. 29 of 2010.

2. Evolution of Competition Law in India

India after independence chose a centrally planned economic structure also referred to as the Nehruvian[15] Socialism Model. The Nehruvian Model was a mixed economy model – a model that was neither a market economy like the United States of America nor a socialist economy one like the USSR. Under the mixed model, both the private and public sector co-existed. The approach behind the mixed economy model was to ensure that the Government played a significant role in capital formation in the country in order to promote an inclusive economic growth and social justice[16]. To promote economic objective, the Government reserved for itself strategic industries such as mining, electricity and heavy industries, serving public interest. The functions of the private sectors were made subject to Industrial (Department and Regulation) Act of 1951(IDRA)[17]. The IDRA empowered the Government to regulate almost every aspect of the functioning of private sector viz. size of plant and production size, price of goods produced and its distribution, foreign trade and exchange control, labor issues etc. Despite the laudable goals of the Nehruvian model, the result was unsatisfactory. While the objective of the industrial licensing system was to direct resources in socially desired directions, it however resulted in giving discretionary power to government authorities to control investment decisions of private industries, resulting in trade barriers on competition and reduction in efficiency and consequently, the growth of the economy[18]. This compelled the Government to initiate reformation of Indian economy, the reform wave began in mid-1980s, co-incidentally during the regime of Mr. Nehru's grandson Rajiv Gandhi. The limited reforms of 1980s were followed by wholesale reforms in the year 1991. In the wake of 1991 balance of payment crisis[19] another round of wide ranging economic reforms were initiated under the guidance of the then finance minister and present Prime Minister of India Mr. Manmohan Singh. The reforms beginning 1991 were not a one off event and ever since 1991 many more rounds of reforms have been rolled out year after year to usher India into a market based economy. These reforms have to a varying extent influenced every aspect of economic policy including reforms of economic legislation.

As discussed, the Nehruvian model was a mixed economy model, but it was tilting more towards socialistic pattern of economic growth with the objective being 'economic growth with social justice'. Despite more than a decade of independence, it was apparent to every one including Mr. Nehru that that the professed model was not yielding desired results. Economy was growing at the rate of less than 3% per annum and income growth was around 1.75%. The growth rate, often disparagingly referred to as the Hindu rate of growth was not enough to result in the much desired trickle down. A concerned Government, appointed a Committee in October, 1960 to look into the reasons of inequality in the distribution

15. Named after the First Prime Minister of India Pandit Jawahar Lal Nehru.

16. See Macroeconomics of Poverty Reduction : India Case study, http://www.igidr.ac.in/pdf/publication/PP-057.pdf

17. Act No. 65 of 1951.

18. Supra note 2.

19. See http://www.nytimes.com/1991/06/29/world/economic-crisis-forcing-once-self-reliant-india-to-seek-aid.html

of income and levels of living (Mahalanobis Committee)[20]. The Committee noted that big business houses were emerging because of the "planned economy" model practiced by the Government and recommended looking at industrial structure[21]. Subsequently on account of such recommendations made by the Mahalanobis Committee, the Government constituted the Monopolies Inquiry Commission (MIC) in 1964 to enquire into the extent of and effect of concentration of power in the private sector and the prevalence of monopolistic practices in India. The MIC found a high level of concentration of economic power in over 85 percent of industrial items in India. The MIC also found that the then licensing policy in the country had enabled big business houses to secure a disproportionately bigger share of licenses resulting in pre-emption and foreclosure of capacity[22]. The MRTP Act was passed to enable the Government to control concentration of economic power in Indian industry[23]. The MRTP Act was notified in the year 1970 and in August 1970, the MRTP Commission was set up.

20. See Mehta Pradeep S; Competition and Regulation in India – Leveraging Economic Growth Through Better Regulation

21. *Ibid.*

22. *Ibid.*

23. It may be relevant to note that the Government had also formed the Hazari Committee which looked into aspects relating to industrial licensing procedure under the IRDA which indicated that the licensing system had resulted in disproportionate growth in respect of industrial houses. Subsequently, the Dutt Committee (Monopolies Inquiry Commission) was also constituted in 1964 to study monopolistic practices and the Dutt Committee also observed the economic concentration of power and suggested the introduction of the MRTP Bill.

3. The MRTP Act: Predecessor of the Competition Act, 2002

The MRTP Act was the operative competition law of India until it was repealed in the year 2009. A discussion of the MRTP Act is important at this juncture to (a) determine the context in which Indian legislature enacted new competition legislation (b) the kind of cases that were brought under MRTP Act and finally, (c) to understand the competition law jurisprudence painstakingly developed over the last four decades by the Supreme Court and the MRTP

The preamble provided that the MRTP Act is an *"Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto."*

The MRTP Act aimed at preventing (a) economic power concentration in a few hands and curbing monopolistic behavior and (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect consumers as well as to avoid concentration of wealth[24].

The MRTP Act was a precursor to the Competition Act and sought to legislate over issues relating to restrictive and monopolistic trade practices. There are areas of similarities between the MRTP Act and the Competition Act. The primary distinction between the enactments stems from the legislative objective. While the thrust of the Competition Act is to promote competition, the objective of the MRTP Act was to prevent economic concentration and restrictive trade practices.

Even in respect of merger control provisions currently found in the Competition Act, the MRTP Act used concentration of economic power as the basis of merger control. Chapter III of the MRTP Act sought to regulate activities of undertakings whose asset value crossed certain financial thresholds. These undertakings were typically called MRTP companies. MRTP companies were under obligation to seek prior approval of the Government before expanding their operations in any manner including through merger and acquisitions. This, in addition to acting as a check on abuse of dominance also acted as a merger control provision. However, the emphasis on economic concentration got removed in 1991, when all such provisions were omitted.

Chapter IV of the MRTP Act dealt with Monopolistic Trade Practice (MTP)[25]. The MRTP Commission was empowered to inquire into the workings of an undertaking if it was of the opinion that such an

24. Subsequent to the 1991 amendment to the MRTP Act, there was a shift in emphasis towards prohibition of monopolistic, unfair or restriction trade practice rather than on concentration of wealth and control of monopolies. See Jaivir Singh, Monopolistic Trade Practices and Concentration of Wealth : Some conceptual problems in MRTP Act, Economic and Political Weekly, Vol. 35, No. 50 (Dec. 9-15, 2000), pp. 4437-4444.

25. See, Chakravarthy S MRTP Act metamorphoses into Competition Act. www. Cuts-international.org/doc01.doc;

undertaking was engaged in monopolistic or restrictive trade practices. The MTP provision under the MRTP Act bears a similarity to the concept of abuse of dominance under the Competition Act. MTP was defined in the Section 2 (i) of the MRTP Act and it inter alia characterized the following as MTP - maintaining prices at an unreasonable level, unreasonably preventing competition, limiting technical development, allowing deteriorating quality, and increasing cost of production, prices and profits etc[26]. The scope and language of Section 2 (i) made it susceptible to a wide interpretation and when read with Chapter IV brought almost every business activity within the *per se*[27] illegal ambit of Chapter IV.

The next category of practices that were dealt with under the MRTP Act were those characterized as Unfair Trade Practices (UTP). UTP was focused on issues of consumer protection such as misleading advertisements, sales promotion, product safety standard etc. Pursuant to a notification of the Ministry of Corporate Affairs[28], all pending cases relating to UTP were transferred to the National Commission constituted under the Consumer Protection Act, 1986.

The third and final category of practices under the MRTP Act was characterized under Restrictive Trade Practices (RTPs) and was dealt under Chapter V – A of the MRTP Act. RTP was defined u/s 2 (o) of MRTP Act and Section 2 (o) read with Section 33 (1) of the MRTP Act as an act which has the effect of preventing, distorting or restricting competition. Certain common types of RTPs enumerated in the MRTP Act were refusal to deal, tie-up sales, full line forcing, exclusive dealings, price discrimination, predatory pricing, re-sale price maintenance, area restrictions etc. It is important to note here that many of these concepts have exclusively found place in Section 3 and 4 of the Competition Act. Section 3 provides illustrative definitions of terms like tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, resale price maintenance. The explanation to Section 4 also defines the concept of predatory pricing.

The MRTP Commission treated RTPs as a per se violation of the MRTP Act. However the Supreme Court in TELCO v Registrar of RT Agreement[29] held that rule of reason had to be applied in the cases of agreements constituting violations of the RTP[30]. The Teleco case was decided in the back drop of

26. http://www.financialexpress.com/news/monopolistic-trade-practices-still-pose-a-threat-to-competition/74030/0

27. Section 32 (of part IV) of the Act declared that "every monopolistic trade practices shall be deemed to be prejudicial to public interest, except where...
(a) such trade practice is expressly authorised by any enactment for the time being in force, or
(b) the Central Government, being satisfied that any such trade practice is necessary –
(i) to meet the requirements of the defence of India or any part thereof, or for the security of the State; or
(ii) to ensure the maintenance of supply of goods and services essential to the community; or
(iii) to give effect to the terms of any agreement to which the Central Government is a party, by a written order, permits the owner of any undertaking to carry on any such trade practice.".

28. Notification No. SO2204 (E) dated 28 August 2009.

29. (1977) 2 SCC 55

30. The Supreme Court propounded the following ratio : *"The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a restrictive trade practice, Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered First, what facts an peculiar to the busmen to which the*

similar judgments in US which applied the rule of reason test, including in Continental T.V. v GTE Sylvania[31]. The Supreme Court reaffirmed the opinion of the Telco court and formally adopted the rule of reasons test expounded by the US Supreme Court in the case of Mahindra & Mahindra Limited v/s Union of India[32]. The MRTP Amendment Act, 1984, brought in response to the above judgments to re-established that the agreements listed under Section 33 (1) of the MRTP Act, such as re – sale price maintenance, area restriction, exclusive dealing etc would be deemed restrictive. Later the Supreme Court in Voltas Ltd v/s Union of India[33] held that in view of the general definition of RTPs under Section 2 (o), practices other than the one listed under Section 33 (1) could be examined under Rule of Reason analysis.

MRTP Act to Competition Act 2002

As noted earlier, a substantial part of the MRTP Act was focused around monopolistic behavior and economic concentration. In light of the changing economic situation and initiation of economic reforms in the country post 1991, the need was felt for a change in approach towards fostering competition. Against this background, the Finance Minister of India in its budget speech in February, 1999 made the following statement in the context of to the then existing MRTP Act.

> *"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."*

The Raghavan Committee[34] was constituted to recommend a suitable legislative framework relating to competition law for the country. It was felt that although the MRTP Act seemingly had provisions regulating anti-competitive practices, in comparison with competition laws of many countries it was inadequate for promoting competition in the market trade and for reducing, if not eliminating, anti-competitive practices in the country's domestic and international trade.

One of the biggest failings of the MRTP Act was the inadequacy of MRTP Act to provide adequate remedy to complainants. Except for orders directing a respondent to 'cease and desist' from the alleged monopolistic, restrictive or unfair trade practices the MRTP Commission could not impose penalties

---

restraint is applied. Second, what was the condition before and after the restraint is imposed. Third, what is the nature of the restraint and what is its actual and probable effect."

31. (1977) 433 U.S. 36

32. (1979). 2 SCC 529 It may be noted that the Supreme Court observed that *"the language of the definition of "restrictive trade practice" in our Act suggests, that in enacting the definition, our legislature drew upon the concept and rationale underlying the 'rule of reason'. That is why this Court pointed out in the Telco case in words almost bodily lifted from the judgment of Mr. Justice Brandeis [in the case of Board of Trade v. United States 62 L. Ed. 683]"*

33. AIR 1995 SCC 1881.

34. http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf

for breach of law and; no other penalty or fine could be imposed[35].

Secondly, it is a generally accepted principle that competition law has extraterritorial application in all the cases where the overseas conduct of defendant distorts competition in the domestic market. However the Supreme Court repeatedly refused to acknowledge this principle and had held that the wording of MRTP Act did not provide for extra territorial jurisdiction[36].

Thirdly, MRTP Act did not define certain key terms[37] such as abuse of dominance, cartels, collusion, pricefixing, bid rigging, boycotts, refusal to deal and predatory pricing. It is often argued that lack of definition was immaterial. Because the general nature of MRTP Act could have covered all anti-competitive practices e.g. RTP was defined in fairly general terms to include all trade practice that prevents, distorts or restricts competition and therefore there was no need for a new law[38]. It is true that the generic nature of MRTP Act was very wide but this generic nature caused ambiguities in the interpretation and application of the MRTP Act and ambiguities resulted into atmosphere of general business uncertainty on key issues[39].

In pursuance of its mandate, the Raghavan Committee deliberated between amending the existing MRTP Act and enacting a new competition law. In particular the Raghavan Committee was wary that amendments to the MRTP Act to address the issues (discussed above) would have to be exhaustive and would be tantamount to drafting a new legislation. Further the Raghavan Committee was also wary of the fact that during the 30 years of its existence there had been a lot of binding jurisprudence on the interpretation of various provisions of the MRTP Act and the wording of the existing law had been considered inadequate by judicial pronouncements. Given the above, it was felt that drafting a new law would be most beneficial. This led to the enactment of the Competition Act, The validity of the Competition Act was challenged in the Supreme Court, even before it became fully operational. A writ petition[40] filed in the Supreme Court challenged the constitutional validity of the appointment of a retired bureaucrat as the head of the Commission. The petitioner contended that the Commission envisaged by the Competition Act is a judicial body having adjudicatory powers and in view of the doctrine of separation of powers recognized under the Indian Constitution, the Chairman of the Commission

35. See, Chakravarthy S MRTP Act metamorphoses into Competition Act. www. Cuts-international.org/doc01.doc;

36. See American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and others (1998) 3 CompLJ 152 MRTPC. ANSAC, a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI complained, to the MRTPC to take action against ANSAC for forming a cartel to exports to India. SC did not go into the allegations of cartelization, it held that the MRTP Act did not give the MRTPC any extraterritorial jurisdiction therefore MRTPC therefore could not take action against foreign cartels.

37. See Study of Cartel Cases in select Jurisdiction at http:// www.cuts-ccier.org/CARTEL/pdf/FinalReport.pdf

38. *Ibid*

39. Both Supreme Court and MRTP Commission had in various cases such as: Haridas Exports v. All India Float Glass Manufacturer Association (AIFGMA), (2002)6 SCC 600, AIFGMA v. PT Mulia Industries, 2000 CTJ 252 (MRTPC), Union of India v. Hindustan Development Corporation 16 SCC 499 (1993), DG (I & R) v. Modern Food Industries, 3 Comp LJ 154 (1996), had not been able to give any guidance to the business community as to what will constitute predatory price under MRTP Act. In Modern Food , Supreme Court did mention *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)but missed the significance of this judgment with respect to the market structure and the theory recoupment.*

40. Brahm Datt v. Union of India (2005) 2 SCC 431

had to be appointed by the Chief Justice of India and not a bureaucrat chosen by the executive. The Supreme Court passed its order on the said matter in January 2005, declining to grant relief sought by the Petitioner in view of the Government offering to amend the Competition Act. As stated in the abovementioned petition, the Competition (Amendment) Bill, 2007 was passed in September 2007 and the said amendment Act inter alia divided the competition authority, as envisaged in the original Act, into two (a) CCI as an administrative expert body; and COMPAT to carry out adjudicatory functions. The CCI was established in October 2003. However the operative provisions of the Competition Act would be brought into force in two phases in May, 2009[41] and June, 2011[42] respectively. In the first phase the provisions relating to anti-competitive Agreement and Abuse of dominance were notified. Subsequently the provision relating to the combination was also notified. The Central Government on December 10, 2012 had also moved a Competition (Amendment) Bill, 2012 in the Lok Sabha to further amend the Competition Act[43]. The proposal to amend the Competition Act was moved by the Ministry of Corporate Affairs, with a view to fine tune the provisions of the Act and to meet the present day needs in the field of competition, in light of the experiences gained in the actual working of the CCI over the last few years[44]. The Bill was passed in the Lok Sabha and currently it is pending in the Rajya Sabha. The Bill has to be passed by both houses of Parliament and it comes into force only after receiving the assent of the president and is notified in the official gazette.

41. Central Government notification S.O 1241 (E) and S.O 1242 (E) dated May 15, 2009

42. Central Government notification S.O. 479(E) dated 4th March, 2011.

43. http://www.nishithdesai.com/New_Hotline/Competition/Competition%20Law%20Hotline_Jan1013.htm

44. http://pib.nic.in/newsite/erelease.aspx?relid=88148

4. Indian Competition Law Framework

Articles 38 and 39 of the Constitution of India[45] provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing (a) that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and (b) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Accordingly, Parliament had first enacted the MRTP Act thereafter, for the reasons discussed above, the Competition Act to promote equitable distribution of wealth and economic power. The Competition Act is the creation of the union legislature and there is no corresponding law enacted at the state/provincial level. The Statement of the Objects and Reasons to the Competition Act states the reason for enacting the new law in the following words: "In the pursuit of globalization, India has responded by opening up its economy, removing controls, and restoring to liberalization". The objective of the Competition Act can be further gathered from its preamble which states as follows – *"An act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India…"*

The Competition Act is drafted, as are most of the competition laws in the world, in fairly general terms and is not limited to regulation of commercial acts of private parties. The Competition Act prohibits or regulates (A) Anticompetitive agreements (u/s 3 of the Act) (B) Abuse of dominant position (u/s 4 of the Act) (C) Combinations (u/s 5 & 6 of the Act).

As a quasi-judicial body, the CCI is bound by principles of rule of law in giving decisions[46] and the doctrine of precedents. As per the Competition Act the Commission is duly empowered to receive documents and testimonial by way of evidence and therefore is well suited to adjudicate disputes before it on the basis of material adduced by parties and by application of the principles of evidentiary proof under the Evidence Act. This is important since unlike the United States, a suit for anti-competitive practices cannot be brought in a civil court. Nor does intent in cartel like conduct take the case outside the jurisdiction of the CCI. Further, the scope of investigation of the Federal Trade Commission (FTC) and the Department of Justice (DOJ) are slightly different[47]; however in India all cases relating to anti-competitive practices can only be investigated by the CCI.

45. Article 38 and 39 of the Constitution of India is part IV of the Constitution, referred to as Directive Principles of State Policy (DPSP). DPSP is guidelines to the central and state governments of India, to be kept in mind while framing laws and policies. DPSP is not enforceable by courts, however the principles laid DPSP are considered fundamental in the governance of the country, making it a duty of the State to apply these principles in making laws to establish a just society in the country.

46. These are (a) predictability in the judicial reasoning (b) uniform and consistent application of law

47. See for instance Theoretical and Practical Observations on Cartel and Merger Enforcement at the Federal Trade Commission, Remarks of J. Thomas Rosch, Commissioner, FTC at the George Mason Law Review's 14th Annual Symposium on Antitrust Law, February, 2011.

Section 27 of the Act lays down remedies for the violation of Section 3 and 4 of the Competition Act. The CCI may issue a "cease and desist' order, or impose a penalty not exceeding '10 percent of the average turnover during the preceding three years' from the date of order. In cartel cases CCI could impose a penalty that could be higher of either up to 10 percent of the turnover or three times the amount of profit derived from the cartel agreement. In the cases of 'contravention by companies', CCI may under the provision of Section 48 of the Competition Act proceed against and punish any person who, at the time of the violation, was in charge of the company, unless that person can show that the violation was committed 'without his knowledge' or that he had exercised 'all due diligence to prevent the violation'. Section 43 A provides that in case of a failure to notify a combination, the Commission shall impose a penalty of 1% of the total assets or turnover of the combination. Section 42A of the Competition Act provides for the compensation in case of contravention of orders of the CCI. This section provides that a person may make an application to the Competition Appellate Tribunal for recovery of compensation from an enterprise for any loss or damage suffered by him for violating the directions of the CCI under sections 27, 28, 32, 33 and 41 of the Competition Act.

5. Anti-Competitive Agreements

Section 3 of the Competition Act states that any agreement which causes or is likely to cause an appreciable adverse effect (AAE) on competition in India is deemed anti-competitive. Section 3 (1) of the Competition Act prohibits any agreement with respect to *"production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India".*

Although the Competition Act does not define AAEC and nor is there any thumb rule to determine when an agreement causes or is likely to cause AAEC, Section 19 (3) of the Act specifies certain factors for determining AAEC.[48] The intent of the legislature reflected vide the mandatory language of Section 19 (1) of the Act is that the CCI is required to carry a balanced assessment of anti-competitive effect as well pro-competitive justification of the agreement. As stated above AAE is not defined but Section 19 (3) provides the following factors that the CCI must have due regard to which determining whether an agreement has an AAEC under Section 3:

i. *creation of barriers to new entrants in the market;*
ii. *driving existing competitors out of the market;*
iii. *foreclosure of competition by hindering entry into the market;*
iv. *accrual of benefits to consumers;*
v. *improvements in production or distribution of goods or provision of services;*
vi. *promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.*

The language in section 19(3) states that the CCI *shall have 'due regard to all or any'* of the aforementioned factors. In the adjudications that have been analysed by us below, we note that the CCI has examined the allegations and material on record as against the elements of Section 19(3) as set out above. However, in *Automobiles Dealers Association v. Global Automobiles Limited & Anr.*[49], CCI held that it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3).

The Competition Act does not categorize agreements into horizontal or vertical however the language of Sections 3 (3) and 3 (4) makes it abundantly clear that the former is aimed at horizontal agree-

48. The factors under Section 19 (3) includes six factors, first three being anti-competitive remaining three being pro-competitive factors (a) creation of entry barrier (b) driving existing competitors out of market (c) foreclosure of competition (d) benefits to consumers (e) improvements in the production or distribution of goods or the provision of services, and (f) the promotion of technical, scientific and economic development.

49. CCI Case No 33 of 2011, decided on July 3, 2012.

ment[50] and later at vertical agreements[51]. Horizontal agreements relating to activities referred to under Section 3 (3) of the Competition Act are presumed to have an AAE within India. The Supreme Court in *Sodhi Transport Co. v. State Of U.P.*[52] as interpreted *'shall be presumed'* as a presumption and not evidence itself, but merely indicative on whom burden of proof lies. Vertical agreements relating to activities referred to under Section 3(4) of the Competition Act on the other hand have to be analyzed in accordance with the rule of reason analysis under the Competition Act. In essence these arrangements are ant-competitive only if they cause or are likely to cause an AAEC in India.

Section 3(3) of the Competition Act provides that agreements or a 'practice carried' on by enterprises or persons (including cartels) engaged in trade of identical or similar products are presumed to have AAEC in India if they:-

- 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;
- Indulge in bid-rigging or collusive bidding.

The first three types of conducts may include all firms in a market, or a majority of them, coordinating their business, whether vis-à-vis price, geographic market, or output, to effectively act like a monopoly and share the monopoly profits accrued from their collusion. The fourth type of cartelised behavior may involve competitors collaborating in some way to restrict competition in response to a tender invitation and might be a combination of all the other practices.

The only exception to this per-se rule is in the nature of joint venture arrangements which increase efficiency in terms of production, supply, distribution, storage, acquisition or control of goods or services. Thus there has to be a direct nexus between cost/ quality efficiencies the agreement and benefits to the consumers must at least compensate consumers for any actual or likely negative impact caused by the agreement.

Section 3(4) of the Competition Act provides that any agreement among 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 Section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. As can be

50. between actual or potential competitors operating at the same level of the supply chain

51. between firms operating at different levels, i.e. agreement between a manufacturer and its distributor

52. 1986 AIR 1099

reason, these agreements are not deemed anti-competitive. Only if they cause or are likely to cause an AAEC in India will these agreements be in violation of section 3(1) of the Competition Act. The rule of reason must be applied in this determination.

