



Competition Law in India

A Report on Jurisprudential Trends

June 2015

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May 2015

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Glossary

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
"JFTC"	Japanese Fair Trade Commission
"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 Honorable Supreme Court of India
"TFEU"	Treaty on the Functioning of the European Union

Glossary

Provided upon request only

“UTP”	Unfair Trade Practices
“Coal India”	Coal India Limited
“Competition Bill”	Competition (Amendment) Bill of 2012
“Constitution”	Constitution of India, 1950
“CEA”	Central Electricity Authority
“EU”	European Union
“First Report”	Competition Law in India: Jurisprudential Trends and the Way Forward, Nishith Desai Associates, April 2013
“FSA”	Fuel Supply Agreement
PNGRB	Petroleum & Natural Gas Regulatory Board
“RINL”	Rashtriya Ispat Nigam Limited
“SAIL”	Steel Authority of India Limited
“TRAI”	Telecom Regulatory Authority of India
“US”	United States of America

Introduction

The Indian competition law regime has grown considerably in the last six years ever since the Act became operational in 2009. 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 in India since the First Report. This Report is divided into nine parts. Part I of this report deals with the trend analysis of cases brought before the Commission. 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 till date and relevant decisions/orders passed by the Commission and COMPAT. Part IX of this report summarizes some of the international trends in competition law jurisprudence. This Report also includes an annexure that provides illustrative details of orders passed by CCI since the First Report, up to May 2015 in respect of anti-competitive agreements and abuse of dominance (i.e., orders in relation to matters under Section 3 and Section 4 of the Act).

1. Trend Analysis

Information on the CCI website reveals that as on March 2015¹, there were approximately 590 cases pending before CCI and about 8.5% of these cases were cases transferred from the MRTP Commission. Approximately 83.1% of the cases were cases where someone approached the CCI and in approximately 4.6% of the cases, CCI has taken *suo moto* cognizance.

From 2013 till May 2015, CCI disposed off matters as follows:

- Section 26 (1) – 12 orders in 2013; 13 orders in 2014 and 10 orders in 2015;
- Section 26 (2) – 52 orders in 2013; 83 orders in 2014 and 29 orders in 2015;
- Section 26 (6) – 9 orders in 2013; 4 orders in 2014 and 3 orders in 2015;
- Section 26 (7) – 1 order in 2013;
- Section 27 – 15 pronouncements in 2013; 21 pronouncements in 2014 and 10 pronouncements in 2015;
- Other orders (imposing penalty under Section 45 for failure to furnish information) 2 orders in 2014.

Apart from these cases relating to information under Section 3 and Section 4, CCI also examined 36 combinations in 2015 as against 80 and 52 combinations in 2014 and 2013 respectively.² In all, CCI had a busy 2014 and the trend would show that anti-trust enforcement and litigation are not likely to reduce!

Cases Before the CCI During the FY 2014-15

Description	Information Received u/s 19 (1)	Cases Received from MRTPC On transfer	Suo moto cognizance	References received from Govt.	References received from Statutory Authorities	Total
Number of matters pending at the beginning of the year	380	50	16	14	1	461
Number of matters received during the year	110	Nil	11	8	Nil	129
Total number of matters	490	50	27	22	01	590

We find following trends on the basis of collected data –

I. Steady increase in the number of complaints

In 2014 – 2015 CCI addressed issues of anti-competitive behavior in real estate, power, media and entertainment, automobiles sector including couple of e-commerce cases where CCI examined online and offline transactions.³ Recently, certain retailers have voiced concerns about practices of online trading

1. Fair Play, Volume 12, January – March 2015 and website of CCI, available at <http://www.cci.gov.in/>

2. Figures for 2015 are till May 2015.

3. *Asish Ahuja v. Snapdeal & Anr.* Case No. 17 of 2014, dismissed by order under Section 26 (2) of the Act dated May 19, 2014.

portals such as Amazon, Snapdeal and Flipkart by which the latter are able to offer huge discounts.⁴ In *M/S Jasper Infotech Private Ltd. v. M/S Kaff Appliances (India) Private Ltd.*⁵, the CCI while examining practices of online trading portals held that prescription of price by e-commerce companies to its dealers and insistence to follow a particular pricing regime is in violation of Section 3(4) (e) read with 3(1). Quantitatively, there may not be a substantial increase in cases filed or disposed off in 2014, qualitatively, CCI has addressed a lot of important issues. Perhaps the most important issue is in public procurement in relation to the power industry, which will be addressed in later sections.

II. Diverse Nature of Informants

As observed in the First and Second Report and discussed below 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. There has not been much change in the nature of informants and as observed in the previous reports, there is a healthy mix of private individuals, trade associations, chambers of commerce, direct competitors in the market, enterprises engaged in distributing activity for a dominant manufacturer and others.

The varied nature of informants and the limited instances of *suo moto* cognizance shows that competition law and its enforcement has permeated significantly across class of informants and various industries.