The Competition Act does recognize that protectionist measures with respect to rights granted under intellectual property laws need to be taken by the holder thereof in the course of activities and entering into agreements and arrangements. Consequently, the Competition Act specifically states that the contours of anti-competitive restraints will not apply with respect to those horizontal and vertical agreements which impose reasonable conditions to protect or restrain infringement of, the rights granted under intellectual property laws[53].

In the pronouncements /orders passed by the CCI in the context of allegations under section 3 and section 4 of the Competition Act examined by us in this paper, the CCI has not set out broad principles of ingredients of an offence or of the nature of permitted activities. Generally, CCI has, on an examination of the material before it and on an analysis of the relevant provisions of the Competition Act, arrived at a conclusion as to whether an agreement or arrangement is violative of section 3 or section 4 of the Competition Act without setting principles of interpretation or a broad proposition of law. As the court of first instances, the CCI has shown that it is generally more concerned with establishment of facts.

The decisions by the CCI under Section 3 that have gained most significance and have had the greatest impact are those pertaining to cartelization. Since the establishment of an anti-competitive or a cartel like conduct is fact based, the CCI in all cases has relied extensively on reports of the DG In certain cases[54], the CCI has directed the DG to file a supplementary report as well.

53. Section 3(5) of the Competition Act

54. See *Varca Druggist, Cement Manufacturers Association*

6. Abuse of Dominance

Section 4 of the Competition Act is the operative provision of the Act dealing with the abuse of dominant position. This provision is broadly fashioned on the European Union prohibition on abuse of dominance contained in Article 102 of the Treaty on the Functioning of the European Union (TEFU).

Section 4 prohibits any enterprise from abusing its dominant position. The term 'dominant position' has been defined in the Act as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour"[55]. The definition of the dominant position provided in the Competition Act is similar to the one provided by the European Commission in United Brand *v Commission of the European Communities*[56] case. In the United Brands case the Court observed that "a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers."[57]

The Competition Act defines the relevant market as *'with the reference to the relevant product market or the relevant geographic market or with reference to both the markets'.*[58] *The relevant geographic market is defined as "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".*[59] The Competition Act further provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors[60]:

i. regulatory trade barriers;
ii. local specification requirements;
iii. national procurement policies;
iv. adequate distribution facilities;
v. transport costs
vi. language

55. Competition Act, 2001 explanation (a) to Section 4.
56. *United Brands v Commission of the European Communities;* [1978] ECR 207
57. *ibid*
58. Competition Act, 2001 explanation (a) to Section 2 (r)
59. *Ibid;* section 2 (s)
60. *Ibid* section 19 (6)

vii. consumer preferences

viii. need for secure or regular supplies or rapid after-sales services

The relevant product market is defined in as *'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'.*[61] The Competition Act provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors[62]:

i. physical characteristics or end-use of goods

ii. price of goods or service

iii. consumer preferences

iv. exclusion of in-house production

v. existence of specialized producers

vi. classification of industrial products

The abuse of dominance analysis under the Competition Act starts with the determination of market, once the relevant market has been determined; the CCI's next task is to establish whether the enterprise enjoys a dominant position. It is important to note here that the Competition Act does not prohibit the mere possession of dominance that could have been achieved through superior economic performance, innovation or pure accident but only its abuse[63].

The Competition Act sets out following factors which the CCI will take into account to establish the dominant position of an enterprise[64]:

i. market share of the enterprise

ii. size and resources of the enterprise

iii. size and importance of the competitors

iv. economic power of the enterprise including commercial advantages over competitors

v. vertical integration of the enterprises or sale or service network of such enterprises

vi. dependence of consumers on the enterprise

vii. 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

61. *Ibid* section 2 (t)

62. *Ibid* section 19 (7)

63. *United States v. Grinnell Corp.,* 384 U.S. 563 (1966)

64. Competition Act 2002; Section 19 (4)

viii. 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

ix. countervailing buying power

x. market structure and size of market

xi. social obligations and social costsxii.

xii. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition

xiii. any other factor which the Commission may consider relevant for the inquiry

Once the dominance of an enterprise in the relevant market is determined the CCI has to establish the abuse of its dominance by an enterprise. The Competition Act sets out a list of activities that shall be deemed abuse of dominant position[65]:

i. anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices,

ii. limiting the supply of goods or services, or a market or technical or scientific development, denying market access,

iii. imposing supplementary obligations having no connection with the subject of the contract, or

iv. using dominance in one market to enter into or protect another relevant market.

The list of abuses provided in the Competition Act is meant to be exhaustive, and not merely illustrative. This broadly follows the categories of abuse identified under 102 of TEFU.[66] The Competition Act also exempts certain unfair or discriminatory conditions in purchase or sale or predatory pricing of goods or service from being considered an abuse when such trading conditions are adopted to meet competition.

It is important to note that the abusive practices listed in section 4 (2) are only prohibited under section 4 (1), these practices are not declared void as per section 3 and section 6 dealing respectively with the anti-competitive agreement and combination regulation.

65. *Ibid* Section 4 (2)

66. Treaty on the Functioning of the European Union; Article 102

7. Jurisprudential Trends - Section 3

As stated above, the decisions by the CCI under Section 3 that have gained most significance and have had the greatest impact are those pertaining to cartelization. A cartel is essentially an agreement to limit output with the objective of increasing prices and profits. There are certain agreements or practices which, because of their pernicious effects on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[67]

Cartels are considered *"the supreme evil of antitrust."*[68] Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the CCI. A cartel is illegal per se or by itself. No argument or circumstance can justify the existence of a cartel and no proof of harm is required. Antitrust jurisprudence in the US makes use of procedural techniques such as 'presumption of anticompetitive practices' to supplement the rules of evidence. This automatically shifts the burden of proof on the Opposite Party. Such presumptions are permitted as tools of administration of antitrust law.[69]

The existence of a cartel may be proved by direct evidence, indirect (circumstantial) evidence, or a combination of both. Direct evidence includes written agreement among cartel members, statement of a cartel member who attended a meeting and reached an agreement with competitors, a memorandum written within a company to report a meeting with competitors where an agreement was reached, records of telephone conversations with competitors, or a statement of a person who was approached by the cartel to join it.[70] However, getting direct evidence of cartels tend to be very difficult leading to reliance on circumstantial evidence. Cartels however are not easy to maintain and several factors become critical for sustenance of a cartel. First is a channel for coordination or cooperation among the firms. Channels for co-operation can be varied ranging from organized cartels with agreements to simple information exchange between competitors[71].

We have analysed nine significant cases dealt by the CCI since its inception and have commented on the trends that can be observed with in such cases. The cases analysed by us are as follows:

67. *Northern Pacific Ry. v. United States,* 356 U.S. 1 (1958)

68. See Mehta Pradeep S; Competition and Regulation in India – Leveraging Econo Economic Growth through better Regulation available at http://www.cuts-ccier.org/icrr2011/pdf/Competition_and_Regulation_in_India-2011_Leveraging_Economic_Growth_Through_Better_Regulation.pdf
less it is repugnant to constitutionally valid provisions of the Act.

69 See, Chakravarthy S MRTP Act metamorphosis into Competition Act. www. Cuts-international.org/doc01.doc;

70. See Policy Brief published by Organisation For Economic Co-Operation And Development; available at http://www.oecd.org/competition/cartels/38704302.pdf

71. *Ibid.*

I. Varca Druggist & Chemist & Others v/s Chemist & Druggists Association, Goa[72] ("Varca Drug")

This case was initiated on a complaint filed by Varca Druggist & Chemist through its proprietor Mr. Hemant Pai Angle and two other proprietors of pharmaceutical drugs and medicines firms before the Director General (Investigation & Registrations), Monopolies & Restrictive Trade Practices Commission (DGIR, MRTPC) alleging that the Opposite Party, namely, Chemist & Druggist Association, Goa (CDAG) was indulging in restrictive trade practices. The case was transferred to the CCI on the repeal of MRTP Act.

The CCI comes to the conclusion that the conduct and practices of CDAG were limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act.

The CCI imposed a penalty Rs. 2,00,000 on CDAG.

II. Builders Association of India v/s Cement Manufacturer's Association and 11 cement companies[73] ("Cement Manufacturer Association")

The informant, a society registered under the Societies Registration Act, 1860 was an association of builders and other entities involved in the business of construction. The Opposite Party-1 (OP 1) is an association of the cement manufacturers of India in which both public and private sector cement units were members. The informant had submitted that cement manufacturers, namely, Associated Cement Co Ltd., Gujarat Ambuja Cement Ltd., Grasim Cement, Ultratech Cement Ltd, Jaypee Cement, India Cements Ltd., J. K. Cements of Group, Century Cement, Madras Cement Ltd, Binani Cement Ltd and Lafarge India Ltd were members of OP-1 and were the leading manufacturers, distributors and sellers of cement in India. As per the informant, the respondent cement manufacturers under the umbrella of OP-1 indulged directly and indirectly into monopolistic and restrictive trade practices, in an effort to control the price of cement by limiting and restricting the production and supply of cement as against the available capacity of production. The CCI found the Opposite Parties in contravention of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act. The CCI imposed a penalty of 0.5 times of net profit for 2009-10 and 2010-11 in case of each cement manufacturer named as Opposite Parties in this case.

III. In Re: Suo Moto case against LPG Cylinder Manufacturers[74] ("LPG Cylinder")

The cognizance in the present case was taken by the CCI suo-moto under section 19(1) of the Compe-

72. *MRTP C-127/2009/DGIR4/28;* decided on June 11, 2012.

73. *CCI Case no 29/2010;* decided on June 20, 2012.

74. *CCI Suo-Moto Case no. 03/2011;* decided on February 24, 2012.

tition Act consequent upon the submission of investigation report of the DG in Case No. 10 of 2010, M/s Pankaj Gas Cylinders Ltd. v. Indian Oil Corporation Ltd. In that case it was reported by the DG that in tender No. LPG-0/M/PT-03/09-10 floated by Indian Oil Corporation Ltd. (IOCL) for the supply of 105 lakh, 14.2 Kg capacity LPG cylinders with SC valves, the manufacturers of LPG cylinders had manipulated the bids and quoted identical rates in groups through an understanding and collusive action.

The CCI also observed that all the bidding companies who had infringed the provision of section 3(3) of the Competition Act were responsible in equal measure and no mitigating circumstances were available to any of them. Considering the totality of facts and circumstances of the present case and the seriousness of contravention the commission decides to impose a penalty on each of the contravening company at the rate of 7% of the average turnover of the company.

IV. Sunshine Pictures Private Limited & Eros International Media Limited vs Central Circuit Cine Association, Indore & Ors.75 ("Eros International")

The Informant alleged that under the garb of a trade association the Opposite Party had become a vehicle for collusive conduct for persons and enterprises engaged in identical business of distribution and exhibition of films.

The CCI noted that the associations were indulging in issuing circulars and letters of restricting the exhibition of films and taking punitive action against the Informants, in violation of provisions of Section 3(3)(b)of the Competition Act.

Looking at the gravity of the allegations, the commission decided to impose a penalty on each of these associations at rate of 10% of the average of their three years total receipts.

V. FICCI – Multiplex Association of India Federation House v/s United Producers/ Distributors & Ors.[76] ("FICCI – Multiplex Association of India")

The informant FICCI-Multiplex Association of India had alleged that the respondents namely United Producers/Distributors Forum (UPDF), The Association of Motion Pictures and TV Programme Producers (AMPTPP) and the Film and Television Producers Gild of India Ltd. (FTPGI) were behaving like a cartel. The Informant alleged that UPDF is an association of film producers and distributors which includes both corporate houses and individuals independent film producers and distributors. The AMPTPP and FTPGI were the members of UPDF. It was further alleged that UPDF, AMPTPP and FTPGI produce and distribute almost 100% of the Hindi Films produced/supplied/distributed in India and thereby exercise almost complete control over the Indian Film Industry.

75. CCI Case No. 52 of 2010 and Case No. 56 of 2010.

76. CCI Case No. 1 of 2009; decided on May 25, 2012.

It had been further alleged that UPDF vide their notice dated 27.03.2009 had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the informant. It had been further informed that being aggrieved by the decision of UPDF various members have approached the informant and sought its assistance.

The CCI after considering the contentions of the opposite parties on merit and after elaborate discussion ruled that Opposite Parties had contravened the provisions of Section 3(3)(a) and 3(3)(b) of the Competition Act. The CCI imposed a penalty of Rs. 1,00,000 on each of the 27 opposite parties.

VI. Film & Television Producers Guild of India v/s Multiplex Association of India & Ors.[77] ("Film & Television Producers Guild")

The Film and Television Producers Guild of India, Informant, filed a complaint against Multiplex Association of India (MAI) and various constituents of MAI alleging that MAI was forcing producers/distributors to negotiate revenue sharing only with MAI and not individual constituents. Further, MAI was imposing terms of exhibition which was prejudicial to the producer given the nature of film industry. The Informant alleged that these practices were anti-competitive (Section 3 of the Competition Act) and that MAI was abusing its dominant position (Section (2) (a) and 4 (2) (c) of the Competition Act).

The CCI framed two issues – whether the Opposite Parties ('OPs') acted in violation of Section 3 and Section 4 of the Competition Act. After an examination of the detailed findings of the DG, the CCI rejected the same as there was insufficient evidence to establish that OPs had formed a cartel or acted in concert either for the purpose of revenue sharing or controlling the distribution and exhibition of films. Both issues were therefore decided in favor of the OPs.

VII. Uniglobe Mod Travels Pvt. Ltd v/s Travel Agents Federation of India & Ors.[78] ("Uniglobe")

An interesting case relating to the expulsion of a travel agent for its failure to comply with the trade associations notice that members not deal / transact with Singapore Airlines The Informant, Uniglobe Mod Travel Pvt. Ltd., did not comply with several emails of Opposite Party (Travel Agents Federation of India) and was consequently suspended. The Informant had also filed a civil suit in the High Court of Delhi and had withdrawn the same (July 7, 2009) before filing the present complaint (July 21, 2009).

The CCI had framed two issues – whether it had jurisdiction to entertain the complaint and whether OPs had contravened Section 3 of the Act.

77. *CCI Case No. 37 of 2011;* decided on January 3, 2013.

78. *CCI Case No. 3 of 2009,* decided on October 4, 2011.

Although matters relating to transactions between foreign airlines and travel agents were broadly covered by the Director General of Civil Aviation (DGCA), CCI held that the impugned arrangement was likely to cause and appreciable adverse effect on competition and hence the CCI was empowered to enquire into the transaction. The CCI also held that the communications of OP did affect the availability of tickets and hence held the communications of OP as in violation of Section 3 of the Competition Act. As travel agents had resumed dealing in tickets of Singapore Airlines, Commission imposed a penalty of Rs. 100,000 (Rupees One Lakh Only) on the OPs and issued an injunction in favor of the Informant restraining OPs from indulging in anti-competitive practices.

VIII. In Re: Glass Manufacturers of India [79] ("Glass Manufacturers")

The present matter relates to suo-moto cognizance taken by the erstwhile MRTPC on the basis of an article published in the magazine 'The Outlook Business' alleging cartel like practices of leading Indian manufacturers of float glass. Consequent upon the repeal of the MRTP Act, the case was received on transfer by the CCI) under section 66(6) of the Competition Act.

The DG concluded that no case of violation of provisions of section 3 was made out in the matter for the period under investigation. The CCI agreed with this finding and stated that in the absence of any evidence of determination of price, limit on supply or production of supplies in the market or sharing/ allocation of market arising out of any agreement or action in concert there was no reason to disagree with the findings of DG.

XI. All India Tyre Dealers' Federation v/s Tyre Manufacturers80 ("Tyre Dealers Federation")

The information in this case was originally filed by the All India Tyre Dealers' Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded by the MRTPC. Consequent upon the repeal of the MRTP Act, the matter stood transferred to the CCI under section 66(6) of the Competition Act. In the said information dated December 28, 2007, AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities.

The CCI took into consideration the act and conduct of the tyre companies/ ATMA, and found that on a superficial basis the industry displays some characteristics of a cartel there has been no substantive evidence of the existence of a cartel. The CCI held that the available evidence did not give enough proof that Tyre companies and associations acting together had limited and controlled the production and price of tyres in the market in India. The CCI found that there was not sufficient evidence to hold a violation by the **tyre** companies of section 3(3) (a) and 3(3)(b) read with section 3(1) of the Competition Act.

79. *MRTP Case No.* 161 of 2008 decided on January 24, 2012

80. *MRTP Case RTPE No.* 20 of 2008 decided on October 30, 2012

i. Allegations made by the Opposite Parties in aforementioned cases

On a perusal of the allegations made by the complainants in the cases referred to above (other than the suo-moto cases taken by the CCI), we see that the majority of the cases deal with violations of sections 3(3)(a)[81] (agreements or arrangements directly or indirectly determining purchase or sale prices) and 3(3)(b)[82] (agreements or arrangements limiting or controlling production, supply, markets, technical development ,investment or provision of services) of the Competition Act. In almost all of the cases examined by us a trade association was involved and impleaded in the proceedings[83]. In all such cases it was alleged that the trade association facilitated the alleged anti-competitive practices. The 'cause of action', so to speak, in most allegations of cartelization are as a result of the informant noticing common behavior patterns among persons engaged in a similar activities or as result of a particular policy or practice being adopted by a trade association. In most cases the informant has been directly affected as a result of these practices[84]. Although cartelization is alleged, the informants have not always sought to establish an agreement amongst the opposite parties but have presumed the existence of one on account of the similarity of behavior patterns.

In the suo-moto cases analysed by us we note that the CCI had taken cognizance of these on the basis of news articles published in newspapers and business magazines[85].

ii. Data looked at by the DG in aforementioned cases

The text of the orders issued by the CCI does not elaborate on the manner in which the DG collects evidence to arrive at its report. However, the references to evidence relied on by the DG in the orders of the CCI analysed by us suggest that the data relied on by CCI / DG differs depending on the nature of allegation. Broadly the data relied on by the DG can be classified as follows: (i) questionnaires to the opposite parties impleaded by the informant (Opposite Parties) and recording of statements by key individuals responsible for activities of such entities (ii) financial information of the Opposite Parties. In cases where it has been alleged that the Opposite Parties have entered into agreements or arrangements directly or indirectly determining purchase or sale prices, the DG has looked into this in detail. In such cases, in particular the DG has referred to (a) cost audit reports (b) pricing policies of the Opposite Parties including cost of production, sale prices, margins retained (c) data relating to installed capacity v/s utilized capacity (iii) data pertaining to the Opposite Parties including agreements that they may have entered into, bye-laws and policies of such Opposite Parties (iv) data to understand

81. See for instance *Tyre Dealers Federation, Film & Television Producers Guild, FICCI – Multiplex Association of India, Cement Manufacturer Association.*

82. See for instance *Eros International, Uniglobe, FICCI Multiplex Association, Film Producers Guild and Varca Druggist.*

83. See for instance Eros International, Uniglobe, FICCI Multiplex Association, Film Producers Guild and Varca Druggist, Tyre Dealers Federation

84. See for instance, *Tyre Dealers Federation, Cement Manufacturer Association, Eros International, Film Producers Guild and Varca Druggist.*

85. In CCI Suo-Moto Case no. 01/2011 (In Re: Rise in Onion Prices), the CCI referred to various reports published in newspapers during the month of December 2010 and an article published in the Wall Street Journal under the heading of 'India Food Inflation Rises'. In the Glass Manufacturers of India case, the CCI referred to articles published in Outlook magazine.

the industry in which the Opposite Parties operate in the form of independent reports, reports by Governmental agencies etc. In some cases, the DG has also interviewed and sought information from independent service providers to corroborate evidence of meetings[86].

iii. Defenses taken by the Opposite Parties in aforementioned cases

In summary, on the basis of the cases analysed by us, in terms of defending allegations of cartelization, the Opposite Parties have defended their activities as follows:

1) Trade Association is not an enterprise

Where a trade association has been impleaded as an Opposite Party, a common defense has always been that the provisions of the Section 3 do not apply to activities of a trade association on account of the trade association not being an enterprise[87]. The Opposite Parties in such cases have alleged the trade association not being engaged in commercial activities in not an enterprise as defined under the Competition Act. This defense has especially been used when it has been alleged that a particular action or practice of the trade association is in violation of Section 3(3) of the Competition Act[88].

2) Activities alleged are only evidence of price parallelism and this alone is not sufficient to justify an allegation of cartelization

Another common defense that has been put forth in almost all cases dealing with a violation of section 3(3)(a) of the Competition Act[89] is that pricing parity between Opposite Parties relied on by the DG to establish the existence of an agreement at best amounts to price parallelism. This in itself does not prove concerted action. Opposite Parties have relied on international jurisprudence to demonstrate that in the absence of 'plus factors' mere price parallelism cannot be an evidence of collusive behavior.

3) No evidence of an 'agreement' found

Opposite Parties have also commonly stated that the DG has failed to provide the existence of an

86. For instance in the case of LPG cylinder manufacturer's case, the DG procured information from Sahara Star, a five star hotel, in whose premises meetings of the LPG cylinder manufacturers were held.

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

    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;

88. *Eros International, Uniglobe Mod Travels, FICCI Multiplex Association,and Varca Druggist*

89. See FICCI Multiplex Association, Cement Manufactures Association, Tyre Dealers Federation, Glass Manufacturers, LPG Cylinder

'agreement'[90] amongst the Opposite Parties[91]. This is the basic tenant of the Competition Act. If no agreement between the Opposite Parties is proven, then the allegations under Section 3(3) cannot stand.

4) Circumstantial Evidence is not sufficient

The Opposite Parties have often alleged that the evidence relied on by the DG to arrive at a conclusion of a violation of section 3(3) of the Competition Act is limited to circumstantial evidence and this by itself is not sufficient to conclude that a conspiracy amongst the Opposite Parties existed[92]:

5) CCI has no jurisdiction

Opposite Parties, for various reasons, have alleged that the CCI has no jurisdiction to try the matter in question. For instance, in the Varca case[93], being a case transferred from the MRTPC to the CCI, it was alleged that since these events took place prior to the coming into effect of the relevant provisions of the Competition Act, the CCI had no jurisdiction to try the matter under the provisions of the Competition Act. In the FICCI case[94], some of the Opposite Parties alleged that the demands of the complainant amounted to 'compulsory licensing' for which alternative machinery under the Copyright Act, 1957 was available on account of which the CCI had no jurisdiction. In the Uniglobe case[95], the Opposite Parties alleged that the practice complained of was in the nature of an administrative action of the Opposite Party and it could not be within CCI's jurisdiction to intervene.

Below we discuss the defences of the various Opposite Parties relying on international jurisprudence as well as CCI's views on the same.

I. Price Parallelism

i. What is price parallelism?

Price parallelism is a mirroring effect where traders independently pursue their 'unilateral non-co-operative actions' in view of what other rivals are doing[96]. Therefore, there is neither an explicit agreement nor a tacit understanding among the traders. Parallel pricing occurs if firms change their prices

90. Section 2(b) of the Competition Act defines agreement to mean "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;"

91. *See FICCI - Multiplex Association, Cement Manufacturers' Association, Tyre Dealers Federation, LPG cylinder,Varca Druggist.*

92. *See Cement Manufacturers Association, Tyre Dealers Federation, LPG cylinde.*

93. See *Varca Druggist.*

94. See *FICCI – Multiplex Association of India* .

95. See Uniglobe

96. J. David Robertson, East Asian Trade After the Uruguay Round, (Cambridge University Press, 1997) at p 202.

simultaneously, in the same direction, and proportionally. A concise representation of the degree of price parallelism is given by the correlation between prices. Price parallelism is often used in prosecuting cartels as a tool to determine whether a pattern of collusion can be determined. Uniform conduct of pricing by competitors permit inference on existence of a conspiracy between competitors[97].

However, it may be worthwhile referring to the OECD Report on Prosecuting Cartels Without Direct Evidence of 2006 which states as follows:

> *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 independent observation and reaction by rivals in the marketplace, is not unlawful.*

ii. International jurisprudence on price parallelism

International jurisprudence generally recognizes that parallel conduct alone is not sufficient proof of cartel agreement[98]. There must be additional evidence which tends to prove the existence of unlawful agreement, usually known as 'plus factors'[99]. This can be represented by the judgment of the U.S. Supreme Court in *Theatre Enterprises Inc. v. Paramount Film Distribution Corporation[100],* where it was stated:

> *The Court has never held that proof of parallel business behavior conclusively establishes agreement, or phrased differently, that such behavior itself constitutes a Sherman Act offence.*

The US Supreme Court in the case of Twombly[101] held that in order to claim relief under section 1 of the Sherman Act, the facts alleged to state a claim of relief must be enough to raise a right to relief above speculative level and the facts must be sufficient to nudge the plaintiff's claims from across the line of conceivable to plausible.

In the case of In re *Flat Glass[102],* the Third Circuit Court recognized the following three plus factors

---

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

98. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp, 509 U.S. 209 where the Court observed in the context of conscious parallelism that 'the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit maximizing, supracompetitive level by recognizing their shared economic interest and their interdependence with respect to price and output decisions.'*

99. See *In re Flat Glass 385 F.3d at 360 (2004), where the Court observed that 'the factors serve as proxies for direct evidence of an agreement.'*

100. *346 U.S. 537 (1954)*

101. *Bell Atlantic Corporation v. Twombly* 550 U.S. 544 (2007)

102. *385 F.3d at 360 (2004)*

i. Evidence that the defendant had a motive to enter into a price fixing conspiracy;

ii. Evidence that the defendant acted contrary to its interests;

iii. Evidence implying a traditional conspiracy.

Even out of the above, the Court recognized that the most important evidence will usually be non-economic evidence that there was an actual manifest agreement not to compete. That evidence may involve "customary indications of traditional conspiracy" or "proof that the defendants got together and exchanged assurances of common action or other adopted a common plan even though no meetings, conversations or exchanged documents are shown[103].

Similarly, in the case of *In Re High Fructose Corn Syrup[104],* Judge Posner set out the standard of proof requirement under the Sherman Act as under:

> *The evidence upon which a plaintiff will rely upon will usually be and in this case of two types – economic evidence suggesting that the defendants were not in fact competing, and non-economic evidence suggesting that they were not competing because they had agreed not to compete. The economic evidence will in turn generally be of two types, and is in this case: evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelised if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a noncompetitive manner.*

In the context of plus factors, every plus factor offered need not always be recognized to result in a cartelization claim. The case of *Blomkest[105]* is an illustration to this point where the plus factors offered were (a) inter-firm communications between the producers (b) acts by producers allegedly against their self-interest and (c) an expert report purporting to show the price of potash would have been substantially lower if not for the collusion. The Court, in a split decision ruled against cartelization on the grounds that the price verification evidence was unpersuasive as it related to past transactions and not to future conduct and they were sporadic. They also held *"The fact that there were several dozen communications is not so significant considering the communications occurred over at least a seven-year period in which there would have been tens of thousands of transactions. Furthermore, one would expect companies to verify prices considering that this is an oligopolistic industry and accounts are often very large. We find the evidence falls far short of excluding the possibility of independent action."*

103. See *also Petruzzi's IGA v. Darling-Delaware,* 998 F.2d.1224 (1993)

104. *In re High Fructose Corn Syrup Antitrust Litigation.,* 295 F.3d 651 (7th Cir. 2002).

105. *Blomkest Fertilzer v. Potash Corp. of Saskatchewan Inc .,*203 F. 3d 1028 (8th Cir. 2000)

iii. Price parallelism in the context of CCI's orders

As stated above, from the decisions of the CCI analysed by us we note that the defence that the evidence gathered by the DG only proves price parallelism has been alleged many a times. The CCI appears to concede to the view that 'price parallelism on its own cannot be said to be indicative of any practice being carried on in terms of Section 3(3) of the Competition Act'[106], however it is not clear whether this view has been consistently followed through the orders of the CCI. For instance, while holding the cement companies guilty of cartelization in the Cement Cartel case, the CCI relied on the report of the DG which dealt with price parallelism[107]. As per the DG, *[the] price parallelism [as deduced by the DG based on the data it collected] indicated the possibility of prior consultation on price movement.* Further it has been stated that the DG was given no specific reason for price parallelism by Opposite Parties. Consequently, this evidence of price parallelism was used as evidence to establish concerted action. It remains to be seen whether for the purpose of Indian jurisprudence price parallelism needs to be substantiated with a reason.

Further, the CCI is yet to firmly decide on what is tantamount to 'acceptable plus factors' to corroborate price parallelism as a substantial piece of evidence. As stated above, in the case of In re *Flat Glass*[108], the Third Circuit Court recognized the following three plus factors

i. Evidence that the defendant had a motive to enter into a price fixing conspiracy;

ii. Evidence that the defendant acted contrary to its interests;

iii. Evidence implying a traditional conspiracy.

The CCI in the *Tyre* case seems to suggest that an 'analysis of data relating to production; capacity utilization; cost analysis; cost of sales/sales realization/margin; cost of production and natural price movement; net dealer price & margin and market share' constitutes plus factors[109]. The OECD Report clearly states that an important type of plus factor is evidence showing that there were communications among the suspected cartel operators in the course of which they could have reached agreement. The CCI has not concluded as to how the data collected by it results in evidence showing collusion - consequently, It is questionable whether a mere correlation of this data amongst the Opposite Parties is enough to conclude that a motive has been established.

II. Circumstantial Evidence

The OECD Report on Prosecuting Cartels without Direct Evidence of 2006 gives a good overview of the

106. *In re: Domestic Air Lines decided on January 11, 2012; Tyre Case*

107. Cement Manufacturers Association

108. 385 F.3d at 360 (2004)

109. Tyre Dealers Federation case at Paragraph 322 of the order

use of circumstantial evidence. This report states as follows:

> *"Circumstantial evidence is employed in cartel cases in all countries. The better practice is to use circumstantial evidence holistically, giving it cumulative effect, rather than on an item-by-item basis. Complicating the use of circumstantial evidence are provisions in national competition laws that variously define the nature of agreements that are subject to the law.*
>
> *There are two general types of circumstantial evidence: communication evidence[110] and economic evidence[111]. Of the two, communication evidence is considered to be the more important. Economic evidence is almost always ambiguous. It could be consistent with either agreement or independent action. Therefore it requires careful analysis. National treatment of cartels, such as whether they are prosecuted as crimes or as administrative violations, can affect the burden of proof that applies to the cases, and hence the use of circumstantial evidence. It can be difficult to convince courts to accept circumstantial evidence in cartel cases, especially where the potential liability for having violated the anti-cartel provisions of the competition law is high.*
>
> *There are circumstances in countries that are relatively new to anti-cartel enforcement that could affect the extent to which they rely on circumstantial evidence in their cases."*

The CCI has relied on circumstantial evidence extensively in certain cases[112]. In its **reliance** the CCI has always quoted the following excerpt from the OECD Report on Prosecuting Cartels without Direct Evidence of 2006 when it comes to circumstantial evidence[113].

> *"Circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidence .....In order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreement."*

However the paragraph often quoted by the CCI from the aforementioned report is not complete. What the OECD says is as follows: *"Circumstantial evidence is of no less value than direct evidence for it*

110. The OECD Report describes communication evidence as evidence that cartel operators met or otherwise communicated, but does not describe the substance of their communications. It includes, for example, records of telephone conversations among suspected cartel participants, of their travel to a common destination and notes or records of meetings in which they participated.

111. As per the OECD Report economic evidence can be categorized as either conduct or structural evidence. The former includes, most importantly, evidence of parallel conduct by suspected cartel members, e.g., simultaneous and identical price increases or suspicious bidding patterns in public tenders. Structural economic evidence includes evidence of such factors as high market concentration and homogeneous products. Of these two types of economic evidence, conduct evidence is considered the more important. Economic evidence must be carefully evaluated.

112. See for example *CCI Suo-Moto Case no. 02/2011* (In Re: Aluminium Phosphide Tablets Manufacturers), 02/2011, decided on April 23, 2012, Builders Association of India vs Cement Manufacturers' Association.

113. See *Cement Manufacturers Association , Tyre Dealers Federation.*

is the general rule that the law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case."

Reference to the phrase *'a jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case'* suggests that the OECD Report refers to instances where criminal liability is also attached to an allegation of cartelisaton. Since the offence under the Competition Act is limited to being a civil one, one could argue that the burden of proof is lower. Nonetheless this does not take away from the fact that circumstantial evidence may not be looked at in isolation – it should produce a conclusive proof from where the easy inference can be drawn as to existence of the agreement. The OECD in its report has observed that in most countries, cartels (and other violations of the competition law) are prosecuted administratively. It has further noted that the standard in respect of burden of proof is higher where the same is treated as a criminal breach. In this context, it has observed that direct evidence is almost certainly required where there are criminal sanctions, especially in the United States of America[114]. This approach can also be noticed in the Indian context, where as per the Evidence Act, 1882, the standard that is required in case of civil offences is that of "preponderance of probability" whereas in cases of criminal offences, the standard of proof requirement goes to that of "proof beyond reasonable doubt"[115] A similar approach can also be seen in the EU where the standard that is sometimes used for competition law violations is "balance of probabilities" which is similar to the "preponderance of probability" test[116]. The question that of course arises is where the financial penalties are significantly high, whether the burden of proof that is required to be discharged should be that of "proof beyond reasonable doubt". While there are no clear developments in respect of this issue, this is an area that may become relevant, especially in situation where the significant fines are imposed in respect of cartelization cases and in such cases, it may be argued that a higher burden would need to be discharged[117].

III. Trade Associations

i. Role of trade associations

The role of trade associations and the impact on competition is an area that has been in focus and investigation by competition law regulators in various jurisdictions. As was observed by Adam Smith in

114. See OECD on Prosecuting Cartels without Direct Evidence, 2006

115. *Cholan Roadways Limited Vs. G. Thirugnanasambandam* [2004 (10) SCALE 578]

116. See generally Gerald FitzGerald, David McFadden, Filling a gap in Irish competition law enforcement: the need for a civil fines sanction, June 9, 2011, available at http://www.tca.ie/images/uploaded/documents/2011-06 09%20Filling%20a%20gap%20in%20Irish%20competition%20law%20enforcement%20-%20the%20need%20for%20a%20civil%20fines%20sanction.pdf

117. See for instance A. Rajendran and Ors. v. Assistant Commissioner of Income Tax where the Court made a distinction between penalty proceedings and regular assessment in income tax matters to state that the rules of probability when applied in a penalty proceeding would have to be applied with more rigour of preponderance, so as to tilt the balance to the side of the revenue in an accentuated manner.

the Wealth of Nations:

> *"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"*[118]

The establishment of a Trade Association can be for different objectives such as

- Creating a forum for representation to the Government
- Media interaction and collection / dissemination of statistics and market information
- Setting out standards and code of practices

However, in certain contexts, a Trade Association can be used as a forum to indulge in anti-competitive practices. Exchange of information or practices and decisions taken by a trade association that relate to supply / distribution of goods or pricing policies are often held to be anti-competitive in nature. Of course, not all exchanges of information or such decisions may necessarily be anti-competitive in nature. The key issues that surround the anti-competitive arrangements in case of Trade Associations are in respect of exchange of information, whether of price or non-price information, which may result in causing an AAE on competition.[119] In fact even the CCI has recognized that a trade association needs to regulate to protect the interests of the industries[120].

ii. Decisions of a trade association

A question often debated is whether a 'decision' of an association is tantamount to its members entering into an agreement. In the Eros Case, the dissenting opinion made an interesting noting with respect to the decisions of trade associations. In the view of this member of the CCI, *"once a person or an enterprise subscribes to the shares of a company* ***or becomes*** *a member of a society then the entity which is found is a company or a society and this would be a different body from an association of persons or enterprises. In such a case it would be incorrect to hold that the incorporated company or the society is an association of enterprise… … … … … … As one entity cannot enter into an agreement with self, there was no agreement. As far as practice and decision taken are concerned, it is necessary that the practice or the decision taken should be by an association of enterprises. As there was only one entity in an area, there was an absence of an association of enterprises".*[121]

118. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1904, 5th Edn London: Methuen & Co., Ltd.), at page 80 I.10.82 available at http://www.econlib.org/library/Smith/smWN4.html#B.I, Ch.10, Of Wages and Profit in the Different Employments of Labour and Stock

119. See *United Kingdom Agricultural Tractor Registration Exchange* [1993] 4 CMLR 358 where the exchange of information relating to sales and market shares, broken down by territory, product line and time period was found to have violated Article 81 (1) of the EC Treaty.

120. See *Uniglobe*

121. It may be noted that this dissenting member of the CCI in a later order [see Varca Druggist & Chemist & Ors.] has opined conversely. In this order he has stated that *"Every individual member who subscribes to the Memorandum of Association and becomes member of the Association either at the time of inception or later on, is a party to the decision as recorded in the form of by-laws, guidelines, rules & regulations of the association… … … … Those members who do not agree with such decisions which affect the trade or service are supposed to convey their disagreement with the decisions to the Association."*

However this view has not been followed by the CCI in any of its decisions involving trade associations. In fact in Eros International, the majority opinion clearly states as follows *"Th[e] collective intent and behavior of the members of the associations which find reflection in the rules and regulations of the association; and decision of the association in a way is an agreement at horizontal level of the nature provided in section 3(3) of the Act."*

Internationally, the scope of the term decision has been given a wide meaning to include the constitution or rules of an association or even its recommendations[122]. Even a trade association's coordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with[123].

The key issue/factor that is considered is whether the effect of the decision, is to limit the freedom of action of the members in some commercial matter[124].

iii. International jurisprudence

In the context of the TEFU, Article 101 (3) sets out the exceptions to 101 (1) in respect of any agreements which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

i. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

ii. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

This test under Article 101 (3) has also been used in the context of applying the rule of reason test in the United States where fixing of standards have been upheld where they provide pro-competitive benefits such as ensuring products of different manufacturers are compatible with each other and keeping unsafe products out of the marketplace[125].

A trade association membership alone is not sufficient evidence of collusion or a conspiracy of anti-competitive practices. The requirement that has to be shown is to provide sufficient evidence to suggest that the trade association's members reached an actual explicit or tacit agreement that has an adverse effect on competition.

122. See *In Re National Sulphuric Acid Association,* [1980] 3 CMLR 429.

123. See Office of Fair Trading, Agreements and Concerted Practices, 2004.

124. See Office of Fair Trading, Trade Associations, professions and self-regulating bodies, 2004

125. See OECD Competition Committee, Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations, November 4, 2008, DAF/COMP(2007)45, available at http://www.oecd.org/regreform/sectors/41646059.pdf 2007..

iv. Trade Association as an enterprise

As elaborated above, Opposite Parties have often argued that a trade association is not an enterprise covered under the ambit of the Competition Act[126] since it doesn't carry out any commercial activities. There seems to be no unequivocal resolution on this point. In fact the majority opinion in the Eros case concludes with this argument. On this ground the majority opinion held that the allegations of abuse of dominance under section 4 of the Competition Act did not stand against the Opposite Parties since section 4 only applied to enterprises. The dissenting opinion in Eros International case however disagrees with this conclusion. On analyzing the definition of 'enterprise' under the Competition Act the dissenting opinion states that it is not necessary that a person should be carrying out any business to qualify as an enterprise under the Competition Act. The dissenting opinion proceeds to state that a trade association being able to operate independent of the competitive forces prevailing in the relevant market, is a dominant undertaking and its practices should be measured against the requirements of section 4. However, the CCI has consistently stated that a trade association is an association of enterprises and the agreements and practices fall within the contours of section 3(3) of the Competition Act[127].

IV. Agreement

The CCI in *Neeraj Malhotra v. Deutsche Post Bank*[128], has stated that in order to establish a finding of infringement under section 3(1) read with 3(3) of the Competition Act, the agreement must be established unequivocally.

In some of the cases analysed by us the CCI has clear evidence of an agreement that was led to the anti-competitive practices being followed by the Opposite Parties. For instance in the Varca case, the evidence relied on by the DG included MoUs, rules, regulations and guidelines of the Chemists & Druggists Association, Goa which contained restrictive clauses. The CCI held that these documents were reflective of the collective intent of the constituent members based upon which the association

126. See Eros International, FICCI - Multiplex Association of India , Varca Druggist, Uniglobe.

127. 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. Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

128. See CCI Case No. 05 of 2009

took decisions and members in turn give effect to the decisions by acting upon them. This in the majority opinion constituted an agreement amongst members. In others, for instance the Cement cartel case[129], the CCI has had to try to establish an agreement. In cases where there is no clear evidence of an agreement, in our view, the CCI has not been able to effectively discharge its burden of establishing one amongst the relevant opposite parties.

129. See *Cement Manufacturers' Association*.

8. Jurisprudential Trends - Section 4

Antitrust analysis of both dominance and abusive behaviors entails complex legal and economic considerations. The CCI orders discussed below suggests that the CCI has been called upon very early in its existence to determine complex antitrust issues arising from the conduct or enterprises engaged in very complex market. On the basis of our analysis of Section 4 cases, we have found following trend with respect to the abuse of dominance cases under the Competition Act.

I. Certainty and transparency in analyzing abuse of dominance cases

The Competition Act is drafted in fairly general terms, it only lays down the conduct which will be deemed abusive and provides a list of conditions that the CCI may consider while determining the issue of dominance and abuse of dominance. As discussed above, the application of Section 4 of the Competition Act on abuse of dominance involves the finding of a dominance position and abusive behavior of the dominant firm, usually associated with unfair or discriminatory pricing or exclusionary practices such as predatory pricing or rebates exclusive dealing or refusal to deal etc. However, the analysis of both dominance and abusive behaviors entails complex economic and legal issues. Competition authorities across the world have adopted a certain analysis pattern to determine the abuse of dominance and its abuse. Our analysis into the abuse of dominance orders handed down by the CCI shows that the CCI tends to stick to the international best practice to analyze Section 4 cases[130]. A certainty and transparency in the approach of CCI would enable firms to plan procompetitive business strategy within the frame work of the Competition Act.

II. Inconsistent standards of market determination

In the following sections we have discussed in detail about the importance of market definition in analyzing abuse of dominance cases. Definition of market helps in identifying the scope of competition in a market such as assessing market power of a firm, identification of relevant competitors. From an economic point of view the hypothetical monopolist test is the correct conceptual framework to define a relevant market as a first step in a competition analysis[131]. It allows to determine the competitive constraints a firm faces. Even when the necessary data to perform the hypothetical monopolist test are not available, this test provides a coherent conceptual framework to define the relevant market.

130. See the OECD report on policy roundtables on Abuse of dominance available on http://www.oecd.org/competition/abuse/2379408.pdf. The OECD report finds that Determining whether a firm has a dominant position is done with reference to a defined market. That is, the firm has a dominant position or is a monopoly or has power only with respect to a market. Having defined the relevant market(s), the firm's status is evaluated according to various criteria. "Market share" seems to be an almost universally applied criterion, although the details of measurement are undoubtedly different. A second almost universally applied criterion is an evaluation of barriers to entry. Holding a dominant position, jointly dominant position, a monopoly or a position of substantial market power is generally not abusive or illegal. However, some behaviour by such firms is. The definition of what is abusive, or at least what is illegal, should depend on the objective of the law.

131. See report of OECD Round table available at http://www.oecd.org/daf/competition/Marketdefinition2012.pdf

In the NSE Order, CCI has explained in sufficient detail non-application of SSNIP. Such data points for conducting SSNIP analysis was absent in the NSE matter considering that the CD market started functioning in 2008 and historically all the market players had adopted zero pricing policy to compete in the CD Market. However the DLF order was a fit case to apply the SSNIP test. Even in the absence of data forthcoming from the parties, the CCI may have taken services of market research firm to collect sample data from Gurgaon to analyze and conclude its discussion on the geographic market. The CCI on the contrary chose to dismiss the SSNIP test on purely theoretical ground. However the manner in which market analysis was conducted in the DLF cases indicates that the CCI has at least in the instance of DLF case has omitted to use a valuable tool of market analysis.

III. Analyzing abuse of dominance

We have discussed two orders of the CCI to analyze the approach taken by the CCI to establish the abuse of dominance. We found that in the NSE case the CCI had ignored the concept of networks effect. As has been explained in the minority opinion the market comprising the trading of CD Segment on stock exchange shows the sign of networks industry and the determination by the CCI that NSE was a dominant player in CD segment may actually have been false signals generated due to the unique characteristic of networks effect. There is not enough information available to conclude a trend in the orders issued by the CCI, however our case study of leading cases indicates that other than the broader heading of analysis pattern discussed in our first concluding part, the CCI may have been lacking consistency in applying the economic principles to analyze the abuse of dominance case.

IV. Reliance on EU v US Authority

This discussion is important because the CCI being a young agency often looks to other mature jurisdiction for guidance. This also helps in understanding the types of arguments that will persuade the CCI. Our analysis suggests that the CCI has placed great reliance on EU orders in determining cases. This trend may be primarily driven by the reason that section 4 is fashioned on Article 102 of TEFU and Article 102 differs from Section 2 of the Sherman Act[132]. Section 2 prohibits monopolization, attempts to monopolize, and conspiracies to monopolize, Article 102 broadly prohibits any abuse of a dominant position within the internal market or a substantial part of it and it identifies four categories of potential abuse, which include “limiting production, markets or technical development to the prejudice of consumers. As can be observed the wording of Section 4 is similar to Article 102 which may be one the reason that the CCI has placed increased reliance on the European Authorities.

132. Sherman Antitrust Act, 15 U.S.C. §§ 2 .

V. Analysis of the abuse of dominance cases under the Competition Act

As discussed above the application of Competition Act on abuse of dominant involves the finding of a dominance position and of an abusive behavior of the dominant firm, the analysis of dominance and abusive practice entails complex economic and business considerations. In this part we have focused our discussion on analyzing as to how the CCI has approached abuse of dominance in leading cases.

Typically, an analysis of abuse of dominance involves two distinct parts, determining the status of the firm or firms and then evaluating the behavior[133] This involves determining whether a firm is dominant or not with reference to a 'relevant market'. Relevant market has two components – (i) geographical market, (ii) product market. These aspects are discussed below. The mere finding of a dominance position is not anti-competitive. The test is whether such a dominant firm has used its position of strength in a manner that causes an AAE Competition.

'Relevant Market'

Delineation of the relevant market is germane to the analysis of the anti-competitive effects of a particular business conduct sought to be assessed for the purpose of the Competition Act. The process of defining the relevant market is primarily a process of identifying closely substitutable products and the geographical expanse within which such substitutable commodities compete with each other. The assessment of market power of an alleged dominant enterprise hinges on how the relevant market is defined. A narrow market will overstate the market power of an enterprise whereas broad definition of market will understate the market power.