III. Industries in which Opposite Parties are Engaged

In earlier years, CCI scratched the surface of examining transactions relating to SOEs. In 2013 and 2014, CCI cracked the whip! 2013 concluded with a momentous ruling against Coal India.⁶ In 2013, CCI also gave a green signal to the Jet – Etihad (*Jet – Etihad Case*).⁷ In September 2014, CCI also rendered a landmark ruling on automobile ancillary products and services in the auto industry.⁸ In 2015, CCI penalized automobiles⁹ and pharmaceuticals¹⁰ sector companies involved in anti-competitive activities. CCI till date has examined various issues in industries across the spectrum from those directly affecting consumers (such as real estate, auto ancillaries etc.) to heavy industries (such as cement, steel, coal, defence industry etc.). It is also important to note that CCI has not approached the cases or pursued against these industries with misplaced zeal – approximately 4.6% cases are ones where CCI has taken *suo moto* cognizance.

IV. Complaints Received Against SOEs

2013 and 2014 are probably watershed years for prosecution of SOEs with CCI pursuing regulators such as Institute of Chartered Accountants of India, several SOEs in the power sector, procurement by the Union Ministry of Railways. In *Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. & Anr.*¹¹, constitutional mandate for state monopoly was raised by Opposite Parties placing reliance on Supreme Court ruling in *Ashoka Smokeless Coal (P) Ltd. v. Union of India*.¹² However, this did not preclude

4. *Future Group's Kishore Biyani, vendors accuse Flipkart of undercutting to destroy competition*, available at http://articles.economictimes.indiatimes.com/2014-10-08/news/54784739_1_future-group-kishore-biyani-marketplaces.

5. *Case No. 61/2014*

6. *Case No. 3 of 2012 M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. & Anr.*, *Case No. 11 of 2012 Maharashtra State Power Generation Company Ltd. v. M/s. Western Coalfields Ltd. & Anr.* and *Case No. 59 of 2012 M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Corporation Limited & Anr.*, Coal India Limited, being Opposite Party No.2 in each of the cases.

7. *Combination Registration No. C – 2013/05/122 dated December 11, 2013.*

8. *Case No. 03 of 2011 Shamsheer Kataria v. Honda Siel Cars Ltd. & Ors.*

9. *Case No. 61 of 2012 Indian Foundation of Transport Research & Training v Sh. Bal Malkait Singh, President and Ors.*

10. *Case No. 78 of 2012 M/s Rohit Medical Store vs Macleods Pharmaceutical Limited & Ors.*

11. *Case No. 3 of 2012, supra.*

12. (2007) 2 SCC 640.

examination of Coal India's business practices by CCI. A similar order was passed in *M/s. Madhya Pradesh Power Generating Company Limited v. M/s. South Eastern Coalfields Ltd. & Anr.*¹³, (**MP Gen Co Case**). In these cases, while CCI was alive to regulatory framework and formulation of policy, CCI did not exempt the applicability of the Act to SOEs. Additionally, although cases relating to FSAs and Coal India are in appeal, it does not look like CCI will be changing its approach towards other SOEs.

V. Inquiry, Enforcement and Penalty by the CCI

A material change in enforcement in 2013 - 2014 was introduction of the Competition Bill seeking to confer more powers on the DG towards enforcement and realization of penalties. CCI has passed several orders providing for 'cease and desist' along with orders imposing penalty. To ensure compliance, it was thought fit to confer more powers on the DG. However, the Competition Bill has lapsed and it remains to be seen if it is reintroduced or any further action is taken by the Central Government.¹⁴

CCI has imposed billions of Rupees of penalty – Rs. 25 Billion in *Shamsher Kataria v. Honda Siel Cars Ltd. & Ors.* (**Automobiles Case**), Rs. 17 billion in *M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. & Anr.*, *Maharashtra State Power Generation Company Ltd. v. M/s. Western Coalfields Ltd. & Anr.* and *M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Corporation Limited & Anr.* (**Coal India Case**) and *Belaire Owners' Association vs. DLF Limited & Ors.*¹⁵ being notable instances. While in some cases, appellate courts have granted stay, pending disposal of the appeal, in other cases, the appellate court has refused stay on recovery of penalty.¹⁶

However, an area of the Act where application is not certain and CCI adjudication lacks clarity is imposition of penalty. CCI orders imposing penalty do not have a discernible rationale which provides a legal or economic basis for imposition of a particular percentage of penalty. This issue was addressed by COMPAT in *M/s. Excel Crop Care Limited v. Competition Commission of India & Ors.*¹⁷ It is important to note that COMPAT accepted the ruling on merits of CCI in this case and modified the CCI order on imposition of penalty. In this case, COMPAT held that it was important to articulate the reasons as to why a particular percentage of penalty was being imposed and secondly, what would be the relevant turnover for such imposition. In this case, COMPAT held¹⁸:

While arriving at a conclusion about the relevant turn over it would be open to the authorities like CCI to rely on the general principles expressed in those guidelines regarding the method of calculation etc.