A widely accepted test for determining the market is the application of a "hypothetical monopolist" test, otherwise commonly referred to as the "SSNIP" test (which refers to a small but significant non-transitory increase in price).

Looking at international jurisprudence on this matter it may be worthwhile to note that the DoJ and the FTC have jointly issued revised merger guidelines for assessing horizontal mergers (Horizontal Merger Guidelines).[134] The Horizontal Merger Guidelines define market exclusively for the purpose of analyzing horizontal mergers. The principle concern in horizontal merger analysis is increase in likelihood of confusion and also unilateral effects that might result in single firm price increases. The economic principles dealt in the guidelines serves equally well in analyzing abuse of dominance or monopoly. The European Union has also issued guidelines on the assessment of horizontal mergers under the

133. OECD Report on Abuse of Dominance and Monopolisation, 1996 OCDE/GD(96)131, available at http://www.oecd.org/dataoecd/0/61/2379408.pdf

134. Horizontal Merger Guidelines, 2010 available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf .

Council Regulation on the control of concentrations between undertakings[135] which serve a similar purpose.

Relevant Product Market

Competition Authorities in various countries use or adopt different definitions of the product market. Despite the lack of uniformity, the veneer that runs through the definitions is that the product market has the characteristic of interchangeability or substitutability of goods/services by the consumers/ purchasers[136].

The OECD Report on Abuse of Dominance and Monopolisation, 1996 notes that the definition of the relevant product market in abuse of dominance cases is likely to be based on functional characteristics of a product and related evidence of consumer behaviour. This may include evidence such as the physical characteristics of the product, the uses to which the products are put, and evidence about behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices.

The US Horizontal Merger Guidelines employ the Hypothetical Monopolist Test (HMT) to determine whether a group of product constitutes a relevant product market[137]. The test requires that a hypothetical profit-maximizing firm, not subject to price regulation, involving only present and future seller of those products (hypothetical monopolist) would likely impose at least a small but significant and non-transitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms[138]. For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing HMT[139].

The SSNIP analysis ordinarily starts with prevailing price or prices that are assumed to prevail absent the anti-competitive practice. This most often involves increase of five percent, but that number could vary depending on the nature of the industry. Econometric techniques are applied to determine whether such a price increase would be profitable by estimating the number of sales that would be lost in response to such price increase. In making this estimate, historical evidence, such as how customers have shifted their purchase in response to price change, information from actual buyers, and the cost of making switch to other products is also considered.

135. (2004/C 31/03) available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PD

136. Relevant Market In Competition Case Analyses by Dr.S Chakravarthy available at http://www.circ.in/pdf/Relevant_Market-In-Competition-Case-Analyses.pdf

137. See Horizontal Meger Guideline, 2010 available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

138. *Ibid*

139. *Ibid*

Relevant Geographic Market

Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or occasionally even global, depending upon the facts in each case. The principle of geographic market is similar to that of product market. The geographic market is defined by purchasers' views of the substitutability or interchangeability of products made or sold at various locations[140].

Geographic market definition under the US Horizontal Merger Guidelines follows a similar principle to that laid down in the product market definition. In addition the US Horizontal Merger Guidelines cite factors such as transport cost, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation and service availability to be taken into consideration when determining the geographical market. Further a firm's ability to price discriminate based on customer location may justify the recognition of smaller markets.

When it comes to the SSNIP test jurisprudence suggests that it is not a full proof test, it is often subject to Cellophane Fallacy. The term Cellophane Fallacy arises from the question of what is the base price level from which SSNIP should be applied. The Du Pont case[141] suffered from this fallacy, where the SSNIP test concluded that there was no market power. The fallacy pertained to a product named cellophane and the reason for the fallacy was that since market power was already being exercised by the monopoly firm at the given price level which was not identified by the SSNIP test. Therefore, if the prices are already over and above the competitive level, then SSNIP test fails as was the case of Cellophane in Du Pont.

We have analysed 3 significant cases dealt by the CCI since its inception and have commented on the trends that can be observed with in such cases. The cases analysed by us are as follows:

i. MCX Stock Exchange Ltd. Vs. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd decided on June 3, 2011[142] (NSE Case)

MCX Stock Exchange Ltd. (MCX-SX), a public limited company and a recognized stock exchange for trading in Currency Derivatives (CD) segment filed the information Under Section 19(1)(a) of the Act against the National Stock Exchange India Ltd. (NSE), Dot Ex International Ltd. (Dot Ex) and Omnesys Technologies Pvt. Ltd. (Omnesys), alleging abuse of dominant position in the market for stock exchange services in India Under Section 4 of the Competition Act.

140. Relevant Market In Competition Case Analyses by Dr.S Chakravarthy available at http://www.circ.in/pdf/Relevant_Market-In-Competition-Case-Analyses.pdf (last visited on April 2, 2013)

141. *U.S. v. E. I.* du Pont 351 U.S. 377, 76 S.Ct. 994,

142. *MCX Stock Exchange Ltd. Vs. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd. Case No. 13/2009 Decided On June 3, 2011.*

It was alleged by the informant that NSE had waived transaction fees, the principal source of revenue for stock exchanges, in its Currency Derivatives segment. Further, it was alleged that NSE had employed other subsidising activities in the Currency Derivatives segment.

CCI concluded that there was a clear intention on the part of NSE to eliminate competitors in the relevant market and also considering the fact that Competition Act is a new legislation, it would suffice if penalty at the rate of 5% of the average turnover was levied. The CCI imposed a penalty of Rs. 55.5 crores within 30 days of the date of receipt of the order which is 5% of the average of its 3 years' annual turnover.

ii. Kapoor Glass Private Limited Vs.Schott Glass India Private Limited decided on March 29, 2012[143] (Kapoor Glass)

The informant alleged certain anticompetitive acts by Schott Glass India Private Limited ("**Schott Glass India**") in the market of 'neutral USP-1 borosilicate glass tubes' and 'glass ampoules' made out of such glass tubes in India.

The informant has alleged that the practices of the OP of charging unfair prices, granting quantity discounts and loyalty rebates were inconsistent with the provisions of Section 4 (2) (a) of the Competition Act. Further, hiring of the informant's employees in order to strengthen its market share in the downstream market for glass ampoules was in violation of the Section 4 (2) (e) of the Competition Act. It was also alleged that its practice of refusal to deal with glass ampoule manufactures may be inconsistent with the provisions of Section 3 (4) of the Competition Act.

The CCI found that Scott Glass India has contravened various provisions of section 4 of the Competition Act and its acts and conduct had adversely affected competition on the relevant market(s) delineated in the instant case. Due to unfair and dissimilar discounts of Scott Glass India, the converters in the downstream market had been impacted adversely and their margins had also declined. As a dominant player in the market, there was special onus on Scott Glass India to ensure fair competition in the market. The CCI imposed a penalty at a rate of 4% on the average of three years turnover of Scott Glass India.

iii. Belaire Owner's Association v/s. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana decided on August 12, 2011[144] ("DLF")

Belaire Owners' Association filed this complaint against three Respondents namely, DLF Limited, HUDA and the Department of Town and Country Planning, Haryana. The informants alleged that DLF

143. *Kapoor Glass V/S Schott Glass India Pvt Ltd* Case No. 22 of 2010 Decided On: March 29, 2012.

144. *Belaire Owner's Association Vs. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana* Case No. 19 of 2010 Decided On: August 12, 2011.

Ltd had abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the Housing Complex 'the Belaire', which has serious adverse effects and ramifications on the rights of the allottees.

The CCI concluded that DLF Ltd. was in contravention of Section 4(2)(a) (i) of the Competition Act in particular on account of the size and resources that DLF Ltd. had and the duration for which the abuse had continued leading to great advantages for DLF Ltd. and immense disadvantages to consumers. The CCI imposed a penalty at the rate of 7% of the average of the turnover for the last three preceding financial years on DLF Ltd.

For any violation of Section 4 of the Competition Act, the following components are key issues of determination:

i. What is the 'relevant market'?
ii. Is the firm a dominant undertaking?
iii. If the response to the query (ii) is in the affirmative, do the actions of the dominant undertaking constitute an abuse of its dominance?

We have analysed each of these aspects in the case studies below in the context of the 3 decisions referred to above.

I. Case Study-I

Determination Of Market

In this first part of our case study we will discuss two orders of the CCI, namely the DLF Case and MCX Case to analyze the determination of market by the CCI.

i. DLF Case

The CCI while defining the relevant market in this case first established that that DLF was providing services of a developer/builder as defined under the definition of "service" provided under section 2(u) of the Competition Act. Once the nature of service was determined, the CCI next moved to define the relevant product and geographic market. The CCI noted from the investigation report submitted by the DG Investigation that that the nature of service being provided by DLF was described as services of developer / builder in respect of "high-end" residential building in Gurgaon. The relevant market definition had two important components "high-end" and "residential". "Gurgaon" was defined as the relevant "geographic market".

Terms like "high-end" or "affordable" are relatively subjective and therefore it was felt necessary to

establish a clear and logical interpretation of the term "high-end". The CCI in its order noted that "high-end" is a complex mix of factors such as size, reputation of the location, characteristics of neighborhood, quality of construction etc. However, the most significant characteristic of a "high-end" has to be the capacity of the buyer to pay the price for buying the "high-end" residential apartment.

The CCI after it defined the relevant product market examined the relevant geographic market and defined Gurgaon as relevant geographic market. The CCI was of the view that a decision to purchase a high-end apartment in Gurgaon is not substitutable by a decision to purchase any apartment in any other geographical location because Gurgaon possess certain unique geographical characteristics such as its proximity to Delhi, proximity to Airports and a distinct brand image. The CCI was of the view that a decision to fix a residence depends on several factors ranging from occupation to children's education, family, friends, surroundings, amenities, quality of life etc. The CCI also observed that a residential property is by nature immovable, and the preference of residential property is generally not interchangeable or substitutable therefore a small, 5 % increase in the price of an apartment in Gurgaon would not make the person shift his preference to other location.

ii. Analysis of CCI's determination of relevant market in the DLF Case

It is a settled principle of competition law that in order to find abuse of dominant position a three step test is undertaken. The first step is to determine the relevant market, the second step is to find out dominant position in the relevant market and the third and final step is to establish the abuse of dominant position. Therefore the moment the relevant market definition goes wrong the rest of the steps are bound to go wrong as well.

The CCI's starting point in defining the markets in this case is similar to the approach that the US or EU authorities would use which is to look at publicly available information, industry reports and reports submitted by the parties themselves[145]. However the point at which the market definition analysis of the CCI falls short is that CCI has probably gone no further than collection of data. One would expect that the CCI would conduct rigorous economic analysis to test the various market reports[146]. We make this statement because it is difficult to say from a perusal of the order of the CCI on the DLF Case as to whether dehors the data referred to in the order, whether the DG or the CCI conducted a rigorous economic analysis to determine the relevant market.

As discussed above it is also a well settled principle of competition law that the market analysis starts with conducting SSNIP test. Even when the necessary data to perform the hypothetical monopolist test are not available, this test provides a coherent conceptual framework to define the relevant market[147]. However in this DLFcase the CCI convinced itself that the residential property in Gurgaon was

145. http://www.justice.gov/atr/public/reports/236681.pdf

146. See ICN's recommended practice dominance/substantial market power analysis pursuant to unilateral conduct laws. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf

147. OECD Policy Roundtables – Market Definition available on http://www.oecd.org/daf/competition/Marketdefinition2012.pdf

not substitutable and despite applying the SSNIP Test the buyers will not move from Gurgaon to other peripheral locations in Delhi such as to Vasant Kunj. The CCI without conducting a market survey and SSNIP analysis made a case that a 5% increase will not make the people shift from the relevant geographic market determined in this case.

As stated above the definition 'relevant market' *inter alia* is precursor to meaningfully identify the scope of competition in a market. In abuse of dominance cases the primary goal of market definition is to determine the existence of market power, which is the ability of the firm to keep the price above the long-run competitive level. Market definition also facilitates the identification of competitors in the relevant market and identifying other relevant competition issues such as potential or actual entry barriers. A wrong determination of market is fatal to analyzing and determining the abuse of dominance by an enterprise.

Had CCI done a more rigorous economic analysis of the market, CCI could have come to a different conclusion, in which case DLF may not have been perceived to be dominant and consequently the provisions of Section 4 may not have been applicable.

iii. NSE Case

As stated above the informant MCX alleged that the Opposite Party NSE abused its dominant position in the relevant market. MCX is a stock exchange recognized by the Securities and Exchange Board of India (SEBI). MCX has regulatory approvals to operate in currency derivatives. NSE was incorporated in 1992 and was recognized as a Stock exchange in 1993. DG identified that NSE runs operations in the following relevant product market segments: (a) equity, (b) equity futures and options (F&O) (c) debt segment, (d) currency derivative (CD) and (e) over the counter (OTC) market for trades in foreign currency. However the CCI identified the relevant market for this case to be stock exchange services in respect of *currency derivatives'.*

As per the CCI in terms of the different products traded on the exchanges, a clear differentiation can be drawn between equity, F&O and WDM segments in terms of underlying assets. To illustrate the CD market is a futures derivative market and underlying securities for CDs are currencies. The OTC market includes forwards, swaps and options for hedging currency risk. The CCI contended that though CD and OTC could be considered as similar products, they are vastly different products in terms of their respective characteristic as well as participants. OTC segment is different in terms of settlement on maturity, settlement period, counter party risk, size of market lot and participation. Whereas the CD segment is primarily for speculators of currency values and short term hedgers who want to cover their economic exposure but require greater liquidity.

The CCI in the absence of historic data prices found it unnecessary to dive into HMT or SSNIP test, The CCI found that the CD product segment did not exist prior to August, 2008 and secondly since the inception of the CD product market the exchanges did not charge any transaction fees, data feed

fees etc. These fees may be said to constitute the price for product, and have not been charged by any market player in the CD segment. In this case, CCI further found that in the absence of such data, an attempt to apply SSNIP test would be misuse of an econometric tool, which in itself, is not error-proof. The proportion of transaction value that a broker pays as transaction fees and accessories fees is so small and insignificant that it would have practically no bearing on substitutability effect in the SSNIP analysis.

iv. Analysis of market definition in NSE Case

As discussed above the SSNIP test approach to delineating markets examines whether a hypothetical monopolist would be able to raise prices and increase profits as a result. This question is examined primarily by estimating own-price elasticity of demand of the collection of products in question. Own-price elasticity of demand measures the extent to which revenue is lost when price of products in question is increased generally by 5-10%. The accurate measurement of the extent of revenue lost in response to price increase requires the use of econometric analysis.

Econometric analysis is dependent on the use of historical data relating to the products in question to isolate the impact of different factors on a given variable[148]. Specifically, a dependent variable, such as the demand for a product, is assumed to be a function of several 'independent variables'. In the absence of data of sufficient quality, the impact of each of these independent variables on the dependent variable cannot be isolated[149].

The CCI had rightly pointed out in its order that in the market segment comprising CD the historical data required to delve into SSNIP test was absent. Since the inception of the CD product market the exchanges did not charge any transaction fees. Therefore in absence of credible price related data the CCI was correct in its approach to not rely on SSNIP analysis.

The CCI on the basis of data independently collected by the DG and submission made by the parties was able to show that CD segment as a product cannot be substitutable by equity and F&O product segment. The CCI found that CD segment underlines currencies and the related derivatives; it is traded on the platform of derivatives which is a different market from the assets platform in which the equity and F&O product is traded. Technical, infrastructural or financial capabilities of any exchange in a particular product segment, has no bearing to determination of supply substitutability between the different product segments.

The CCI in its analysis had also considered the 2008 report of RBI-SEBI Standing Technical Committee on exchange trade currency futures. The report had formed the basis to start a new segment of capital market in India i.e. the exchange traded CD segment:

148. See An Introduction to Quantitative Techniques in Competition Analysis available at http://www.crai.com/ecp/assets/quantitative_techniques.pdf

149. ibid

"Exchange traded futures as compared to OTC forwards serve the same economic purpose, yet differ in fundamental ways... The counter party risk in a future contract is further eliminated by the presence of Clearing Corporation. Further in an exchange traded scenario where the market lot is fixed at a much lesser size than the OTC market, equitable opportunity is provided to all classes of investors whether large or small to participate in the futures market..."

The said report advocated a clear separation of CD segment from other segments in any recognized exchange where other securities are also traded.

II. Case Study – II

Assessment Of Dominance And Abuse

i. MCX Stock Exchange v/s National Stock Exchange

This was one of the earliest and amongst the most complicated cases that was brought before the CCI in its little over 3 year existence. The informants alleged that the opposite parties bused their dominant position in respect of the following four measures contravening the section 4 of the Act:

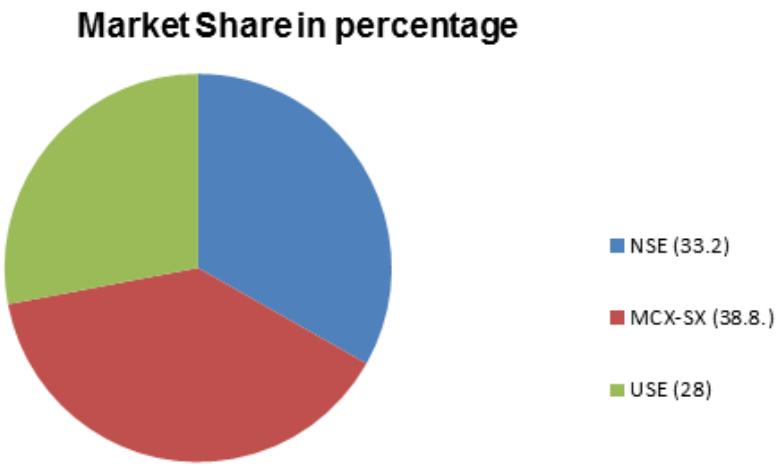
i. Transaction fee waiver by NSE;
ii. Admission fee and deposit level waivers;
iii. Data feed fee waiver; and
iv. Exclusionary denial of "integrated market watch" facility.

The CCI found that –

i. NSE has abused its dominant position in terms of Section 4(2)(a)(ii) and 4(2)(e) of the Competition Act.
ii. The intention of NSE was to acquire a dominant position in the CD segment by cross subsidizing this segment of business from the other segments where it enjoyed virtual monopoly.
iii. It also camouflaged its intentions by not maintaining separate accounts for the CD segments.
vi NSE created a facade of the nascent position of the market for not charging any fees on account of transactions in the C.D. segment. Competitors with small pockets would be thrown out of the market as they follow the zero transaction cost method adopted by the NSE and therefore in the long run they will incur huge losses".

ii. Existence of dominance

The CCI order identifies only three market players, NSE, MCX and USE in the relevant market. The report submitted by NSE indicates following market share of each of the market players. It is important to note here that NSE started with 100% market share in August, 2008.



According to the CCI in the Indian context, dominant position is a "position of strength"; such strength should enable it to operate independently of the other competitive forces in the market or to affect its competitors or the relevant market itself in its favour.

The evaluation of this 'strength' is to be done not merely on the basis of the market share. Evaluation should also consider host of other factors such as size and importance of competitors, economic power of the enterprises, entry barriers etc., as provided in section 19 (4) of the Act. The CCI is required to take a holistic approach while inquiring into the dominant position of any enterprise. In context with the analysis of NSE's dominant position, the CCI observes that –

"it would be wrong to conclude that NSE does not enjoy such a position of strength as one of the only three players in the relevant market delineated as above... We can first ascertain whether NSE has a position of strength which enables it to affect MCX-SX as a competitor in its favour".

1) Zero Pricing Policy

The CCI questioned the zero pricing policy of NSE for such a long period considering the objective of any business is to make profit, CCI finds that "No enterprise would spend an eternity on selfless development of any market without any prospects of making profit. The greater the financial and commercial strength of an enterprise, the longer it can wait and the greater risks it can take... It cannot be argued that the capacity of NSE to defer profits or to bear long term risk of possible market failure is lesser than that of MCX-SX in the relevant market. This is clearly a position of strength".

2) NSE's knowledge of the effect of zero pricing policy

The CCI, having not found any acceptable justification for why a professionally managed enterprise like NSE would not want to keep any track of the commercial viability of its operations or does not have any concerns about the desire of its shareholders to earn higher dividends, the CCI concluded the following that.

i. It was unthinkable that a professionally managed modern enterprise can afford such financial complacency in the face of competition unless

ii. It was it is part of a bigger strategy of waiting for the competition to die out.

iii. This complacence can only point to awareness of its own strength and the realisation that sooner or later, it would be possible to start generating profits from the business, once the competition is sufficiently reduced.

3) Structure of Stock Exchange business in India

The CCI also looked into the structure and functioning of the stock exchanges in India since independence. It is a historical fact that post-independence several stock exchanges had gone out of business. In this context the CCI observed that had NSE not gotten the undeniable advantages arising out of its operations in other markets, it would not have been able to or would not have wanted to charge zero price for providing stock exchange services for the Currency Derivatives market. In this regard, MCX-SX, or indeed any other current or future competitor that does not have similar advantages is clearly in a weaker position.

After analyzing these three points the CCI concluded that NSE enjoyed a position of strength in the relevant market which enabled it to affect its competitors in its favour. *"To conclude otherwise would not only be turning a blind eye to the facts available but also to the provisions of the Competition Act and to the intent and spirit of this economic legislation."*

iii. Abuse of Dominance by NSE

The CCI having concluded that NSE enjoyed a position of strength found that NSE found following violations of the Section 4 of the Competition Act –

i. Violation of Section 4 (2) (ii) of the Competition Act- waivers of transaction fees, admission fees or data feed fee waiver because the zero price policy in the relevant market is unfair

Section 4 (2) (a) (ii) deals with unfair or discriminatory price in purchase or sale (including predatory

price) of goods or service. The CCI finds that from the wording of the provisions, it can be concluded that predatory price" is considered as a subset of "unfair price". Interestingly the term 'unfair' is not defined in the Competition Act. The CCI therefore observes that the fairness has to be determined from case to case basis. The CCI lays down that 'unfairness' will have to be determined in relation to a customer or in relation to a competitor. CCI concludes that in the context of this case, unfairness of pricing cannot be determined by selecting cost benchmark. Since MCX-SX has no other source of income, the NSE's zero price policy cannot be termed anything but unfair as far as the informant is concerned.

ii. Violation of Section Sections 4 (2) (b) (i) and (ii); 4 (2) (c) and 4 (2) (d) - denying APIC to ODIN and putting FTIL on watch list

The CCI on this issue found that software applications such as NOW and ODIN are essential facilities. The trading on stock exchanges is being done extensively on electronic applications. There is an aftermarket for market watch and data feed services. Since ODIN and NOW are competing in the aftermarket, the CCI concluded that denial of APIC for CD segment foreclose competition of electronic platform for the CD segment for NSE traded derivatives and was tantamount to exclusionary conduct in the main relevant market.

iii. Violation of Section 4 (2) (e) – Use of the position of strength in the non CD segment to protect its position in the CD segment.

The CCI identified two distinct relevant markets to examine the provisions of section 4 (2) (e) to assess the charge of NSE leveraging its dominant position in one relevant market to enter into, or protect, another relevant market. The CCI observed that the Act doesn't indicate that there has to be a high degree of associational link between the two markets being considered for this sub section because competition concerns are much higher in India due to historical lack of competition policy and regulation. The CCI found in the present case that the relevant market for the clauses (a) to (d) of section 4 (2) is the stock exchange services for currency derivatives in India, whereas the relevant market for clause (e) of the section 4 (2) is the stock exchange services for the non CD segment.