However, it should be an endeavor of the authorities to apply those principles not mechanically or blindly but after carefully considering the factual aspects. Such factual aspects could include the financial health of the company, the necessity of the product, the likelihood of the company being closed down on account of unreasonable harsh penalty etc. At the same time the authorities would be well advised in considering the general reputation and the other mitigating factors like the first time breaches as also the attitude of the company. This list is certainly not exhaustive and the authority can and should consider all the relevant factors while considering the relevant turn over as also considering the extent of penalty on that basis. It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court. [para 63]

Two landmark cases on imposition of penalty relate to failure on the part of opposite party to provide information.¹⁹ In *In Re: Consim Info Private Limited v. Google Inc., USA and Google India Private Limited and*

13. Case No. 5 of 2013, along with Case No. 7 of 2013, *M/s. Madhya Pradesh Power Generating Company Limited v. M/s. South Eastern Coalfields Ltd. & Anr.* and Case No. 37 of 2013 *M/s. West Bengal Power Development Corporation Ltd.*

14. See NDA Hotline, *More Powers to Director General under the Competition (Amendment) Bill 2012* available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/more-powers-to-director-general-under-the-competition-amendment-bill-2012.html?no_cache=1&cHash=59e15955doae63b2898dacfbb0320e594.

15. Case No. 19 of 2010.

16. See particularly Supreme Court Order dated August 27, 2014 in Civil Appeal No. 6328 of 2014, *M/s. DLF Limited v. Competition Commission of India*.

17. Appeal 79 of 2012, Order dated October 29, 2013.

18. *M/s. Excel Crop Care Limited, supra*.

19. Case No. 7 of 2012, *In Re: Consim Info Private Limited v. Google Inc., USA and Google India Private Limited* and Case No. 30 of 2012, *Consumer Unity & Trust Society (CUTS) v. Google Inc., USA and Google India Private Limited* and Case No. 67 of 2010 *Magnolia Flat Owners Association v. M/s. DLF Universal Limited & Ors.*

Case No. 30 of 2012, Consumer Unity & Trust Society (CUTS) v. Google Inc., USA and Google India Private Limited, (Google Case), penalty was imposed due to delayed furnishing of information / failure to furnish information²⁰ and in *Magnolia Flat Owners Association v. M/s. DLF Universal Limited & Ors. (Magnolia Flat Owners Case)*, penalty was imposed due to non-compliance with prior orders of CCI.

Companies should bear in mind consequences of non-compliance while engaging with CCI.²¹ However, from a jurisprudential perspective, the *Google Case* and the *Magnolia Flat Owners Case* along with landmark cases such as *Automobiles Case* and *Coal India Case* do not offer any jurisprudential insight on imposition of penalty.

VI. Cartel v/s Abuse of Dominance

As observed in the previous reports, there are almost an equal number of anti-competitive agreements and abuse of dominance cases, in majority of the cases informants raised allegations under Section 3 and Section 4. Based on CCI orders under Section 26 (1) of the Act, directing DG to investigate, it would appear that the allegations are raised under Section 3 and Section 4 of the Act as a matter of strategy.

VII. Dissenting Opinion in CCI Orders

Dissenting opinions have been made public and this is a welcome trend. Internationally, landmark dissenting views have subsequently become the prevailing view. Transparency in the decision making process permits room for debate and reinforces faith in the system.

VIII. Competition Law Litigation

The Competition Act provides for a statutory appellate forum, the COMPAT. However, in 2014 and 2015 there have been significant number of writ petitions which have been filed challenging orders of the CCI including orders directing investigation or penalty. In 2014 and 2015 alone, there have been nearly 43 writ petitions filed in the Delhi High Court.²² In certain cases, the writ petitions were dismissed and appeals against these dismissal orders have been filed to the appellate court within the Delhi High Court.

In 2015 (till May), there were as many as 11 cases involving Competition Commission in Delhi High Court which were initiated with only one case being disposed off. Some cases relate to procedural due process while some cases appear to be related to substantive due process or merits.

It is a settled principle of law that when there is a statutory appellate mechanism, writ petitions should not be entertained by High Courts.²³ It is equally well settled that even if there is a statutory appellate mechanism, the same is not a bar to writ petitions where an authority acts in violation of principles of natural justice or acts beyond jurisdiction.²⁴ Additionally, in certain cases, the Supreme Court has held that when there is no challenge to constitutionality of the relevant statute, writ petitions are not to be entertained by courts.²⁵ In the appeals against the *Automobiles Case*, a challenge to the constitutionality of

20. A review of the Delhi High Court website would reveal that the *Google Case* has been challenged in Delhi High Court by Google Inc.

21. See NDA Hotline, *Google's Failure to Show Cause to CCI costs Rs. 10 Million* available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/googles-failure-to-show-cause-to-cci-costs-rs-1-crore.html?no_cache=1&cHash=2c3e4deb299eb42fed7ac2cc874a5082.

22. Writ Petitions are filed almost exclusively in the Delhi High Court since the Commission is situated within the territorial jurisdiction of the Delhi High Court.

23. *State of Madhya Pradesh v. Nerbudda Valley Refrigerated Products Company Private Limited & Ors.* (2010) 7 SCC 751, *State of H.P. & Ors. v. Gujarat Ambuja Cement Ltd. & Anr.* (2005) 6 SCC 499.

24. *Paradip Port Trust v. Sales Tax Officer & Ors.* (1998) 4 SCC 90.

25. *Karnataka Chemical Industries & Ors. v. Union of India & Ors.* (2000) 10 SCC 13.

the decision making process has been raised and as per news reports, Section 27 (b) of the Act has been challenged.²⁶

In *Google Inc. v. CCI*²⁷, the Delhi Court in April 2015, held that CCI may recall or review its order subject to certain restrictions and the same should be done sparingly and not in every case where an investigation has been ordered without proper hearing.

In 2014 and 2015 (till May), several cases decided by CCI have reached to the Supreme Court. In 2014 and 2015, approximately 72 cases were filed and interestingly in 64 cases private parties have approached the Supreme Court and in only 8 cases, the Competition Commission has approached the Supreme Court. This would seem to indicate that in a fairly high percentage of cases, COMPAT is upholding rulings of CCI. While some cases do raise issues relating to constitutionality, more than 90% of the 64 appeals are statutory appeals under the Act.²⁸

As these appeals would be decided over the next few years, the position of law under the Act, including, conflict of jurisdiction between CCI and certain regulators such as TRAI and PNGRB, will come to be settled.

An important case decided in 2014 was a challenge to the *Jet – Etihad Case*.²⁹ The combination was approved by CCI in November 2013. While examining the proposed combination, views of Air India were solicited which raised certain concerns. These were considered and disposed off when CCI finally approved the proposed combination by way of an order under Section 31 (1) of the Act (*Jet – Etihad Order*). An appeal under Section 53B was made to COMPAT challenging the *Jet – Etihad Order* by Jitender Bhargava, a public citizen with over 20 years association with Air India. COMPAT dismissed the appeal on the point of *locus standi* without examining the merits of the *Jet – Etihad Order*. Although Section 53A provides that ‘any person, aggrieved’ may challenge an order of CCI, COMPAT interpreted ‘any person’ to mean, a person ‘aggrieved’ by the CCI order and that it could not mean ‘any’ and ‘every’ person.

It is possible that in the near future, COMPAT is called upon to examine the legality of CCI orders passed in relation to combinations and it is equally possible that proceedings relating to combinations are brought before the Delhi High Court in its writ jurisdiction. In a relatively short period of time, CCI and COMPAT have shown their ability to handle litigation and going forward, both institutions may require additional infrastructure to handle litigation.

Keeping in mind the need and recognizing the constitutionality of specialized tribunals, the Supreme Court reiterated the well-settled principle that quasi-judicial tribunals were bound to comply with principles of rule of law and principles of natural justice.³⁰ Rule of law requires that rulings laid down by an authority are consistent, uniform and predictable. The fact that CCI is an appellant in only 8 cases in the Supreme Court perhaps indicates the degree of consistency in the interpretation and application of the Act by CCI and this is certainly a promising sign.

Litigation can be costly and sometimes collateral damage from litigation outweighs notional benefits. Regulatory litigation is specialised, extremely sensitive³¹ and requires treatment different from commercial litigation. Once the stage is set for litigation, it is difficult to turn the clock back and a party should be prepared to litigate up to the Supreme Court.

Companies should be vigilant about its rights should and seek enforcement of these rights if these rights are violated. Arbitrary actions or actions that violate principles of natural justice give rise to the right to

26. See *Spare Parts Case: Final Hearing on Tata, Mahindra Plea in October*, available at <http://profit.ndtv.com/news/corporates/article-spare-parts-case-final-hearing-on-tata-mahindra-plea-in-october-673283>.

27. SWP (C) No. 7084 of 2014 decided on 27.04.2015

28. There is no report which provides these details. These statistics are on the basis of a review of the cases pending as disclosed on the website of the Supreme Court, available at <http://courtnic.nic.in/courtnicsc.asp> and for the Delhi High Court available at <http://delhihighcourt.nic.in/case.asp>.

29. For an analysis of the *Jet – Etihad Case*, see *NDA Hotline Competition Commission of India approves Jet – Etihad Deal!* available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/competition-commission-of-india-approves-jet-etihad-combination.html?no_cache=1&cHash=1caec18e8828475d9184e79621d6d182.

30. *Namit Sharma v. Union of India (2013) 1 SCC 745*.

31. See *Show cause for litigation*, Vivek Kathpalia and M.S. Ananth, Nishith Desai Associates, Hindu Business Line, available at <http://www.thehindubusinessline.com/opinion/show-cause-for-litigation/article4891879.ece>.

litigate before High Courts. An action is arbitrary or violates principles of natural justice if it lacks reasons, is unreasonable or based on extraneous and irrelevant considerations. Although High Courts would quash such notices, they would also seek a response on the substance of the transaction.