The CCI concluded that *"the two relevant markets have associational links and that NSE has used its position of strength in the non CD segment to protect its position in the CD segment. Further the Denial of APIC for ODIN and distribution of NOW for free are clear acts of protecting its position in the CD segment and are possible due to its position of strength in the non CD segment".*

iv. Analysis of the CCI's Assessment of Dominance and abuse

While analyzing this decision of CCI, we will be drawing liberally from the dissenting opinion in this matter.[150] The dissenting opinion offers very different rationale which is premised on network economics

150. Dissenting opinion rendered by Dr. Geeta Gouri, Member Competition Commission of India.

to establish that NSE didn't abuse its dominant position in the market.

Network industries form a large, significant, and frequently fast-growing part of the world economy.[151] A network industry comprises a market in which the consumption of goods or services by one consumer has a positive impact on the value of goods or service consumed by another consumer. To illustrate a telephone holds more value to an individual consumer if other individual also have phones. The more people who have them, the greater the number of possible phone calls one can make, and the more valuable telephones become.

The crucial defining feature of networks is the complementarity between the various nodes and links[152]. A common and defining feature of network industries is the fact that they exhibit increasing returns to scale in consumption, commonly called network effects.[153] Network industries exhibit increasing returns to scale in production, unit cost decreases with increasing scale of production and often incremental cost is negligible[154].

The minority order was of the opinion that Stock Exchange Industry exhibits a strong characteristic of network effect. As discussed above in a network industry the value to the users increases with increase in the number of its users. Consumers are willing to pay a higher price for the value they derive from operating in a robust network. In a financial stock exchange the externality that arises in the act of exchanging assets or goods is of critical importance in a stock exchange.

v. Why NSE may not be a dominant player

From the very beginning of the CD Market segment, NSE enjoyed 100% market share. Whereas the market share of the 3 D Market segment player in 2010 stood at 33,17%, 38,82% and 28,01% respectively for NSE, MCX-SX and USE. The minority opinion rightly points that the minority members *"are not aware of any case in the history of jurisprudence globally, where a firm's market share has been reduced drastically (to less than one third in this case) in a relatively short period (two year in this case), and yet it has been found to be dominant by a competition regulator or a court".* Three way split in market share clearly indicates that there is no major entry barrier as evidenced from the entry of MCX-SX and later USE in a short period of time. The market share of the CD segment confirms fairly the oligopolistic characteristic in network industry. Perhaps the majority order may have confused the evidence of network externalities as an evidence of dominance itself and condemned NSE for being the dominant player.

151. Competition Policy In Network Industries: An Introduction ; Nicholas Economides; available at http://www.ftc.gov/be/seminardocs/economides.pdf
152. *Ibid.*
153. *Ibid.*
154. *Ibid.*

vi. Why NSE may not have abused its dominant position

In order to understand as to whether or not the zero price policy adopted by NSE resulted in directly or indirectly imposition of unfair or discriminatory price in sale of services, we have to first analyze the concept of predatory price or unfair price under the Competition Act.

Predatory pricing is on the one hand deemed as an instrument of abuse whereas on the other hand it brings benefit to consumers by lowering the price. This dilemma is further intensified because predatory price abuse is particularly hard to distinguish from vigorous price competition between the market players.

Globally there are two major schools of thought on this matter. The US is driven by the recoupment theory to establish monopolization.[155] The recoupment theory in essence means that there should exist a *dangerous probability, or a reasonable prospect, that the predator can later raise price sufficient to recoup its investment in below cost pricing.* The minority opinion in this case has also touched upon the proof of recoupment in predatory pricing scenario. However evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. In order to establish abuse it should be clearly proved that the predator must have a reasonable expectation of recovering in the form of later realizing monopoly profits of an amount which is relying in excess of the loss suffered during the predation period[156].

In the EU[157], a detailed cost/price analysis is necessary to prove predation, and prices below average variable cost will be regarded as abusive. Prices below the average total cost, but above average variable cost, may be abusive only if it is proved that the intent of dominant undertaking was to eliminate a competitor from the relevant market. EU rule as laid down in AKZO stands in contrast with the recoupment theory laid down by US Supreme Court, where generally a price above AVC is lawful without condition. The ECJ in Tetra Pack II[158] further confirmed that recoupment of losses is not necessary to establish predatory behavior.[159]

Thus, while in the US the probability of recoupment has to be established to conclude predatory intent, in EU, it is one of the factors, which could be examined to prove abuse.[160]

Surprisingly the main CCI order has not gone into the question of predatory pricing, probably because of difficulty in determining various cost factors in the absence of credible price data. Even the minor-

155. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986)

156. The jurisprudence referred to in this paragraph finds mention in the dissenting opinion of the NSE Case

157. *AKZO Chemie BV v Commission* [1991] ECR I-3359;

158. *Tetra Pak International SA v Commission* [1994] ECR II-00755.

159. The jurisprudence referred to in this paragraph finds mention in the dissenting opinion of the NSE Case

160. Dissenting opinion of in NSE.

ity order has limited itself to postulating on the competing theories of predatory price without actually going into analyzing the exclusionary effect of the below price strategy of NSE

The dissenting opinion in the NSE Case describes in length the 'network industry' and its unique attributes'. The dissenting opinion states that *"in such fluid and dynamic framework, anticipating or adjudicating on anticompetitive behavior carries the risk of being arbitrary defeating the purpose of intervention. Competition regulators have to keep these developments in view, while considering cases where they may be relevant. It is with these concerns that the present investigation".* It is in this context that the dissenting opinion concluded that the zero pricing policy that the NSE adopted was a function of the market dynamics and could not be attributed to an 'abuse' of its position.

In the context of the NSE case and our discussion above about the price dynamics in the networks industry it is easy to mistake zero price in a network industry for predatory pricing. However taking into account the market share of CD segment it is amply clear that vigorous competition in this segment was present. Higher prices in after-market would again attract new players which are clearly demonstrated by easy entry of USE and MCX-SX forcing NSE to continue with zero pricing despite NSE steadily losing the market share to USE and MCX. In such situation the CCI shouldn't have deprive the consumer of zero prices in the market.

vii. Kapoor Glass

Schott Glass India Private Ltd ("**Schott India**") is a subsidiary of Schott Glaswerke Beteilugungs GmbH a German multinational company and a well-known manufacturer of borosilicate tube glass. Schott India entered into a joint venture with Kasiha Manufacturing Company (Kaisha). Kasiha is a downstream ampoule manufacturer. Schott India created a downstream link through the joint venture. Schott India also sold to other ampule manufacturers. FDA approved glass vials is an important factor. The discounts provided by Schott were the subject of inquiry before the CCI on the aspect of whether price discrimination is anti-competitive.

viii. Existence of Dominance

The Opposite Party Schott India operates in both the upstream relevant markets, namely, 'Neutral Clear USP-I borosilicate glass tubes in India' and 'Neutral amber USP-I borosilicate glass tubes in India'.

Market Share

In the relevant market for 'Neutral amber USP-I borosilicate glass tubes in India ', as per the submissions of the Opposite Party, Schott India's market share in India was 93% in the product known as NGA range of tubes and 87% in the branded Fiolax range in 2009-10. In the relevant market of 'Neutral Clear USP-I borosilicate glass tubes in India', the OP's market share, as per their submissions, stood at

42% in 2009-10, moving up from 38% in 2007-08 for the NGC range. The market share data compiled by the DG, which includes all the sub categories of borosilicate glass tubes produced by Schott India i.e., combining both the relevant markets discussed above, showed that Schott India's share in the Indian market for clear and amber tubes including both Fiolax and NGC/NGA varieties in terms of sales value had declined marginally from 83% in 2007-08 to 81% in 2009-10. The figures demonstrated that the Opposite Party had the largest market share in each of the two relevant markets separately 61.49% in terms of quantity and 81.17% in terms of value in the broader market of 'neutral USP -I borosilicate glass tubes' in India; the nearest individual competitor's share in the broader market being 13.09% and 7.81% respectively.

Market shares is an important factor in assessing market power of an enterprise, though mere numbers cannot in themselves determine dominance. The larger the market share, the more likely it is that the undertaking in question is in a dominant position. The ECJ stated in Hoffman-La Roche[161]:

"Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.

This passage from Hoffman-La Roche was also referred to by the ECJ in the AKZO v. CCI case[162] and the ECJ found that in the absence of evidence indicating lack of dominance, a 50% market share could be considered to presume dominance. In the Virgin/British Airways[163], case British Airways was held to be in a dominant position in the UK air travel agency services market with a market share of 39.7%. However the Hoffman-La Roche court found that a 43% market share was not enough to establish dominance.

In the light of international jurisprudence on this issue, it can be assumed that the CCI was correct in its approach to analyze the market share of industry players to determine the market power of firms and a significantly high market share of Schott India in the relevant market definitely indicated that Schott India was a dominant player.

ix. Entry Barriers

Heavy capital requirement, huge running cost, high gestation period and economies of scale in the production of the upstream relevant products were among the entry barriers identified by the DG. The requirement of stability test by the Pharma companies' acted as another entry deterrent, DG further added. Given the growing demand and market size, these factors did not render a profitable entry into the market permanently infeasible; however they capable of erecting temporary entry parries and

161. *Hoffmann La Roche v. Commission,* 85/76, [1979] E.C.R.-461

162. *AKZO Chemie BV v Commission* [1991] ECR I-3359;

163. *Virgin/British Airways,* (2000) O.J. L30/1

delaying entry. For imports, the import duty of 10% acts as a significant entry constraint.

For antitrust purpose, a barrier to entry is some factor in market that permits firms already in market to earn monopoly profit while deterring outsiders from coming in.[164]

It would only be in exceptional circumstances that a company enjoying high market shares such as Schott India in this case may not be in a position to exert market power. On the other hand it is also unlikely that an enterprise with high market shares will have the possibility of sustaining supra-competitive prices in the long run if the entry barriers are low, because any price increase could be subject to competitive reaction by the remaining or potential players on the relevant market. The fact that a company holds a large market share would not be sufficient for a finding of dominance. In those cases, the high market shares could be simply indicative of a "superior skill, foresight and industry" of the company.[165] The CCI in this case has found several factors such as heavy capital requirement, huge running cost, high gestation period and economies of scale in the production of the upstream relevant product coupled with regulatory barrier of entry indicates that the relevant market has very high barriers of entry.

x. Countervailing Buying Power

The downstream relevant markets, leaving aside the JV of the OP Schott-Kaisha, consists of several small manufacturers who individually lack the requisite size, importance or financial strength to exercise countervailing buying power on the OP. Collective consideration of the factors reviewed in the foregoing paragraphs, in the light of the definition of dominant position as provided in the Act establishes the dominance of Schott Glass India in the upstream relevant markets of 'neutral clear USP -1 borosilicate glass tubes in India' and 'neutral amber USP -1 borosilicate glass tubes in India'.

Buyer power is understood as the ability of one or more buyers, to obtain favorable purchasing terms from their suppliers. Buyer power is an important aspect in antitrust analysis, because powerful buyers may discipline the pricing policy of powerful sellers, thus creating a 'balance of power' on the market concerned. The EC in the Knorr-Bremse[166] case approved concentrations with a market share of 80 per cent due to countervailing factors such as, inter alia, a highly concentrated demand side. The CCI has been able to show in this case that other than Schott India- Kaisha JV, the downstream market has only small players, who are not able to exert countervailing buyer power on Schott India.

Collective consideration of the factors reviewed in the foregoing paragraphs and in the light of international best practice on determining the dominant position the CCI had correctly determined the dominance of Schott India in both upstream relevant markets of 'neutral clear USP -1 borosilicate

164. *Joe s Bain, Barriers to competition: Their Character and consequence.*

165. *United States v. Grinnell Corp.,* 384 U.S. 563 (1966)

166. Knorr-Bremse / Allied Signal Case No IV/M.337

glass tubes' and 'neutral amber USP -1 borosilicate glass tubes'.

xi. Assessment of abuse of dominance by Schott India

The informant, Kapoor Glass Industries, allegation pertaining to imposition of unfair/discriminatory price in sale of glass tubes was directed at the two kinds of discounts offered by Schott India:

i. volume/target discount; and

ii. loyalty discount.

Price discrimination was directed to both the upstream and downstream markets.

The majority opinion of the CCI inter alia observed that Schott Kaisha and other converters are not similarly placed and since Schott Kaisha-JV is its major customer, it is giving more discounts to it as an incentive. The CCI further observed that giving favourable discount to a customer who is providing more business may not be anti-competitive provided there is no harm caused to competition in the market. In the instant case CCI found that Schott India was charging different prices to different customers for the same and equivalent product in terms of quality and other characteristics. The price of tubes for the Schott Kaisha JV was fixed under long term tubing supply agreement by Schott India. Due to this arrangement, Schott Kaisha JV will always be getting price benefits over other converters even if it does not get any target or functional discount. Therefore, dissimilar conditions of sales have been imposed by Schott India for equivalent transactions between JV and other converters. In addition to price benefit, Schott India is not only giving enhanced quantum of discount to the group JV in comparison with the other converters, but is also applying dissimilar conditions for giving such discounts. All these factors are giving competitive edge to Schott JV over other competitors in the downstream market which is reflected in their declining profit margins. The margins of other converters in downstream market vis-à-vis the Schott JV have also gone down considerably over the years.

It is generally accepted that discounting practices are often pro-competitive, efficiency enhancing, or at worst benign, however under certain circumstances they can prevent entry of equally efficient competitors or force them from the market.[167] These effects depend on three factors that must be present[168]:

i. the discounting firm must have a dominant position in at least one market,

ii. there must be economies of scale in the competitive markets, and

iii. the discounting practice must affect a sufficient volume of sales so as to deprive rivals of economies of scale.

167. Bundled and Loyalty Discounts And Rebates, DAF/COMP(2008)29, December 2, 2008, available at http://www.oecd.org/competition/abuse/41772877.pdf

168. *Ibid.*

Schott India is a dominant player in the upstream market. Schott India in its submission made to the DG didn't contest this fact. Even in the down-stream market Schott India is a dominant player along with its JV Partner. While analyzing the entry barrier the DG has also concluded that economies of scale in the production of the upstream relevant products are among the entry barriers. The information relating to the volume of sales is confidential information therefore we cannot draw conclusion on these issues. However on the remaining two issues the fact pattern of Schott India perfectly fits into the condition that OECD in its report has declared to be anti-competitive. We are also of the view that in this case CCI has taken a correct approach to conclude that Schott India is abusing its dominant position by offering loyalty or volume discount.

9. International Trends in Antitrust / Competition Law and what Indian Companies should be aware of while doing business globally.

This chapter analyses the major developments in US and EU competition / anti-trust law in the last few years. In this section we provide an overview of the major developments in both these jurisdictions and analyse what we in India can learn from such developments.

I. International Cartels

Prosecuting iternational cartel offenses has been the priority for both the EU and the US. In the USA, the DoJ has been particularly active in prosecuting cartels with an international dimension. Most of the DOJ's investigations have been of suspected international cartel offenses and increasingly defendants are foreign companies. With most manufacturing having moved outside of USA, chiefly to Asia, the DOJ has been aggressive in extending the global coverage of US cartel enforcement[169]. Also, there has been a marked increase in the both the fines being imposed as well as the length of the prison terms.

Perhaps one of the most significant developments has been winning a jury trial against a foreign defendant accused of criminal price fixing. On March 13, 2012, a federal jury in the Northern District of California[170] determined that AU Optronics (AUO), a Taiwanese manufacturer of thin-film transistor liquid crystal display (TFT-LCD) panels, an American subsidiary of AUO and two senior AUO executives were all guilty of price-fixing. This trial stems from an investigation into suspected international cartel activity in the TFT–LCD industry which concentrated on AUO, Samsung Electronics Co. Ltd., LG Display Co. Ltd., Sharp Corp., Chunghwa Picture Tubes Ltd., Chi Mei Optoelectronics and HannStar Display Corp. Samsung triggered the investigation by informing the DOJ about the price-fixing conspiracy.

LG Philips, Sharp, Chunghwa, Chi Mei, Hannstar agreed to plead guilty and to pay fines. Some of the executives of these companies also agreed to plead guilty and serve prison terms. AUO is a Taiwanese company and is one of the world's leading manufacturers of TFT-LCD panels. However, AUO decided to contest the Antitrust Division's case.

The Division alleged that, from 2001 to 2006, the defendants conspired at more than 60 meetings (called "Crystal Meetings", most of which took place in Taiwan) with competitors to fix the prices of

169. US DOJ, Antitrust Division Update 2012, available at www.justice.gov/atr/public/division-update/2012/criminal-program.html.

170. United States v AU Optronics available at http://www.justice.gov/atr/cases/f259800/259889.pdf

TFT-LCD panels. The DOJ's evidence included testimony by cooperating witnesses from some of the other TFT-LCD makers and a former AUO America employee. AUO's counsel later argued that AUO had been lying to its competitors at the Crystal Meetings and, instead of aligning its prices, AUO actually set its prices below the price to which the conspirators had agreed.

Similarly in the EU, the European Commission fined six LCD panel producers, all of who were foreign companies, for operating a cartel by way of which the companies agreed prices, exchanged information on future production planning, capacity utilization, pricing and other commercial conditions. Even the European Commission held that while all the cartel participants were foreign companies, it noted the effect on customers in Europe. Commissioner Almunia said "Foreign companies like European ones need to understand that if they want to do business in Europe, they must play fair".[171]

More recently, the European Commission has fined seven international groups of companies a total of € 1, 470, 515, 000[172] for participating in cartels in the cathode ray tubes (CRT) industry[173]. These companies fixed prices, shared markets, allocated customers between themselves and restricted their output over a period of ten years. One cartel concerned colour picture tubes used for televisions and the other one colour display tubes used in computer monitors. Chunghwa, LG Electronics, Philips and Samsung SDI participated in both cartels, while Panasonic, Toshiba, MTPD and Technicolor (formerly Thomson) participated only in the cartel for television tubes. Chunghwa received full immunity, as it was the first to reveal their existence to the Commission[174]. Commissioner Almunia said: *"These cartels for cathode ray tubes are 'textbook cartels': they feature all the worst kinds of anticompetitive behaviour that are strictly forbidden to companies doing business in Europe."* [175]

While several factors have been responsible for the increase in cartel enforcement, two of the major factors are effective Amnesty /Leniency programs and co-operation between international competition agencies. Under the Amnesty / Leniency programs, corporations and individuals who report their cartel activity and cooperate in the investigation of the cartel reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program. In addition antitrust agencies are increasingly co-operating with each other to investigate international cartels. "Dawn raids" have been co-ordinated in various jurisdictions. In international cartel matters, the DOJ relies on the mutual legal assistance treaties (MLATs) which USA has signed with over 50 countries. These agreements provide for comprehensive reciprocal assistance between the US and foreign governments in criminal matters. Specifically, this assistance often includes searches and seizures of documentary evidence and witness interviews. A good example of this international co-operation could be seen in February 2003 when the United States, the European Commission, Canada, and Japan coordinated

171. http://europa.eu/rapid/press-release_IP-10-1685_en.htm?locale=en

172. The highest fine levied by the Commission on a cartel in the last ten years

173. http://europa.eu/rapid/press-release_IP-12-1317_en.htm

174. Under the 2006 Leniency Program

175. See note 2 supra

surprise inspections, interviews, and other investigative activity in a cartel investigation relating to heat stabilizers and impact modifiers.

There are lessons to be learnt from how the DOJ has dealt with the Amnesty program. For instance, the DOJ tried to revoke an amnesty agreement it had with Stolt-Nielsen and indict the company after the company had provided the evidence based on which conspirators were convicted[176]. Also, there is always the risk, of whether you are the first to reach the DOJ. Companies that have been second to inform have been penalized harshly.

While hefty fines and lengthy prison sentences have been the hallmark of US Cartel enforcement for the last few years, the imposition of jail sentences was in the past primarily limited to US citizens and residents. The new trend is the prosecution and conviction of foreign nationals for violation of US anti-trust laws. Foreign nationals are now increasingly serving prison sentences in USA for cartel offenses.

These cases highlight that multi-national corporations, or even Indian companies providing goods and / or services to USA and/or Europe need to be aware of US anti-trust law and EU competition law issues. It is imperative for companies to develop proper compliance strategies to manage risks. Such compliance programs should ensure that proper diligence even from an anti-trust/competition law is conducted whenever a merger takes place. In companies that have operations or subsidiaries in countries that have lower levels of compliance, the compliance programs should be strictly and regularly monitored. Resources should be spent on adequate training of employees, especially since there are good chances of employees moving between competitors.

n addition, since cartel investigations across various jurisdictions have usually focused on certain industries, there is a fair chance that the TFT–LCD industry and the cathode ray tube industry may also be investigated by the **CCI** The other industries affected by cartel investigations / prosecutions include air and water transportation[177], computer components[178], automobile parts, glass[179], detergents[180], chemicals[181] etc.

II. Intellectual Property Law and Competition Law conundrum

Intellectual Property (IP) law fosters innovation and creativity by awarding limited monopolies. Compe-

176. http://ethisphere.com/stolt-nielsen%E2%80%99s-amnesty-revoked-company-and-executives-indicted-by-doj-for-price-fixing/

177. http://europa.eu/rapid/press-release_MEMO-12-655_en.htm?locale=en

178. ttp://europa.eu/rapid/press-release_IP-12-830_en.htm?locale=en

179. http://europa.eu/rapid/press-release_IP-08-1685_en.htm?locale=en;http://europa.eu/rapid/press-release_IP-07-1781_en.htm?locale=en

180. http://europa.eu/rapid/press-release_IP-11-473_en.htm?locale=en

181. http://europa.eu/rapid/press-release_IP-06-560_en.htm?locale=en

tition law seeks to provide consumer benefit by providing a free and fair market. There is an inherent tension, when the grantee of the intellectual property right (IPR) monopoly seeks to engage in abuse of this monopoly. In a landmark consent agreement Google Inc. has agreed to change some of its business practices related to how it dealt with its patented technologies in response to the United States FTC complaint and subsequent investigations.

Companies in the information technology and telecommunications industries frequently ensure interoperability of their products through voluntary standard setting organizations (SSOs). The SSOs publish technology standards which encourage adoption of common platforms among rival producers which in turn benefits consumers by increasing competition, innovation, product quality and choice.

Problems arise when a patented technology is adopted by a SSO as a technology standard. Before a standard is adopted, several players are competing to get their technology accepted as a standard. However, once a particular technology is accepted as a standard, most of the other players will have to necessarily make substantial investments to adopt the standard. This may at times also include a significant switching cost from their own technology to the standard. Entire industries may get locked in to a particular technology. If this technology is patented, it gives the patent holder massive market power and the ability to demand excessive royalties, where the royalties do not reflect the actual market value of the technology, but the opportunity cost and switching cost of moving away from the standard technology. The high royalties are eventually passed on to the end consumers. The increased value that can be extracted by the patentee due to switching costs on its patents is known as "hold-up value". Besides harming competition, hold-up value undermines the entire institution of SSOs and decreases the incentive to participate in the standard-setting process.

It is for this reason, that when SSOs designate a particular technology as a "standard" it requires the patent holder to license its standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms to any willing licensee, thus relinquishing its right to exclude a willing licensee from using its patented technology. SSOs when determining which technology to designate as a standard, take into account if the patentee is committed to license its SEPs on FRAND terms. If the patentee refuses to license its patent on FRAND terms, the SSO will not include such a technology in a standard.