Although the right to approach the High Court and seek remedy under the Constitution is fluid, such an action should be carefully taken. When an issue affects an industry, making a representation through chambers of commerce to the relevant ministry should be considered.³² Issues relating to policy are better resolved through interaction with government than litigation, as courts anyway defer to the government on policy issues.³³

While litigating before CCI, certain points ought to be kept in mind. The outcome in the *Google Case* demonstrates the importance of compliance, cooperation and documentation. In appropriate cases, a company should consider a regulatory audit which would highlight non-compliance and exposure to litigation risks. Such documentation would help a company in defending its stand on regulatory compliance. Dilatory tactics are counterproductive; it is imperative that a notice is responded to at the earliest by providing information as requested or seeking additional time to comply. Unless a case of violation of principles of natural justice or transgression of jurisdiction can be made out, High Courts do not interfere at this stage. Companies must, therefore, focus on an appropriate reply. It is important for a company to ascertain the circumstances under which the notice has been issued. Sometimes, the investigation is initiated on the basis of a complaint by disgruntled employees or competitors. Even if there is no recourse against such action, a company should be aware of the background for investigation.

Non-compliance with CCI orders can have financial consequences and reputational consequences. It is important that companies be vigilant about their obligations under the Act and equally vigilant about protecting their rights under the law.

32. See for instance, *SIAM should play a role in CCI penalty case: BMW India head*, available at <http://www.thehindu.com/business/Industry/siam-should-play-a-role-in-cci-penalty-case-bmw-india-head/article6360817.ece>.

33. See for instance *Manohar Lal Sharma v. Union of India (2013) 6 SCC 616* on deference by courts to executive branch and NDA Hotline, SC strikes down executive action again on ground of unconstitutionality.

2. Evolution of Competition Law in India

India after independence chose a centrally planned economic structure also referred to as the Nehruvian³⁴ 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.³⁵ 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).³⁶ 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.³⁷ 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 crisis³⁸ 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 of income and levels of living (Mahalanobis Committee).³⁹ 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.⁴⁰ 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.⁴¹ The MRTP Act was passed to enable the Government to control concentration of economic power in Indian industry.⁴² The MRTP Act was notified in the year 1970 and in August 1970, the MRTP Commission was set up.

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

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

36. Act No. 65 of 1951.

37. *Supra note 2.*

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

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

40. *Ibid.*

41. *Ibid.*

42. 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.⁴³

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).⁴⁴ The MRTP Commission was empowered to inquire into the workings of an undertaking if it was of the opinion that such an 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.⁴⁵ 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 ⁴⁶ illegal ambit of Chapter IV.

43. 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.

44. See, Chakravarthy S MRTP Act metamorphoses into Competition Act. www.Cuts-international.org/doco1.doc;

45. <http://www.financialexpress.com/news/monopolistic-trade-practices-still-pose-a-threat-to-competition/74030/o>

46. 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.”.

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 Affairs⁴⁷, 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, resale 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 Agreement⁴⁸ held that rule of reason had to be applied in the cases of agreements constituting violations of the RTP.⁴⁹ The Teleco case was decided in the back drop of similar judgments in US which applied the rule of reason test, including in Continental T.V. v GTE Sylvania.⁵⁰ 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.⁵¹ 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 resale price maintenance, area restriction, exclusive dealing etc would be deemed restrictive. Later the Supreme Court in Voltas Ltd v/s Union of India⁵² 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 Committee⁵³ was constituted to recommend a suitable legislative framework relating to

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

48. (1977) 2 SCC 55

49. 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 are peculiar to the business to which the 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.”*

50. (1977) 433 U.S. 36

51. (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]”*

52. AIR 1995 SCC 1881.

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

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 for breach of law and; no other penalty or fine could be imposed.⁵⁴

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.⁵⁵

Thirdly, MRTP Act did not define certain key terms⁵⁶ 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.⁵⁷ 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.⁵⁸

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 petition⁵⁹ 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 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, 2009⁶⁰ and June, 2011⁶¹ respectively.

54. See, Chakravathy S MRTP Act metamorphoses into Competition Act. www.Cuts-international.org/doco1.doc;

55. 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.

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

57. *Ibid*

58. 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.

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

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

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

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.⁶² 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.⁶³ 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.

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

63. <http://pib.nic.in/newsite/erelease.aspx?relid=88148>

4. Indian Competition Law Framework

Articles 38 and 39 of the Constitution provide 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 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 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 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 Act was 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 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 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 different⁶⁴; however in India all cases relating to anti-competitive practices can only be investigated by the CCI.

Section 27 of the Act lays down reliefs that may be granted on the violation of Section 3 and 4 of the 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 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 COMPAT 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 Act.

64. 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.