Google is a global technology company and through its subsidiary Motorola owns an extensive patent portfolio[182] including patents that cover technology standards in wireless cellular voice and data communications, wireless local area LANs and video compression. Google actively participates in various SSOs and Motorola has been a longstanding member of SSOs[183]. Manufacturers of mobile phones, tablet computers and other "smart devices" providing internet access such as gaming systems, laptops, set top boxes must typically comply with one or more of the technology standards.

182. Motorola's portfolio comprises of over 24,000 patents and patent applications

183. Primary SSOs include the Institute of Electrical and Electronics Engineers, the European Telecommunications Standards Institute, International Telecommunications Union.

The FTC alleged that Motorola, after promising to license its SEPs on FRAND terms, wrongfully sought injunctions and exclusion orders against willing licensees of its SEPs. Google continued Motorola's practice after its acquisition of Motorola in May 2012.[184]

According to the FTC, Motorola/Google enjoyed monopolistic power since the inclusion of Motorola/ Google's patents in the technology standards eliminated any possible alternatives for competitors of Google/Motorola. To determine whether a firm enjoys monopolistic power, it is essential to determine the relevant market where this power is being appraised. According to FTC the relevant product market in this case was the technology covered by any Google owned SEP and all substitutes of that technology. Such monopolistic behavior would likely have the anti-competitive effects such as depriving end-consumers of competing products at lower costs, undermining efficiency of the standard setting process, raising costs of competitors' products and dampening competition. The FTC did not find any pro-competitive benefits or any justification to outweigh the anti-competitive effects of Google's conduct.

To remedy this concern, Google agreed to a Consent order which restricts Google from seeking injunctions on SEPs against potential licensees who are willing to enter into a license on FRAND terms. As a result, Google is prohibited from seeking injunctions, or obtaining or enforcing existing claims for injunctive relief, for FRAND-encumbered SEPs.

On the other side of the Atlantic, the European Commission has opened a formal investigation against Samsung and Motorola to assess whether the companies have used certain of its SEPs to distort competition abusively and in contravention of a commitment to an SSO.

This case highlights the inherent tension between Competition law and Intellectual Property law and is an instance where antitrust law steps in when social welfare is at risk due to the conduct of the intellectual property holder. Also, this case highlights the international and cross border effects of antitrust/ competition law. It has been a constant leitmotif of most investigations and prosecutions, that when one company or a particular industry is investigated in one jurisdiction, chances are that similar investigations will also commence in other jurisdictions across the globe.

III. Two Sided Markets and Platforms

"Two-sided market" is one of the hottest areas in economics and competition policy. Some businesses operate platforms that connect two groups of customers, help those customers interact, and in doing so create value. There are network externalities that operate across the two groups of customers. To give an example in the payment market, a credit card is more valuable to a merchant if more customers use that brand and conversely a credit card is more valuable to a customer if more merchants accept it. An important feature of such a platform is to attract sufficient number of both customers.

184. Motorola filed and Google prosecuted patent infringement claims before the United States International Trade Commission (ITC) and federal district court.

If a credit card company only attracts merchants, there would be no interaction between the two groups (merchants and customers) and hence no value will be created. To be able to attract both sets, platforms usually structure their pricing in a manner that one group pays less than the other or one group is paid to participate. A skewed pricing structure is a feature of two-sided markets. For instance, newspapers make their papers available to customers at very low cost and recoup the same from advertisers, similarly in the internet domain most websites provide free content to users and generate revenues from advertisers. Selling any product or service much below production costs or much higher than production costs may raise competition / antitrust issues. However, in a two-sided market, this may not necessarily be anti-competitive but may actually increase efficiencies.

In a traditional one sided market, there may be a finding of predatory pricing, if a corporation sets its price below its production costs and has a prospect of recouping its investment in the long run. However, in two-sided markets pricing below production costs on one side of the market may be profitable and pro-competitive in the short and the long term. For instance, newspapers routinely sell to readers at prices below the cost of printing the papers. This is not an instance of predatory pricing because advertising revenues will cover the costs of the printing of the newspapers. This is because advertisers seek to reach to a wide audience of readers and hence the pricing is structured in a manner that the advertisers subsidize the customers.

Two-sided markets can lead to certain forms of anti-competitive behavior, for instance, a platform with market power (derived from a very large consumer base on one side of the market) can potentially impose exclusivity, tying/bundling, or excessive pricing on the other side of the market. Exclusivity arrangements will be particularly pernicious as that will drive the other platforms out of business.

Two – sided markets and platforms will become more relevant to any discussion on competition law, because of the internet domain. As more and more economic activities will take place on or through the medium of the internet, internet based platforms will become ubiquitous in commerce. Most internet platforms will be two-sided markets catering to merchants on one side and the end- customers on the other.

IV. Parent Company Liability and Private Equity Investors

The European Community Courts have been imposing liability on a parent company for its subsidiary's participation in a cartel. The Courts test has not been to merely see if the parent company owns 100% of the subsidiary , but whether a parent which owns 100% of the subsidiary is a "single economic entity" wherein the subsidiary lacks autonomy with respect to commercial policy. The Courts have held that it is necessary to make a global assessment of the influence which the parent has over its subsidiary in deciding whether they are part of a single economic entity. The most important judgment in this area is the ECJ's ruling in the Akzo Nobel (Choline Chloride)[185] appeal which confirms that the Commis-

185. Akzo Nobel v Commission [2009] ECR I-8237 (ECJ)

sion should look to all relevant economic, organizational and legal links which tie the subsidiary to the parent in order to assess whether they are part of one undertaking or not. The issue in this case was whether liability should be imposed only on the four subsidiaries that had participated in the choline chloride cartel or also on the groups' top holding company Akzo Nobel NV, which wholly owned all the other four subsidiaries. The Court held that where despite having a separate legal personality, the subsidiary did not act autonomously on the market, the parent company and the subsidiary formed a single economic unit. The basis of determining whether a parent is liable for the conduct of its subsidiaries has been to what extent the parent was ware and complicit in the subsidiaries' conduct. The central concept is based on the presumption that a parent company exercised "decisive influence" over its subsidiaries[186]. The presumption can be rebutted by a company. However, in the EU there has been no instance where a company has successfully rebutted this presumption.

More recently, in the Commission's Power Cables cartel investigations[187], the issue arose whether the parental liability should also be extended to the ownership of a cartel member by a private equity firm. The commission eventually sent a formal charge sheet to private equity firm Goldman Sachs[188] (which owned Italy based Prysmian). This is an important development and investors and private equity firms also need to be diligent in maintaining and conducting effective compliance programs in their portfolio companies.

186. Imperial Chemical Industries Limited (ICI) v Commission [1979] ECR - 619

187. See http://europa.eu/rapid/press-release_IP-11-839_en.htm?locale=en

188. http://www.mms.co.uk/MMSKnowledge/email-news.aspx?pageid=59142

Conclusion

Competition law analysis entail complex legal and economic considerations. The CCI orders discussed above suggests that the CCI has been called upon very early in its existence to determine complex antitrust issues arising from the conduct or enterprises engaged in very complex market.

There has not yet been any final order from the COMPAT or Supreme Court on any of the major Section 3 or 4 cases decided by the CCI, where the parties have gone in to appeal from the order of the CCI. Therefore to analyze and identify jurisprudential trends at this early stage of development of competition law in India is difficult. However our study has highlighted certain key trends in the orders passed by CCI. We have found that CCI has shown determination in initiating inquiry against the SOEs, there is also steady increase in the number of information received by the CCI and informants from various sections of society have come forward to provide the information the commission, which indicates growing awareness about this new piece of legislation. In terms of relying on foreign authorities, the CCI tends to rely more on EU authorities, primarily because the Competition Act is fashioned on the lines TFEU.

Our analysis also points to certain inconsistencies in the order passed by the CCI, such as the CCI orders have been inconsistent in the application of economic principles in analysing the market, establishing abuse of dominance. CCI's inconsistent standards in imposing penalty and excessive reliance on circumstantial evidence have also been a major area of concern for the industry. We have also pointed out in our report certain trends and observations with respect to the functioning of the CCI such as the debate about publication of dissenting opinion and the role of CCI as administrative expert body.

The Competition Act is a big step in India's competition law framework from MRTP regime focused on 'curbing of monopolies' to promote competition in market by proscribing practices that have 'appreciable adverse effect on competition'. The CCI has to be cautious and consistent with respect to its approach in terms of its operations and advocacy exercise. A consistency in CCI's approach in will go long way in enabling the industry in planning pro-competitive business strategy within the framework of the Competition Act.

No legislation is perfect. It evolves through time. History is witness to the fact that competitive pressure has always done wonders for the economy of any country and we hope that the CCI will also be able to do the same in India by fostering the culture of competition in business practices.

Annexure A

COMPETITION ACT, 2002
CASES UPTO
FEBRUARY 2013

Competition Act, 2002 Cases [189]

A. Section 3: Anti-Competitive Agreements Orders

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
1.	30(148)/2008 18/06/10	All India Distillers' Association v Haldyn Glass Gujarat Ltd & Ors	Spirits	Glass	-	Dismissed by CCI without referral to the DG
2.	09/2009 24/09/10	Manish Singh v Roger Williams & Ors	Pharmaceutical	Pharmaceutical	-	Dismissed by CCI without referral to the DG
3.	73/2008 06/10/10	B.C. Aurora v T.V. Channel Operators	Private Individual	T.V. Channel Operators	-	Dismissed by CCI without referral to the DG
4.	RTPE3/200 02/12/10	Federation of Indian Airlines & Ors	Suo Moto	Aviation	-	Dismissed by CCI without referral to the DG
5.	11/2010 16/12/10	Rohit Medical Store through its Proprietor v M/s Aashish Enterprises, Ambala Cantt & Ors	Pharmaceutical	Pharmaceutical	-	Dismissed by CCI without referral to the DG
6.	125/2009 20/01/11	Shri Achintya Mukherjee v Loop Telecom Pvt Ltd & Ors	Telephone Users Association	Telecom	-	Dismissed by CCI without referral to the DG
7.	04/2011 22/03/11	Lodestar Slotted Angles Ltd v Rockline Construction Company & Ors	-	Construction	-	Dismissed by CCI without referral to the DG
8.	RTPE 31/2008 06/04/11	Sh S.K. Sharma, Deputy, CMM-IV, North Western Railway, Hasan-	Railway	PVC	-	Withdrawn

189. upto February 2013.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
		pura, Jaipur v M/s RMG Polyvinyl India Ltd, New Delhi & Ors				
9.	C-145/ 2008 /DGIR 06/04/11	DDRS (G)-II, Railway Board, Ministry of Railways v M/s RMG Polyvinyl India Ltd, New Delhi & Ors	Railway	PVC	-	Withdrawn
10.	01/2009 25/05/11	FICCI- Multiplex Association of India v United Producers/ Distributors Forum & Ors	FICCI	Film	-	Violation of Section 3 found, penalty of Rs. 1 Lac imposed.
11.	04/2009 11/08/11	M.P. Mehrotra v Jet Airways (India) Ltd & Ors	Private Individual	Aviation	-	Dismissed by CCI after referral to the DG
12.	19/2011 30/09/11	Arun Kumar Tyagi v The Software Engineering Institute & Ors.	Private Individual	Computer Software	-	Dismissed by CCI after referral to the DG
13.	03/2009 04/10/11	Uniglobe Mod Travels Pvt. Ltd. v Travel Agents Association of India & Ors.	Aviation	Travel & Tourism	-	Violation of Section3 and fine of Rs. 1 lakh imposed
14.	34/2011 11/10/11	Kshitij Ranjan v Indian Newspaper Society	Private Individual	Print Media	-	Dismissed by CCI without referral to the DG
15.	RTPE 09/2008 17/11/11	M/s FCM Travel Solutions (India) Ltd, New Delhi v Travel Agents Federation of India & Ors	Travel & Tourism	Travel & Tourism	-	Dismissed by CCI after referral to the DG
16.	58/2011 22/11/11	Technologies Products, Gurgaon v Bangalore	High Voltage	Electrical	-	Dismissed by CCI without referral to

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
		Electricity Supply Co. Ltd, Bangalore & Ors	Detector Instrument			the DG
17.	68/2011 29/11/11	M/s VKS Hospitality Pvt Ltd, New Delhi v M/s Eros Resorts and Hotels Pvt Ltd, New Delhi	Health	Hospitality	-	Dismissed by CCI without referral to the DG
18.	57/2011 30/11/11	Shri Anil Kumar Verma, Delhi-9 v The Principal Secretary, Representing the Govt. of A.P., Home (General-A) Department & Ors.	Private Individual	Govt. of A.P.	R. Prasad	Dismissed by CCI without referral to the DG
19.	01/2010 30/11/11	Suo-Moto Case no. 01/2010 (In Re: Sugar Mills)	Suo Moto	Sugar Mills	-	Dismissed by CCI without referral to the DG
20.	04/2009 9/01/2012	M.P Mehrotra V Jet Airways (India) Ltd & Kingfisher Ltd	Private Party	Aviation	R. Prasad (member)	Dismissed by CCI without referral to the DG
21.	02/2010 10/1/2012	In re: domestic airlines	Suo moto	Aviation	R. Prasad (member)	Dismissed by CCI without referral to the DG
22.	01/2011 11/1/2012	In re: domestic airlines	Suo moto	Aviation	R. Prasad (member)	Dismissed by CCI without referral to the DG
23.	161/2008 24/1/2012	In re: Glass Manufactures of India	Suo moto	Glass	-	Dismissed by CCI after referral to the DG
24.	55/2011 24/1/2012	Kolkata West International City Buyers Welfare Association, Howrah v	Welfare association	Construction/ Kolkata Metropolitan Development Asso-	R. Prasad (member)	Dismissed by CCI without referral to the DG

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
		Kolkata West International City Pvt. Ltd. & Ors.		ciation		
25.	43/2011 44/2011 31/1/2012	Gurjit Kaur Arora v DLF LTD	Private Party	Real Estate		Dismissed by CCI without referral to the DG
26.	14/2011 31/1/2012	R.V Ramgopal v Shriram Transport Finance Company Ltd	Transportation	Non- banking finance		Dismissed by CCI after referral to the DG
27.	52/2010 & 56/2010 16/2/2012	Sunshine Pictures Private Limited & Eros International Media Limited v Central Circuit Cine Association, Indore & Ors	Film	Film	R. Prasad	Violation of Section3 and fine imposed
28.	83/2011 21/2/2012	Shri Praveen Kumar Sodhi v Omaxe Ltd. & Ors.	Private Individual	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG
29.	03/2011 24/2/2012	Suo-Moto Case no. 03/2011 (In Re: suo-moto case against LPG cylinder manufacturers)	Suo Moto	Petroleum	-	Violation of Section3 and fine imposed
30.	01/2011 10/4/2012	In re: rise in onion prices	Suo Moto	Agricultural industry	-	Dismissed by CCI after referral to the DG
31.	06/2011 16/4/2012	Coal India Limited v GOCL Hyderabad & Ors.	Coal industry	Explosive Industry	-	Violation of section 3. Penalty equivalent to 3% of average turnover of 3 years was imposed.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
32.	43/2010 16/4/2012	A Foundation for Common Cause & People Awareness v PES Installations Pvt. Ltd. & Ors	NGO	Medical products	-	Violation of section 3.Penalty of 5% of average turnover of 3 years was imposed.
33.	08/2012 17/4/2012	Awaz, NGO for Ventilating Consumer Grievances & Ors. v M/s Indiabulls & Ors	NGO	Banking	-	Dismissed by CCI without referral to the DG
34.	02/2011 23/4/12	Suo-Moto Case no. 02/2011 (In Re: Aluminium Phosphide Tablets Manufacturers)	Suo Moto	APT	-	Violation of Section3 and fine imposed
35.	02/2011 23/4/2012	In Re: Aluminium Phosphide Tablets Manufacturers	Suo moto	chemical	-	Violation of section 3.Penalty of 9% average turnover of three years imposed
36.	17/2011 24/4/2012	Mrs. Manju Tharad & Ors. v Eastern India Motion Picture Association (EIMPA), Kolkata & Ors	Film industry	Film industry	-	Violation of section 3
37.	40/2010 25/4/2012	Shri Gulshan Verma v Union of India, through Secretary, Ministry of Health and Family Welfare & Ors.	Private Individual	Ministry of Health and Family Welfare	-	Violation of Section3 found, penalty not imposed.
38.	40/2010 25/4/2012	Shri Gulshan Verma v Union of India, through Secretary, Ministry	Private Individual	Health ministry	-	Violation of Section3 found, penalty not imposed.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
		of Health and Family Welfare & Or				
39.	09/2011 08/5/2012	UTV Software Communications Limited, Mumbai v Motion Pictures Association, Delhi	Media	Entertainment film industry	-	Violation of Section3 found, penalty not imposed.
40.	20/2012 16/5/2012	M/s Silarpuri Colonizers v Emaar MGF Ltd	Colonization	Real Estate	-	Dismissed by CCI without referral to the DG
41.	19/2012 30/5/2012	Dilip Thakkar v Maharashtra Industrial Development Corporation(MIDC) & Ors	Private Party	Maharashtra Industrial Development Corporation	-	Dismissed by CCI without referral to the DG
42.	MRTP C-127/2009/ DGIR4/28	Varca Druggist & Chemist & Ors. V Chemists and Druggists Association, Goa	Pharmaceuticals	Chemists and Druggists Association	R. Prasad (member)	Violation of section 3 found and Penalty of 5% of average turnover of 3 years imposed.
43.	29/2010 20/6/2012	Builders Association of India v Cement Manufacturers' Association & Ors	Builders Association	Cement industry	-	Violation of section 3 found and Penalty of .5 times of total profit for the FY year 2009-2011 imposed.
44.	33/2011 3/7/2012	Automobiles Dealers Association, Hathras, U.P. v Global Automobiles Limited	Automobile Industry	Automobile Industry	-	Dismissed by CCI without referral to the DG

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
45.	16/2010 3/7/2012	Prints India v Springer India Private Limited & Ors.	Exports	Publishing Industry	R.Prasad	Dismissed by CCI without referral to the DG
46.	RTPE-52/2006 30/7/2012	In re: Alleged Cartelization by Cement Manufacturers.	Suo Moto	Cement	-	Violation of section 3 found and Penalty of .5 times of total profit for the FY year 2009-2011 imposed.
47.	10/2012 7/8/2012	Iqbal Singh Gumber & Ors. v Purearth Infrastructure Ltd. & Ors.	Private Individuals	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG
48.	16/2011 9/8/2012	Mr. Sajjan Khaitan v Eastern India Motion Picture Association & Ors.	Private Individual	Film Industry	S.N. Dhingra	Violation of S. 3 found, penalty not imposed.
49.	C-87/2009/DGIR 5/09/2012	Vedant Bio Sciences v Chemists & Druggists Association of Baroda.	Bio Sciences	Chemicals & Drugs	R. Prasad, Geeta Gouri, S.N. Dhingra.	Penalty of Rs. 53,837 has been imposed by CCI under S. 27.
50.	48/2012 11/10/2012	PDA Trade Fairs (A division of Pradeep Deviah & Associates Pvt. Ltd.) v India Trade Promotion Organization.	Organizers	Trade Promotion Organizers	-	Dismissed by CCI without referral to the DG.
51.	74/2011 18/10/2012	Shri Ram Niwas Gupta & Ors. v M/s Omaxe Ltd. & Ors.	Private Individual	Real Estate	R. Prasad	Dismissed by CCI after referral to the DG (S.3)

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
52.	71/2011 10/01/2013	M/s. Shri Ashtavinayak Cine Vision Ltd. v. PVR Picture Ltd., New Delhi & Ors	Film	Film	-	Violation of section 3 found, penalty not imposed.
53.	56/2011 10/01/2013	M/s. Cinergy Independent Film Services Pvt. Ltd. v. Telangana Telugu Film Distribution Association & Ors	Film	Film	-	Violation of section 3 found. Penalty of 10% of average turnover of 3 years imposed.
54.	07/2010 10/01/2013	Vijay Gupta v. M/s. Paper Merchants Association, Delhi & Ors.	Stationery	Paper	-	Violation of S. 3 found, CCI ordered to modify certain clauses in Rules in Arbitration.
55.	MRTP Case RTPE No. 20/2008 16/01/2013	All India Tyre Dealers Federation v. Tyre Manufacturers	Tyre	Tyre	-	Dismissed by CCI after referral to the DG (S. 3)
56.	20/2011 19/02/2013	M/s. Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists and Ors	Pharmaceutical	Pharmaceutical	Dr. Geeta Gouri	Violation of section 3 found, penalty imposed.
57.	Ref. Case No. 05/2011 21/02/2013	Principal Chief Engineer, South Eastern Railway, Kolkata v. M/s. Orissa Concrete and Allied Industries Ltd. & Ors.	Railway	Concrete	-	Violation of S.3 Cease and Desist Order issued

B. Section 4: Abuse of Dominant Position Orders

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
58.	30(146) /2008 18/6/2010	All India Distillers' Association v Haldyn Glass Gujarat Ltd & Ors	Distillery	Glass	-	Dismissed by CCI without referral to the DG
59.	09/2009 24/9/2010	Manish Singh v Roger Williams & Ors	Pharmaceutical	Pharmaceutical	-	Dismissed by CCI without referral to the DG
60.	73/2008 06/10/2010	B.C. Aurora v T.V. Channel Operators	Private Individual	Media	-	Dismissed by CCI without referral to the DG
61.	RTPE3/2008 02/12/10	Federation of Indian Airlines & Ors	Suo Moto	Aviation	-	Dismissed by CCI after referral to the DG
62.	11/2010 16/12/2010	Rohit Medical Store through its Proprietor v M/s Aashish Enterprises, Ambala Cantt & Ors	Pharmaceutical	Pharmaceutical	-	Dismissed by CCI after referral to the DG
63.	125/2009 20/01/2011	Shri Achintya Mukherjee v Loop Telecom Pvt Ltd & Ors	Private Individual	Telecom	-	Dismissed by CCI without referral to the DG
64.	04/2011 22/03/2011	Lodestar Slotted Angles Ltd v Rockline Construction Company & Ors	-	Construction	-	Dismissed by CCI without referral to the DG
65.	RTPE31 /2008 06/04/2011	Sh S.K. Sharma, Deputy, CMM-IV, North Western Railway, Hasanpura, Jaipur v M/s RMG Polyvinyl India Ltd, New Delhi & Ors	Railway	PVC Sheets	-	Withdrawn

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was en-gaged	Dissenting Opinion	Outcome
66.	C-145/2008 /DGIR 06/04/2011	DDRS (G)-II, Railway Board, Ministry of Railways v M/s RMG Polyvinyl India Ltd, New Delhi & Ors	Railway	PVC Sheets	-	Withdrawn
67.	01/2009 25/05/2011	FICCI- Multiplex Asso-ciation of India v United Producers/ Distributors Forum & Ors	FICCI	Media	-	Violation of Sec-tion 3 Fine imposed
68.	19/2010 12/08/2011	Belaire Owners As-sociation v DLF Limited & HUDA	Resident Association	Real Estate	-	Violation of S. 4 found, fine imposed.
69.	13/2009 26/06/2011	MCX Stock Exchange v NSE Stock Exchange	Stock Exchange	Stock Exchange	-	Violation of S. 4 found, fine imposed.
70.	42/2011 13/09/2011	Mrs. Rajni Kanta Minz v Mr. Munna Munda & Ors.	Private Individual	Real Estate	-	Dismissed by CCI without referral to the DG
71.	46/2011 28/09/2011	PRIMORDIAL Systems Pvt. Ltd., New Delhi v Indian Newspaper society-INS & Ors.	Education	Media	-	Dismissed by CCI without referral to the DG
72.	21/2011 08/11/2011	Mr. Jagmohan Chhabra & Ors. v M/s. Unitech Ltd.	Private Individual	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG
73.	55/2010 14/11/2011	M/s Mili Marketing Private Limited. v M/s DLF Limited. & Ors.	Marketing	Real Estate	-	Case may be clubbed with case no 19/2010
74.	22/2011 & 23/2011 30/11/2011	Brig. B.S. Perhar and Pritam Perhar v Hill View Infrastructures Pvt. Ltd.	Private Individual	Real Estate	-	Dismissed by CCI without referral to the DG