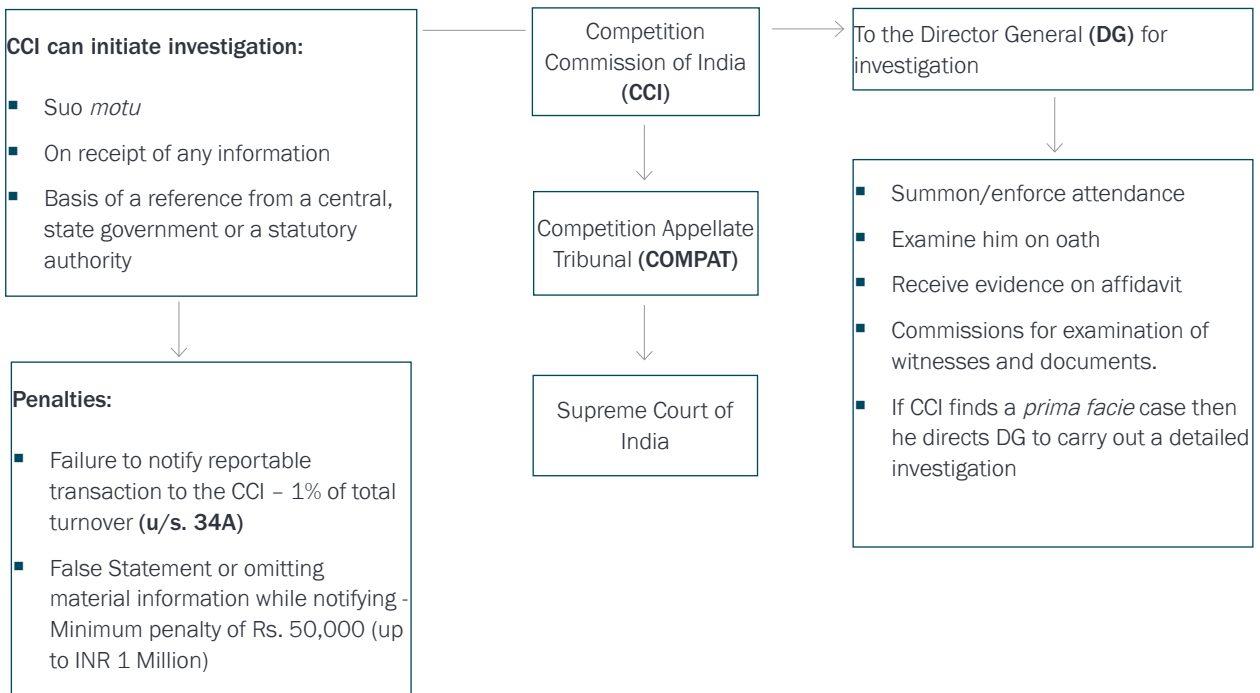
Broad Objectives of the Competition Act

Section 3 – prohibition of anti-competitive agreements

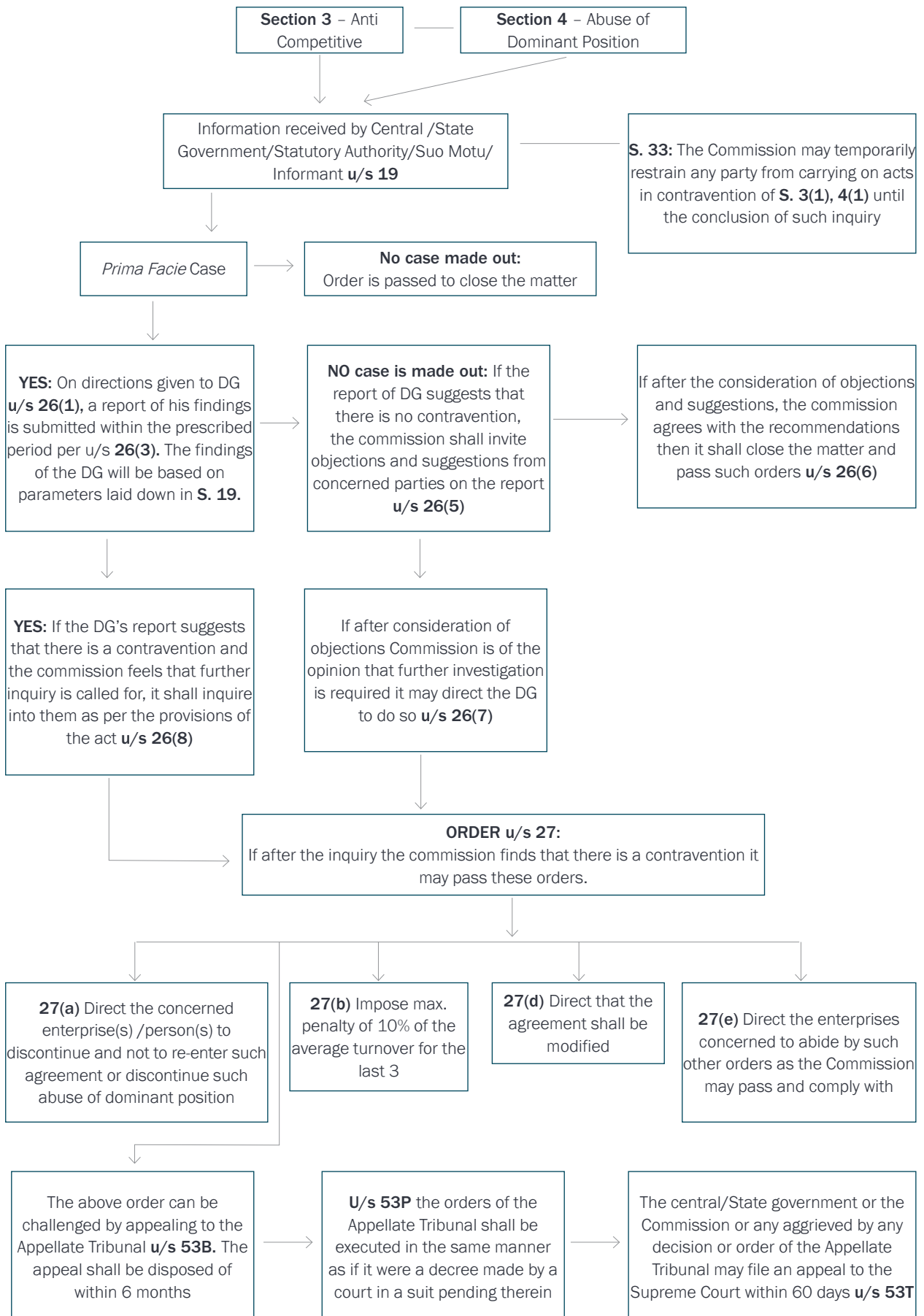
Section 4 – prohibition of abuse of dominant position

Sections 5 & 6 – Regulation of mergers, acquisitions and combinations

Jurisdiction of Authorities



Procedural Chart: Section 3 and 4



Sections 5 and 6

Combination

It is the acquisition of one or more companies by one or more people or merger or amalgamation of enterprises shall be treated as 'Combination' of such enterprises and Persons in the following cases:

- acquisition by large enterprises;
- acquisition by group;
- acquisition of enterprise having similar goods/services;
- acquisition enterprise having similar goods/services by a group;
- merger of enterprises;
- merger in group company.

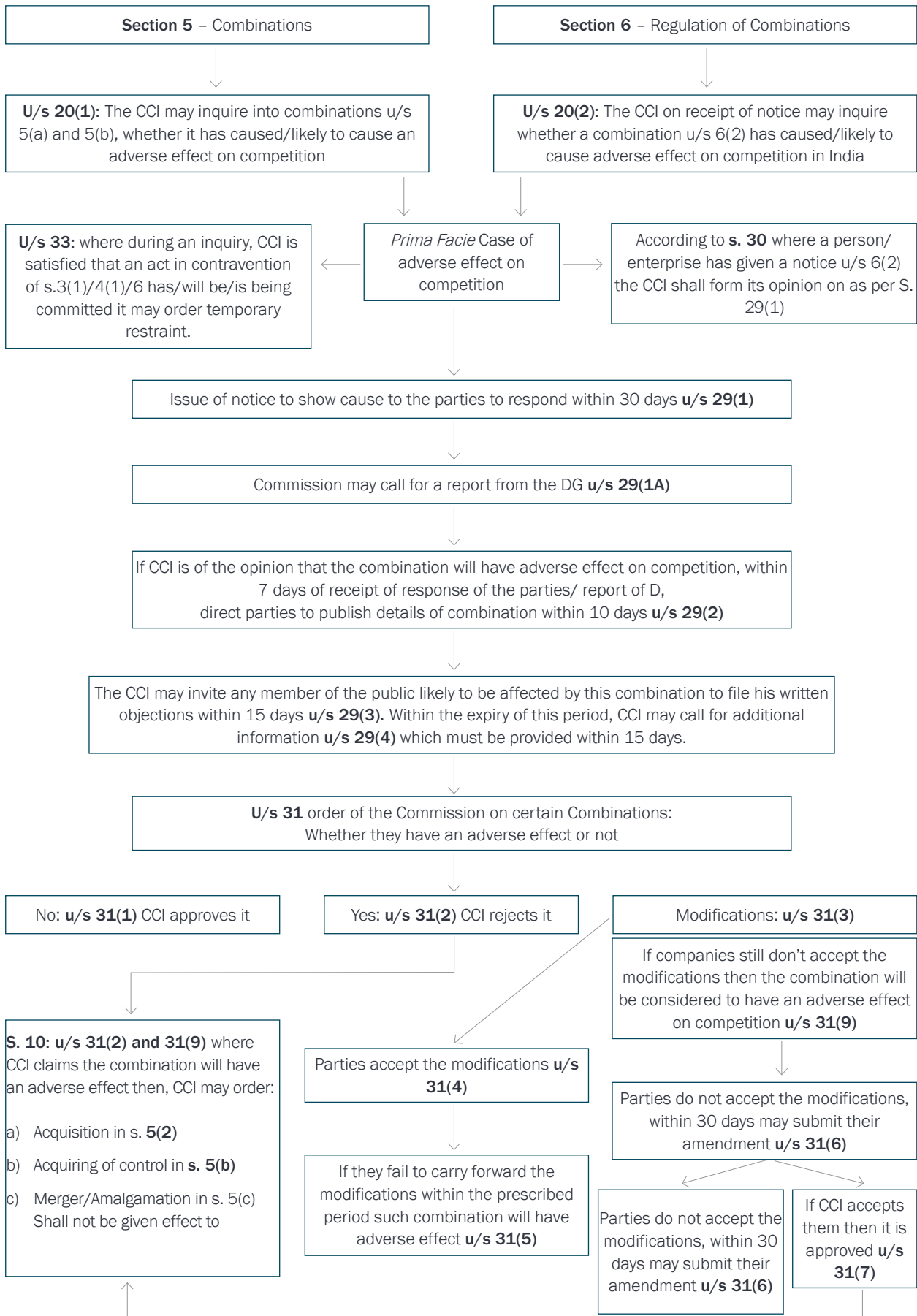
Any combination that causes or is likely to cause appreciable adverse effect on competition (AAEC) in markets in India is void.