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
75.	54/2011 30/11/2011	Shri Debapriyo Bhattacharya, New Delhi-1 v The Principal Secretary, Home (General-A) Department & Ors	Private Individual	E-tickets	R. Prasad	Dismissed by CCI without referral to the DG
76.	50/2011 & Ref. Case No. 2/2011 20/12/2011	Gujarat Textile Processors Association, Surat, Gujarat and Government of Gujarat v Gujarat Gas Company Ltd., Ahmedabad, Gujarat	Textile	Natural Gas	-	Dismissed by CCI without referral to the DG
77.	06/2010 11/01/2012	Ms. Anila Gupta, Mumbai v BEST Undertaking, Mumbai	Private Individual	Electricity	R. Prasad	Dismissed by CCI after referral to the DG
78.	77/2011 12/01/2012	Eastman Cast & Forge Ltd. v Exact Developers & Promoters Pvt. Ltd. & Ors.	-	Building commercial projects	-	Dismissed by CCI without referral to the DG
79.	80/2011, 81/2011, 82/2011 12/01/2012	Ravi Suri & Ors v M/S Today Homes and Infrastucture Pvt Ltd	-	Construction	-	Dismissed by CCI without referral to the DG
80.	77/2011 12/01/2012	Eastman Cast & Forge Ltd v Exact Developers & Promoters Pvt Ltd & ors	Private Party	Real Estate	-	Dismissed by CCI after referral to the DG.
81.	43/2011 & 44/2011 31/01/2012	Mr. Haravtar Singh & Mrs. Gurjit Kaur Arora, London, UK v M/s. DLF Limited, New Delhi	Private Individuals	Real Estate	-	Dismissed by CCI after referral to the DG
82.	67/2011 09/02/2012	George Kuruvilla, Chennai & Ors. v M/s Hirco	Private Individuals	Real Estate	R. Prasad	Dismissed by CCI without referral to

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
		Developments Pvt. Ltd., Mumbai & Ors.				the DG
83.	83/2011 21/02/2012	Shri Praveen Kumar Sodhi v Omaxe Ltd. & Ors.	Private party	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG
84.	02/2012 06/03/2012	M/S Jakarso packs Aid Ltd v State of UP through Principal Secretary & ors	Manufacturer of boxes and sheets	UP Financial Corporation	-	Dismissed by CCI without referral to the DG
85.	01/2012 21/03/2012	Ajay gupta v Rangoli builtech PVt Ltd	Private party	-	-	Dismissed by CCI without referral to the DG
86.	22/2010 29/03/2012	Kapoor Glass Private Limited v Schott Glass India Private Limited	Glass tubes	-	-	Violation of Section 4 and fine imposed
87.	09/2012 04/04/2012	M/s Sampark Securities Private Limited v Haryana State Industrial & Infra. Development Corp. Ltd.	FInance	Construction	-	Dismissed by CCI without referral to the DG
88.	09/2012 04/04/2012	M/s Sampark securities Ltd v HSIIDC	-	Haryana Infrastructure development	-	Dismissed by CCI without referral to the DG
89.	60/2011 10/04/2012	Shri. B. Venkat Reddy v Shri Ram Transport Finance Company, Secunderabad & Ors.	Private party	Transport finance	-	Dismissed by CCI after referral to the DG
90.	17/2012 03/05/2012	Sanjeev Pandey v Mahendra & Mahendra & Ors	Law	Automobile	-	Dismissed by CCI without referral to the DG
91.	4/2012 & 5/2012	in re case	Private party (Poonam	Construction/ real	-	Dismissed by CCI without referral to

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
	08/05/2012		Gupta)	estate		the DG
92.	01/2010 16/05/2012	GKB Hi Tech Lenses Private Limited v Transitions Optical India Private Limited	Glass	Glass	R. Prasad, M.L. Tayal	Dismissed by CCI after referral to the DG
93.	18/2012 31/05/2012	Mr. Hemant Jayanti Shah v Managing Committee of Borivali Nandkuvar Co-operative Housing Society	Private party	Co-operative housing society	-	Dismissed by CCI without referral to the DG
94.	13/2012 18/06/2012	All Odisha Steel Federation v Orissa Mining Corporation	Steel	Mining	-	Dismissed by CCI without referral to the DG
95.	25/2012 29/06/2012	M/s Vindato Investment Pvt. Ltd. & Ors. V M/s Vaidehi -Akash Housing Private Limited	Finance	Housing Private Limited	-	Dismissed by CCI without referral to the DG
96.	36/2011 3/07/2012	M/S Fast Way Transmisssion Pvt. Ltd. v M/S Hathway Sukhamrit Cable & Datacom Pvt. Ltd. And Others	Information & Braodcasting (Day & Night News)	Information & Braodcasting	-	Violation of S. 3 & S. 4. Commission imposed a fine of Rs. 80,401,141 under S. 27(b) of the Competition Act, 2002.
97.	15/2012 4/07/2012	Owners and Occupants Welfare Association v M/s DLF Commercial Developers Ltd. & Ors.	Society	Real Estate	R.Prasad	Dismissed by CCI without referral to the DG
98.	33/2012 24/07/2012	Nalini Gupta v OTIS Elevator Company (I) Ltd.	Private Individual	Manufacture Industry	-	Dismissed by CCI without referral to the DG

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
99.	12/2011 14/08/2012	Arshiya Rail Infrastructure Ltd. (ARIL) v Ministry of Railway (MoR) & Ors.	Infrastructure Industry	Ministry of Railways	S.N. Dhingra, M.L.Tayal, R.Prasad	Dismissed by CCI after referral to the DG. No violation of s. 3 or 4.
100.	70/2011 27/08/2012	Shri Saurabh Bhargava v Secretary, Ministry of Agriculture and Cooperation & Ors.	Private Individual	Secretary, Ministry of Agriculture and Cooperation	R. Prasad	Dismissed by CCI without referral to the DG. No violation of S. 3 or 4.
101.	22/2012 6/09/2012	Dr. Deepa Narula c/o Mr. Prashant Narula v Taneja Developers and Infrastructures Ltd.	Private Individual	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG.
102.	21/2012 18/09/2012	Advertising Agencies Guild v DAVP & Ors.	Advertising	Advertising	R. Prasad	Dismissed by CCI without referral to the DG. Violative of S. 4.
103.	28/2012 4/10/2012	Shivang Agarwal & Anr. v Supertech Ltd. Noida.	Private Individual	Construction Industry	R. Prasad, S. N. Dhingra	Dismissed by CCI without referral to the DG.
104.	43/2012 11/10/2012	Shri A. K. Jain, Gurgaon, Haryana v The Dwarkadhis Projects Pvt. Ltd., Delhi	Private Individual	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG.
105.	38/2012 18/10/2012	All India Genset Manufacturer Association v Chief Secretary, Government of Haryana & Ors.	Manufacture Industry	Govt. of Haryana	R. Prasad	Dismissed by CCI without referral to the DG.
106.	66/2012 5/11/2012	Ajay Devgn Films v Yash Raj Films Pvt. Ltd. & Ors.	Film Industry	Film Industry	-	Dismissed by CCI without referral to the DG.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
107.	51/2012 07/11/2012	Accreditation Commission for Conformity Assessment Bodies Pvt. Ltd. v Quality Council of India/National Accreditation Board for Certification Bodies & Ors.	-	-	-	Dismissed by CCI after referral to the DG.
108.	63/2012 22/11/2012	M/s NexTenders (India) Pvt. Ltd. v Ministry of Communication and Information Technology & Ors.	IT	Ministry of Comm. & IT	R. Prasad	Dismissed by CCI without referral to the DG.
109.	29/2012 27/11/2012	DGCOM Buyers & Owners Association, Chennai v M/s DLF Ltd., New Delhi & Ors.	Residents and Flat Owners Association	Real Estate	Geeta Gouri, R. Prasad	Dismissed by CCI without referral to the DG.
110.	64/2012 29/11/2012	Vijay Rice & General Mills v Punjab State Civil Supplies Corpration Limited.	Milling	Farming	-	Dismissed by CCI without referral to the DG.
111.	65/2012 12/12/2012	Ms Lalita Ramakrishnan & Ors. v M/s Vatika Limited.	Private Individual	Real Estate	-	Dismissed by CCI without referral to the DG.
112.	47/2012 13/12/2012	M/s Mineral Enterprises Limited v Ministry of Railways, Union of India & Ors.	Infrastructure Industry	Ministry of Railways	R. Prasad	Dismissed by CCI without referral to the DG.
113.	50/2012 13/12/2012	Shri Kaushal K. Rana v DLF Commercial Complexes Ltd.	Private Individual	Real Estate	R. Prasad	Dismissed by CCI without referral to the DG.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
114.	19/2010 03/01/2013	Belaire Owner's Association v. DLF Ltd., HUDA & Ors. (Supplementary Order)	Resident Welfare Association	Real Estate	-	Violation of S. 4 Penalty imposed
115.	31/2012 03/01/2013	Sanjay Kumar Gupta v. DLF Ltd.	Private Individual	Real Estate	-	Dismissed by CCI without referral to the DG (S. 4)
116.	67/2010 10/01/2013	M/s. Magnolia Flat Owners Association & Ors. v. M/s. DLF Universal Ltd. & Ors.	Resident Welfare Association	Real Estate	-	Violation of S. 4 Penalty not imposed. OP1 directed to modify unfair conditions.
117.	18, 24, 30, 31, 32, 33, 34 & 35/2010 10/01/2013	DLF Park Place Residents v. DLF Ltd.	Private Individuals	Real Estate	-	Violation of S. 4 Penalty not imposed. OP1 directed to modify unfair conditions.
118.	80/2012 06/02/2013	H.L.S. Asia Limited, New Delhi v. Schlumberger Asia Services Ltd, Gurgaon & Ors	Oil	Oil	-	Dismissed by CCI without referral to the DG (S. 4)
119.	61/2010 08/02/2013	Sh. Surinder Singh Barmi v. Board of Control of Cricket in India	Private Individual	Sports	-	Violation of S. 4 Penalty imposed
120.	57/2012 15/02/2013	Dr. Anoop Bhagat v. M/s Spectra Medical System India Pvt. Ltd. & Ors.	Health-care	Health-care	-	Dismissed by CCI without referral to the DG (S. 4)
121.	72/2012 15/02/13	M/s. Shahi Exports Pvt. Ltd. v. Lakshmi Machine Works Ltd.	Garment	Textile	-	Dismissed by CCI without referral to the DG (S. 4)

C. Cases involving Section 3 & 4 of the Competition Act

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
122.	45/2005 31/05/2001	Suo moto v New Delhi Power Ltd & BSES & Ors	Suo moto	Power	-	Dismissed by CCI after referral to the DG.
123.	19/2008 31/05/2005	Suo moto v New Delhi Power Ltd & BSES & Ors	Suo moto	Power	-	Dismissed by CCI after referral to the DG.
124.	10/2009 26/06/2010	Internet Service Provider Association of India v Department of Telecommunication.	Internet Service Provider Asscoation	Department of Telecommunication	-	Dismissed by CCI without referral to the DG.
125.	39/2010 15/09/2010	Travel Agents Association of India v Balmer Lawrie & Co	Travel agents association	Logistics Industry	-	Dismissed by CCI without referral to the DG.
126.	37/2010 20/09/2010	Travel Agents Association of India v British Airways	Travel agents association of India	Aviation	-	Dismissed by CCI without referral to the DG.
127.	35/2008 21/09/2010	Suresh Goel v Seagate Singapore International	Private Individual	Hard Disk Drive	-	Dismissed by CCI without referral to the DG.
128.	54/2010 24/11/2010	CSR Nanjing Puzhen Co. Ltd v Kolkata metro Rail Co. Ltd & Ors	Railway	Railway	-	Dismissed by CCI without referral to the DG.
129.	104/2009 25/11/2010	Rajesh Nandal v LPG Gas Companies	Private Individual	LPG	-	Dismissed by CCI without referral to the DG.
130.	05/2009 02/12/2010	Neeraj Malhotra v Deutsche Post bank Ltd	Private Individual	Bank	-P N Parashar R. Prasad	Dismissed by CCI after referral to the DG.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
131.	61/2011 02/01/2011	M/s Abir Infrastructure Private Limited. v M/s Emaar MGF Land Limited.	Construction	Construction	-	Dismissed by CCI without referral to the DG.
132.	12/2010 22/03/2011	Yashoda Hospital and Research Centre Ltd v Indiabulls Financial Services Ltd	Health	Financial services	R. Prasad	Dismissed by CCI after referral to the DG.
133.	15/2009 22/03/2011	Shri Surinder Bhakoo v The HDFC Bank Ltd & Ors	Private Individual	Banking	R. Prasad	Dismissed by CCI after referral to the DG .
134.	02/2009 24/03/2011	Consumer Online Foundation v Tata Sky Ltd & Ors	Consumer Online Foundation	Telecommunications	R. Prasad	Dismissed by CCI after referral to the DG.
135.	71/2010 07/04/2011	Shri Ravindra Badgaiyan v M/s Bureau of Indian Standards	Vermicompost	Bureau of Indian Standards	-	Dismissed by CCI without referral to the DG.
136.	06/2010 28/04/2011	Flyington Freighters Pvt Ltd v Airbus S.A.S	Aviation	Aviation	-	Dismissed by CCI without referral to the DG.
137.	06/2009 11/05/2011	Shri Neeraj Malhotra, Advocate v North Delhi Power Ltd & Ors	Legal	Power	R. Prasad P N Parashar	Dismissed by CCI after referral to the DG.
138.	15/2010 12/05/2011	Jupiter Gaming Solutions Pvt Ltd v Government of Goa & Ors	Lottery Game	Government of Goa	R. Prasad	Dismissed by CCI after referral to the DG.
139.	28/2010 23/05/2011	M/s Metalrod Ltd v Religare Finvest Ltd	Iron	Financial	R. Prasad	Dismissed by CCI after referral to the DG.
140.	RTPE/ 16/2009	M/s Cine Prekshakula Viniyoga Darula Sangh	Welfare Society	Food and Beverages	R. Prasad	Dismissed by CCI after referral to

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
	23/05/2011	v Hindustan Coca Cola Beverages Pvt Ltd & ors				the DG.
141.	UTPE/ 99/2009 23/05/2011	Consumers Guidance Society v Hindustan Coca Cola Beverages Pvt Ltd & orsfood and Beverages	Consumers Guidance Society	Food and Beverages	R. Prasad	Dismissed by CCI after referral to the DG.
142.	18/2011 24/05/2011	Mrs Randhir Kaur Sidhu v Fargo Estates Pvt Ltd & Ors	Private Individual	Real Estate	-	Dismissed by CCI after referral to the DG.
143.	2/28, 6/28, 11/28, 13/ 28 07/06/2011	Shri Govind Aggarwal & Ors v M/s ICICI Bank Ltd & Ors	Private Individual	Banking	-	Dismissed by CCI after referral to the DG.
144.	33/2007 07/06/2011	Charging of Differential Rate of Interest by Banks	Suo moto	Banking	-	Dismissed by CCI without referral to the DG
145.	36/2010 22/06/2011	Singhania & Partners LLP v Microsoft Corporation(I) Pvt Ltd &Orsks	Legal	Software	-	Dismissed by CCI without referral to the DG.
146.	04/2010 26/07/2011	Explosive Manufacturers Welfare Association v Coal India Ltd & its Officers	Explosive	Coal	-	Dismissed by CCI with referral to the DG.
147.	60/2010 22/12/2011	Association of Australian Education, Representatives in India (AAERI) v IELTS Australia Pty. Ltd & Ors	NPO	Education	-	Dismissed by CCI without referral to the DG.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
148.	75/2011 28/12/2011	Krishna Mohan Hospital & Ors. v The Secretary, Ministry of Agriculture & Cooperation, New Delhi & Ors.	Health	Ware housing	-	Dismissed by CCI without referral to the DG.
149.	80/2011, 81/2011 & 82/2011	Ravi Suri & Ors v M/S Today Homes and Infrastucture Pvt Ltd	Private Individual	Real Estate	-	Dismissed by CCI without referral to the DG.
150.	7/28, 25/28, 8/28, 10/28	M/s Rajarhat Welfare Association & Ors v M/s HDFC Bank Ltd & Ors	Welfare Association	Bank	-	Dismissed by CCI without referral to the DG.
151.	27/2012	Smt. Raj Rani Chandhok & Ors. v Senior Builders Limited & Ors.	Private Parties	Real Estate	-	Dismissed by CCI without referral to the DG
152.	14/2012 26/07/2012	India Glycols Limited v Indian Oil Corporation Ltd. & Ors.	Petrochemical Industry	Commercial Enterprise (Oil Industry)	R.Prasad	Dismissed by CCI without referral to the DG.
153.	26/2012 26/07/2012	Lt. Col. (Retd) Dr. Mohinder Kumar Yadav v Universal Buildwell Pvt. Ltd. & Ors.	Private Individual	Real Estate	-	Dismissed by CCI without referral to the DG
154.	32/2012 5/10/2012	Subhash Yadav v Force Motor Ltd. & Ors.	Private Individual	Manufacture Industry	-	Dismissed by CCI without referral to the DG.
155.	52/2012 6/11/2012	Exclusive Motors Pvt. Limited v Automobili Lamborghini S.P.A.	Automobile Industry	Automobile Industry	-	Dismissed by CCI without referral to the DG.
156.	35/2012 7/11/2012	IATA Agents Association of India v Federation of Indian Airlines & Ors.	Scientific & Charitable Society	Airlines	-	Dismissed by CCI without referral to the DG.

No.	Case No/ date of decision	Case Name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged	Dissenting Opinion	Outcome
157.	37/2011 03/01/2013	Film & Television Producers Guild of India v. Multiplex Association of India (MAI), Mumbai & Ors.	Film	Film	-	Dismissed by CCI after referral to the DG)
158.	54/2012 09/01/2013	Merino Panel Products Ltd. Gujarat State Fertilizers and Chemicals Ltd. & Ors.	Melamine	Public Sector Undertaking; Melamine	-	Dismissed by CCI without referral to the DG
159.	49/2012 07/02/2013	N. Sanjeev Rao and Mrs. Fatima Tahir v. Andhra Pradesh Hire Purchase Association and 162 Others	Private Individuals	Automobile	-	Dismissed by CCI without referral to the DG
160.	73/2012 19/02/2013	Mr. Karan Sehgal v. M/s. Lakme Lever Private Limited	Operation of Beauty Saloons	Beauty and Wellness Services; Cosmetic; Retail	-	Dismissed by CCI without referral to the DG
161.	69/2012 19/02/2013	Sponge Iron Manufacturers Association v. National Mineral Development Corporation & Ors	Mining	Mining	-	Dismissed by CCI without referral to the DG

D. Combination Notification Filed Under Section 6 (2) Of The Competition Act

Combination Notification Filed Under Section 6 (2) Of The Competition Act.

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
1.	Reliance Industries Ltd/ Reliance Industrial Infrastructure Ltd/ Bharti Axa Life Insurance Company Ltd/ Bharti AXA General Insurance Company Ltd Combination C-2011/07/01	Acquisition Competition Act section 5(a)	Insurance	Unconditional approval	08/7/2011	26/7/2011	19 days
2.	Walt Disney Company (Southeast Asia) Pte. Ltd/ UTV Software Communications Ltd Combination C-2011/08/02	Acquisition Competition Act section 5(a)	TV Broadcasting, Motion Pictures, Interactive Media	Unconditional approval	01/08/2011	25/08/2011	25 days
3.	G&K Baby Care Pvt Ltd/ Danone Asia Pacific Holdings Pte. Ltd/ assets of Wockhardt Group Combination C-2011/08/03	Acquisition Competition Act section 5(a)	Nutrition, Biotech Products	Unconditional approval	24/08/2011	15/09/2011	23 days
4.	Aica Kogyo Company Ltd/ Aica Laminates India Pvt Ltd/ Bombay Burmah Trading Corporation Ltd Combination C-2011/09/04	Acquisition Competition Act section 5(a)	Chemicals, Architectural Products	Unconditional approval	07/09/2011	30/09/2011	24 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
5.	ALSTOM Holdings (India) Ltd/ ALSTOM Projects India Combination C-2011/10/06	Intra-group amalgamation Competition Act section 5(c)	Energy, Power	Unconditional approval	12/10/2011	19/10/2011	8 days
6.	NHK Automotive Components India Pvt Ltd/ Bombay Burmah Trading Corporation Ltd Combination C-2011/10/05	Acquisition Competition Act section 5(a)	Automotive Springs	Unconditional approval	05/10/2011	04/11/2011	31 days
7.	Siemens VAI Metals Technologies Pvt Ltd/ Siemens Ltd/ Morgan Construction Company India Pvt Ltd Combination C-2011/11/09	Intra-group amalgamation Competition Act section 5(c)	Industrial and Infrastructure	Unconditional approval	21/11/2011	13/12/2011	23 days
8.	Nippon Steel Corporation/ Sumitomo Metal Industries, Ltd Combination C-2011/10/07	Merger Competition Act Section 5(c)	Steel	Unconditional approval	14/10/2011	27/12/2011	74 days
9.	Akzo Nobel India Ltd/ Akzo Nobel Chemicals (India) Ltd/ Akzo Nobel Coatinggs Ltd/ Akzo Nobel Car Refinishes India Pvt Ltd	Intra-group amalgamation Competition Act section 5(c)	Chemical, Coatings	Unconditional approval	01/12/2011	28/12/2011	28 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Combination C-2011/12/11						
10.	Tata Chemicals Ltd/ Wyoming I Mauritius Pvt Ltd Combination C-2011/12/12	Intra-group amalgamation Competition Act section 5(c)	Chemical	Unconditional approval	09/12/2011	28/12/2011	20 days
11.	Standard Chartered Bank/ Barclays Bank PLC Combination C-2011/15/11	Acquisition Competition Act section 5(a)	Financial Services (Banking)	Unconditional approval	12/12/2011	28/12/2011	17 days
12.	Electromags Automotive Products Private Limited & The Bombay Burmah Trading Corporation Combination C-2011/12/16	Merger Competition Act Section 5(c)	Manufacturers & Exporters	Order	16/12/2011	01/01/2012	77 days
13.	IVRCL Ltd. and IVRCL Assets & Holdings Ltd. Combination C-2011/12/13	Merger Competition Act Section 5(c)	Infrastructure Industry	Approved	12/12/2011	17/01/2012	403 days
14.	Electromags Automotive Products Private Limited & The Bombay Burmah Trading Corporation Combination C-2011/12/16	Merger Competition Act Section 5(c)	Manufacturers & Exporters	Approved	16/12/2011	17/01/2012	93 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
15.	Shriram Holdings (Madras) Private Ltd. (SHMPL) & Shriram Transport Finance Company Ltd. (STFC) Combination C-2012/01/20	Intra-group amalgamation Competition Act section 5(c)	Holding Company	Approved	10/01/2012	17/01/2012	08 days
16.	Goldman Sachs Services Private Ltd. (GSSPL) & Paternoster India Pvt. Ltd. (PIPL) Combination C-2012/01/21	Merger Competition Act Section 5(c)	Mutual funds/ Financial Asset/ wealth Management	Approved	13/01/2012	24/01/2012	12 days
17.	Navyug Special Steel Pvt. Ltd. (NSSPL) Combination C-2011/12/14	Acquisition Competition Act section 5(a)	Manufacturing Industry	Approved	12/12/2011	31/01/2012	51 days
18.	SML Isuzu Ltd. & Sumitomo Corporation Combination C-2011/12/17	Share Purchase Agreement	Manufacturing Industry	Approved	22/12/2011	02/02/2012	43 days
19.	Taco Composites Ltd. (TACOCL) & Tata AutoComp Systems Ltd. (TACO) Combination C-2012/01/18	Intra-group amalgamation Competition Act section 5(c)	Automobile Manufacturers	Approved	02/01/2012	02/02/2012	32 days
20.	Reliance Infratel Ltd. (RITL) & Netizen Ra-	Merger	Telecom Infrastructure	Approved	24/01/2012	02/02/2012	10 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	jasthan Ltd. (NRL) Combination C-2012/01/25	Competition Act Section 5(c)	Company				
21.	Reliance Industries Investment & Holding Ltd. (RIIHL) & Reliance Industries Ltd. Combination C-2012/01/22	Acquisition Competition Act section 5(a)	Infrastructure Industry	Approved	20/01/2012	14/02/2012	26 days
22.	TATA Power Company Ltd. (TPCL) & TATA BP Solar India Ltd. Combination C-2012/01/26	Acquisition Competition Act section 5(a)	Power Company	Approved	27/01/2012	14/02/2012	19 days
23.	Saint-Gobain Produits pour la Construction SAS (SGPPC) & Shri Ram Electro Cast Ltd. (SREL) Combination C-2012/01/19	Acquisition Competition Act section 5(a)	Manufacture Industry	Approved	09/01/2012	16/02/2012	39 days
24.	Loop Telecommunications Holdings India Ltd. (LTHIL), Capital Global Ltd., Mauritius & Loop Mobile Holdings India Ltd. (LMHIL) Combination C-2012/01/27	Intra-group amalgamation Competition Act section 5(c)	Telecommunication Sector	Approved	27/01/2012	21/02/2012	26 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
25.	Sasan Power Infrastructure Ltd. & Reliance Power Ltd. Combination C-2012/02/29	Merger Competition Act Section 5(c)	Infrastructure Industry	Approved	01/02/2012	15/02/2012	15 days
26.	Sundaram Clayton Ltd.(SCL), Anusha Investments Ltd.(AIL) & Sundaram Investments Ltd.(SIL) Combination C-2012/01/23	Intra-group amalgamation Competition Act section 5(c)	Manufacturing Industry	Approved	23/01/2012	28/02/2012	37 days
27.	Viscount Management Services (Alpha) Ltd. (VMSA) & Reliance Capital Ltd. (RCAP) Combination C-2012/01/24	Merger Competition Act Section 5(c)	Finance	Order	24/01/2012	12/04/2012	20 days
28.	Viscount Management Services (Alpha) Ltd. (VMSA) & Reliance Capital Ltd. (RCAP) Combination C-2012/01/24	Merger Competition Act Section 5(c)	Finance	Approved	24/01/2012	28/02/2012	36 days
29.	Sterlite Opportunities and Ventures Ltd. (SOVL) & Sterlite Industries India Ltd. (SIIL)	Intra-group amalgamation Competition Act section	Mining Industry	Order	02/02/2012	12/04/2012	71 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Combination C-2012/02/30	5(c)					
30.	Sterlite Opportunities and Ventures Ltd. (SOVL) & Sterlite Industries India Ltd. (SIIL) Combination C-2012/02/30	Intra-group amalgamation Competition Act section 5(c)	Mining Industry	Approved	02/02/2012	21/02/2012	20 days
31.	Legrand India Pvt. Ltd. (LIPL) & Indo Asian Electric Pvt. Ltd. (IAEPL) Combination C-2012/02/32	Merger Competition Act Section 5(c)	Electrical and Digital Building Infrastructures	Approved	03/02/2012	14/02/2012	12 days
32.	Zenta Knowledge Services Private Ltd. (ZKSPL) & Accenture Services Pvt. Ltd. (ASPL) Combination C-2012/02/34	Merger Competition Act Section 5(c)	Business Services	Approved	10/02/2012	21/02/2012	41 days
33.	Thesys Technologies Pvt. Ltd. (TTPL) & Capgemini India Pvt. Ltd. (CIPL) Combination C-2012/02/36	Intra-group amalgamation Competition Act section 5(c)	Software Industry	Approved	10/02/2012	23/02/2012	14 days
34.	Escorts Ltd. (EL), Escorts Construction Equipment Ltd.(ECEL), Escorts Finance Invest-	Intra-group amalgamation Competition	Machinery/ Manufacturers	Approved	16/02/2012	23/02/2012	08 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	ments And Leasing Pvt. Ltd. (EFILL) & Escotrac Finance And Investments Pvt. Ltd. (ESCOTRAC) Combination C-2012/02/38	Act section 5(c)					
35.	DLF Construction ltd. (DCL), DLF hotels & Apartments Pvt. Ltd. (DHAPL), DLF Projects Ltd. Combination C-2012/02/35	Merger Competition Act Section 5(c)	Real Estate	Approved	10/02/2012	28/02/2012	19 days
36.	Alok Industries ltd. (AIL) & Grabal Alok Impex Ltd. (GRAIL) Combination C-2012/01/28	Merger Competition Act Section 5(c)	Textile Manufacturing Industry	Approved	27/01/2012	07/03/2012	41 days
37.	United Breweries Ltd. (UBL) & Scottish and New Castle India Pvt. Ltd. (SNIPL) Combination C-2012/03/42	Intra-group amalgamation Competition Act section 5(c)	Distillery & Bottling Industry	Approved	07/03/2012	20/03/2012	14 days
38.	Reliance Infrastructure Ltd.(RINFRA), Reliance Energy Ltd.(REL), Reliance Energy Generation Ltd.(REGL), Reliance Goa and Samalkot	Merger Competition Act Section 5(c)	Infrastructure Industry	Approved	14/02/2012	22/03/2012	38 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Power Ltd.(RGSPL), Reliance Infraventures Ltd. (RIVL), Reliance Property Developers Ltd.(RDPL) & Reliance Infrastructure Engineers Pvt. Ltd. (RIEPL) Combination C-2012/02/37						
39.	India power Corporation Ltd. (IPCL) & DPSC Ltd. Combination C-2012/03/41	Intra-group amalgamation Competition Act section 5(c)	Power Sector	Approved	05/03/2012	29/03/2012	25 days
40.	Siemens Ltd. (SL) & Siemens Power Engineering Pvt. Ltd. (SPEL) Combination C-2012/03/43	Intra-group amalgamation Competition Act section 5(c)	Engineering & Electronics Conglomerate	Approved	12/03/2012	29/03/2012	18 days
41.	Infosys Consulting India Ltd. & Infosys Ltd. Combination C-2012/03/41	Intra-group amalgamation Competition Act section 5(c)	IT Sector	Approved	15/03/2012	29/03/2012	18 days
42.	Alok Industries ltd. (AIL) & Grabal Alok Impex Ltd. (GRAIL) Combination C-2012/01/28	Merger Competition Act Section 5(c)	Manufacturing Industry	Order	27/01/2012	12/04/2012	77 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
43.	Sasan Power Infrastructure Ltd. & Reliance Power Ltd. Combination C-2012/02/29	Merger Competition Act Section 5(c)	Infrastructure Industry	Order	01/02/2012	12/04/2012	72 days
44.	Tetra Laval BV Combination C-2012/02/40	Acquisition Competition Act section 5(a)	Manufacturing Industry	Approved	28/02/2012	12/04/2012	45 days
45.	Sterlite Industries India Ltd. (SIIL), Madras Aluminium Company Ltd. (MALCO), Ekaterina Ltd. (Ekaterina), Sesa Goa Ltd. (SGL), Vedanta Aluminium Ltd. (VAL), Cairn India Ltd. (Cairn), Twinstar Mauritius holdings ltd. (TMHL), Twinstar Energy Ltd. (TEL)& Vedanta Resources Plc. (VR) Combination C-2012/03/45	Intra-group amalgamation Competition Act section 5(c)	Mining Industry (Pvt. Sector Industry)	Approved	22/03/2012	12/04/2012	22 days
46.	Siemens Ltd. (SL) & Siemens Power Engineering Pvt. Ltd. (SPEL) Combination C-2012/03/43	Intra-group amalgamation Competition Act section 5(c)	Engineering & Electronics Conglomerate	Order	12/03/2012	19/04/2012	46 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
47.	Hongkong and Shanghai Banking Corporation Ltd. (HSBC) Combination C-2012/03/46	Acquisition Competition Act section 5(a)	Banking And Finance	Approved	27/03/2012	19/04/2012	24 days
48.	Res Rei Finance Pvt. Ltd. (RREPL), AAA Entertainment Pvt. Ltd.(AAA) Combination C-2012/02/33	Merger Competition Act Section 5(c)	Entertainment Industry	Approved	09/02/2012	26/04/2012	24 days
49.	Tech Mahindra Ltd., Satyam Computer Services Ltd. & C&S Systems Technologies Pvt. Ltd. Combination C-2012/03/48	Intra-group amalgamation Competition Act section 5(c)	IT Outsourcing Company	Approved	30/03/2012	26/04/2012	27 days
50.	Kalyan Jewellers Salem Pvt. Ltd. (KSPL) & Kalyan Jewellers India Pvt. Ltd. (KIPL) Combination C-2012/04/49	Intra-group amalgamation Competition Act section 5(c)	Jewellery Retail	Approved	12/04/2012	02/05/2012	21 days
51.	Nirma Ltd. & Nirma Industries Pvt. Ltd. Combination C-2012/04/52	Intra-group amalgamation Competition Act section 5(c)	Manufacturing Industry	Noted	26/04/2012	07/05/2012	12 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
52.	Nippon Life Insurance Co., Reliance Capital Ltd. (RCAP) & Reliance Capital Asset Management Ltd. (RCAML) Combination C-2012/04/50	Acquisition Competition Act section 5(a)	Insurance/ Banking/ Investment/ Mutual Funds	Approved	20/04/2012	08/05/2012	50 days
53.	Reckitt Benckiser Investments India Pvt. Ltd. (RBIIPL), Paras Pharmaceuticals Ltd. (PPL) & Halite Personal Care India Pvt. Ltd.(HPCIPL) Combination C-2012/02/39	Merger Competition Act Section 5(c)	Manufacturing Industry	Approved	23/02/2012	08/05/2012	76 days
54.	Infosys Consulting India Ltd. & Infosys Ltd. Combination C-2012/03/41	Intra-group amalgamation Competition Act section 5(c)	IT Sector	Order	15/03/2012	17/05/2012	64 days
55.	FIL Investment Advisors, FIL Trustee Company Pvt. Ltd., L&T Finance Ltd., L&T Investment Management Ltd. & L&T Mutual Fund Trustee Ltd. Combination C-2012/04/51	Acquisition Competition Act section 5(a)	Investment/ Mutual Funds	Order	26/04/2012	17/05/2012	22 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
56.	RB Mediasoft Pvt. Ltd., RRB Mediasoft Pvt. Ltd., RB Media Holdings Pvt. Ltd., Adventure Marketing Pvt. Ltd., Watermark Infratech Pvt. Ltd. & Colorful Media Pvt. Ltd. Combination C-2012/03/47	Acquisition Competition Act section 5(a)	Media	Approved	27/03/2012	27/05/2012	63 days
57.	Mitsui Sumitomo, Max India Ltd., Max New York Life Insurance company Ltd. Combination C-2012/05/56	Acquisition Competition Act section 5(a)	Insurance	Approved	11/05/2012	29/05/2012	19 days
58.	FIL Investment Advisors, FIL Trustee Company Pvt. Ltd., L&T Finance Ltd., L&T Investment Management Ltd. & L&T Mutual Fund Trustee Ltd. Combination C-2012/04/51	Acquisition Competition Act section 5(a)	Investment/ Mutual Funds	Approved	26/04/2012	06/06/2012	42 days
59.	Wireless Business Services Pvt. Ltd. (WBSPL), Wireless Broardband Business Services (Delhi) Pvt. Ltd. (WBBS), WBBS Kerela, WBBS Haryana, Qualcomm Incorporated &	Intra-group amalgamation Competition Act section 5(c)	Telecom Industry	Notice not Valid	08/05/2012	06/06/2012	35 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Qualcomm Asia Pacific Pte. Ltd. Combination C-2012/05/55						
60.	IGH Holdings Private Limited Combination C-2012/06/62					18/06/2012	
61.	Varun Shipping Company Ltd. (VSCL), Tarun Shipping and Industries Combination C-2012/04/54	Intra-group amalgamation Competition Act section 5(c)	Private Sector Shipping Company	Approved	30/04/2012	20/06/2012	51 days
62.	Hero Investments Pvt. Ltd.(HIPL) & Hero MotoCorp Ltd. (HMCL) Combination C-2012/06/61	Intra-group amalgamation Competition Act section 5(c)	Manufacturing Industry	Approved	08/06/2012	20/06/2012	14 days
63.	Axis Asset Management Co. Ltd. and Axis Mutual Fund Trustee Ltd. by Schroder Investment Management (Singapore) Ltd Combination C-2012/05/58	Acquisition Competition Act section 5(a)	Asset management	Approved	23/05/2012	04/07/2012	42 days
64.	Welspun India Ltd., Welspun Global Brands Ltd. and Welspun Retail Ltd.	Combination	Textile industry	Approved	05/06/2012	04/07/2012	29 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Combination C-2012/06/59						
65.	Fairbridge Capital (Mauritius) Limited and Thomas Cook (India) Limited Combination C-2012/06/60	Acquisition Competition Act section 5(a)	Travel	Approved	07/07/2012	12/07/2012	05 days
66.	Maruti Suzuki India Limited and Suzuki Powertrain India Limited. Combination C-2012/07/68	Acquisition Competition Act section 5(c)	Automobile	Approved	12/07/2012	24/07/2012	12 days
67.	Global nutrition business of Pfizer by Nestle Combination C-2012/05/57	Acquisition Competition Act section 5(a)	Nutritional supplement	Approved	21/05/2012	01/08/2012	82 days
68.	Dhampur Sugar Mills Limited and J K Sugar Limited. Combination C-2012/07/65	Combination Competition Act section 5(c)	Sugar	Approved		01/08/2012	
69.	Notice for Subscription to the equity shares of Shriram Financial Ventures (Chennai) Pvt. Ltd. by Sanlam Emerging Markets (Mauritius) Ltd. Combination C-2012/07/67	Competition Act Section 5(a)	Financial venture	Approved	06/07/2012	08/08/2012	33 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
70.	India Securities Limited and Essar Capital Limited. Combination C-2012/07/70	Merger Competition Act 5(C)	Consultancy	Approved	27/07/2012	08/08/2012	12 days
71.	SPE Investments and SPE Holdings. Combination C-2012/06/63	Acquisition Competition Act section 5(a)	Media/ Entertainment Competition Act Section 6(2)	Approved	18/06/2012	09/08/2012	52 days
72.	Notice under Section 6(2) jointly filed by ABNL, PEFRL, ITSL, PRIL and FVFRL Combination C-2012/07/69	Acquisition Competition Act section 5(a)	Textile (garments)	Notice not valid	16/07/2012	14/08/2012	29 days
73.	EECL, PEL, EMTICI and EPL Combination C-2012/08/77	Combination Competition Act S. 5(c)	Manufacturing of Industrial Gears	Unconditionally Approved	30/08/2012	18/09/2012	20 days
74.	Mitsui & Co. Limited. Combination C-2012/08/73	Acquisition Competition Act S. 5(a)	Sale, Import, Export, Trading of various products	Unconditionally Approved	09/08/2012	19/09/2012	42 days
75.	STARTV ATC Holding Limited. Combination C-2012/07/64	Acquisition Competition Act S. 5(a)	Finance	Unconditional approval	05/07/2012	20/09/2012	78 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
76.	Century Tokyo Leasing Corporation and Tata Capital Financial Services Combination C-2012/09/78	Acquisition Competition Act Section 5(a)	Finance	Unconditional approval	14/09/12	04/10/12	21 days
77.	Glory Investments A Limited Combination C-2012/08/76	Acquisition Competition Act Section 5(a)	Finance	Unconditional approval	30/08/12	11/10/12	43 days
78.	Serco BPO, SKR BPO and IGSPL. Combination C-2012/10/81	Amalgamation Competition Act Section 5(c)	Business Process Outsourcing	Unconditional approval	03/10/12	16/10/12	14 days
79.	Inox Leisure Ltd., Fame India Ltd., Fame Motion Pictures Ltd., Big Pictures Hospitality Services Pvt. Ltd. and Headstrong Films Pvt. Ltd. Combination C-2012/10/84	Amalgamation Competition Act Section 5(c)	Film	Unconditional approval	12/10/12	23/10/12	12 days
80.	JSW Steel Limited and JSW ISPAT Steel Limited. Combination C-2012/09/80	Amalgamation Competition Act Section 5(c)	Steel	Unconditional approval	28/09/12	25/10/12	28 days
81.	Shelf Drilling International Holdings Ltd.	Acquisition Competition	Drilling	Unconditional approval	09/10/12	30/10/12	22 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Combination C-2012/10/83	Act Section 5(a)					
82.	Vijay Television Private Limited and Asianet Communications Limited. Combination C-2012/10/85	Amalgamation Competition Act Section 5(c)	Communication	Unconditional approval	22/10/12	30/10/12	9 days
83.	Invesco Hong Kong Limited Combination C-2012/10/86	Acquisition Competition Act Section 5(a)	Finance	Unconditional approval	25/10/12	08/11/12	15 days
84.	iGATE Global Solutions Limited and iGATE Computer Systems Limited. Combination C-2012/11/89	Amalgamation Competition Act Section 5(c)	Computer	Unconditional approval	05/11/12	20/11/12	16 days
85.	Standard Chartered Bank, India Branch Combination C -2012/11/90	Acquisition Competition Act Section 5(a)	Banking	Unconditional approval	05/11/12	21/11/12	17 days
86.	Tata Consultancy Services Limited, TCS e-Serve Limited and TCS e-Serve International Limited. Combination C-2012/11/91	Amalgamation Competition Act Section 5(c)	Finance	Unconditional approval	12/11/12	22/11/12	11 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
87.	SCUFL , SRHPL and SEHPL Combination C-2012/11/94	Amalgamation Competition Act Section 5(c)	Finance	Unconditional approval	29/11/12	11/12/12	12 days
88.	DHFL, First Blue and DHPL Combination C-2012/11/92	Amalgamation Competition Act Section 5(c)	Finance	Unconditional approval	19/11/12	13/12/12	25 days
89.	Sumitomo Corporation, Sumitomo Corporation Asia Pte Limited, Mukand Limited and Technosys Metal Processing Limited. Combination C-2012/11/93	Acquisition Competition Act Section 5(a)	IT	Unconditional approval	23/11/12	18/12/12	26 days
90.	Punjab National Bank and MetLife India Insurance Company Limited. Combination C-2012/12/98	Acquisition Competition Act Section 5(a)	Banking	Unconditional approval	07/12/12	26/12/12	20 days
91.	PHL Holdings Private Limited and Piramal Enterprises Limited Combination C-2012/12/96	Amalgamation Competition Act Section 5(c)	Finance	Unconditional approval	03/12/12	27/12/12	25 days
92.	SAAB AB (Publ) and Pipavav Defence and Offshore Engineering	Acquisition Competition	Shipping	Approved	30/11/2012	01/01/2013	31 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Company Ltd Combination C-2012/11/95	Act Section 5(a)					
93.	FVIL, ILCL, LEE, PRIL, FLFL Order under section 38 Combination C-2012/12/99	Amalgamation Competition Act Section 5(c)	Cloth Industry	Approved	07/12/2012	03/01/2013	28 days
94.	Gujrat Gas Company Ltd, GSPC Distribution Networks Ltd Combination C-2012/11/88	Acquisition Competition Act Section 5(a)	Gas	Approved	01/11/2012	08/01/2013	69 days
95.	Metlife International, Metlife Combination C-2012/12/100	Acquisition Competition Act Section 5(a)	Insurance	Approved	18/12/2012	08/01/2013	22 days
96.	Suncoke Europe Holding B.V. and VISA Coke Ltd Combination C-2012/12/101	Acquisition Competition Act Section 5(a)	Steel	Approved	20/12/2012	15/01/2013	26 days
97.	Magma Fincorp Ltd Combination C-2012/12/102	Acquisition Competition Act Section 5(a)	Banking	Approved	28/12/2012	22/01/2013	45 days
98.	Kotak Mahindra Bank Ltd	Acquisition	Non- banking Financial	Approved	02/01/2013	22/01/2013	20 days

No.	Case	Type Of Transaction	Industry Sector	Type Of Decision	Date Of Filing Notice	Date Of Order Of Cci	Time Taken For Cci To Grant Approval*
	Combination C-2013/01/103	Competition Act Section 5(a)					
99.	Intel Corporation and Motorola Mobility LLC' Combination C-2013/01/103	Acquisition Competition Act Section 5(a)	Cellular baseband processor	Approved	04/01/2013	22/01/2013	18 days
100.	SABIC Research and Technology Pvt Ltd Combination C-2013/01/106	Acquisition Competition Act Section 5(a)	Research and Development	Approved	11/01/2013	30/01/2013	19 days
101.	Mahindra and Mahindra Combination C-2013/01/105	Acquisition Competition Act Section 5(a)	Automobile	Approved	07/01/2013	04/02/2013	28 days
102.	UTV Global Broadcasting Ltd Combination C-2013/01/107	Acquisition Competition Act Section 5(a)	Media	Approved	24/01/2013	19/02/2013	26 days
103.	Exide Industries Ltd Combination C-2013/01/108	Acquisition Competition Act Section 5(a)	Insurance	Approved	29/01/2013	19/02/2013	30 days
104.	United Spirits Ltd , Relay B.V. (Diageo) Combination C-2012/12/97	Acquisition Competition Act Section 5(a)	Spirits	Approved	05/12/2012	26/02/2013	83 days

Disclaimer

www.nishithdesai.com

MUMBAI

93 B, Mittal Court,
Nariman Point,
Mumbai 400 021 INDIA
Tel: +91 - 22 - 6669 5000
Fax: +91 - 22 - 6669 5001

SINGAPORE

Level 30,
Six Battery Road,
Singapore 049909
Tel: +65 - 6550 9855
Fax: +65 - 6550 9856

SILICON VALLEY

220 S California Ave., Suite 201,
Palo Alto, California 94306, USA
Tel: +1 - 650 - 325 7100
Fax: +1 - 650 - 325 7300

MUMBAI - BKC

3, North Avenue
Maker Maxity
Bandra – Kurla Complex,
Mumbai 400 051 INDIA
Tel: +91 - 22 - 6159 5000
Fax: +91 - 22 - 6159 5001

BANGALORE

Prestige Loka,
G01, 7/1 Brunton Rd,
Bangalore 560 025 INDIA
Tel: +91 - 80 - 6693 5000
Fax: +91 - 80 - 6693 5001

NEW DELHI

C-5, Defence Colony
New Delhi - 110024
INDIA
Tel: +91 - 11 - 4906 5000
Fax: +91 - 11- 4906 5001