Form of Notification

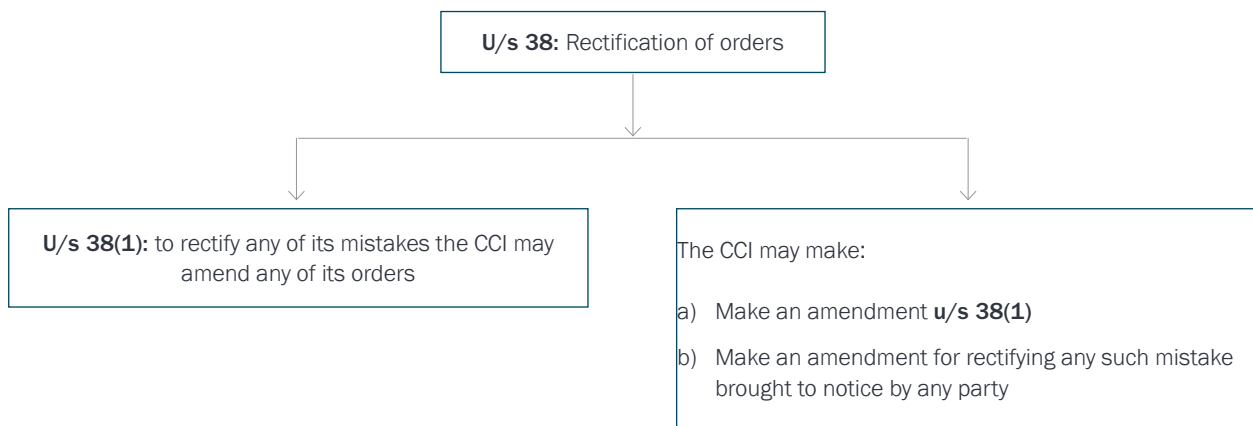
The Combination Regulations 2011 set out three different forms for filing a combination notification:

- Form I (short form). Combination notifications must usually be filed in Form I (Regulation 5(2)).
- Form II (long form). The parties to the combination have the option to give notice in Form II. Form II is preferred where (Regulation 5(3)):
 - The parties to the combination either individually or jointly have a market share after combination of more than 25% in the relevant market, in the case of any vertical overlaps; or
 - The parties to the combination have a combined market share after combination of more than 15% in the relevant market, in the case of any horizontal overlaps.
- Procedure also mandates the compulsory filing of a Compact Disk (CD) with all the necessary forms and documentation as part of the Combination Regulations.

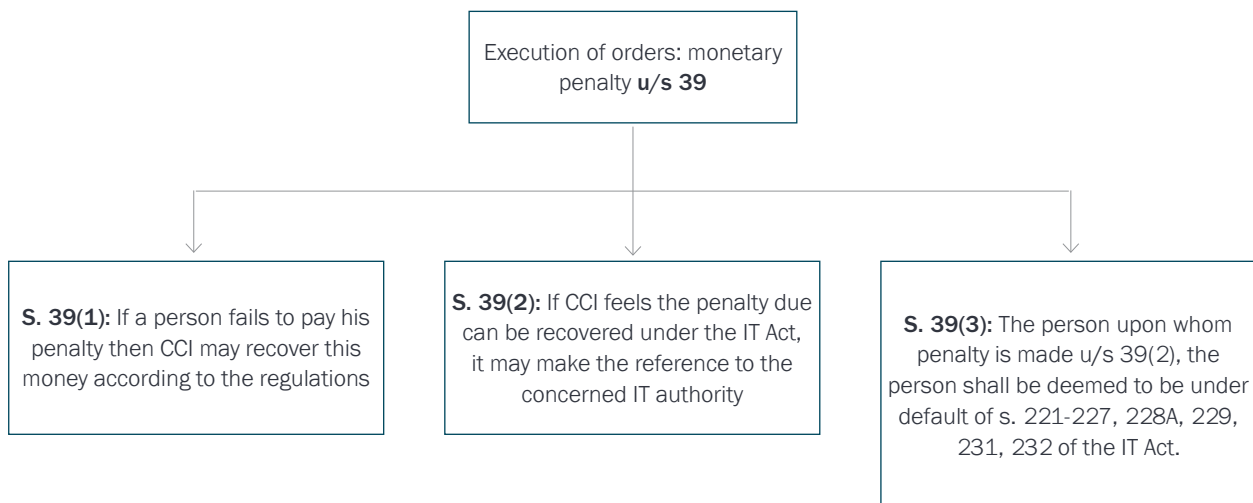
Procedural Chart



Rectification of Orders



Penalty



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 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; 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 analyzed by us below, we note that the CCI has examined the allegations and material on record as against the elements of Section 19(3) of the Act as set out above. However, in *Automobiles Dealers Association v. Global Automobiles Limited & Anr.*⁶⁵, 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 agreement⁶⁶ and later at vertical agreements.⁶⁷ 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.*⁶⁸ 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 cartelized 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.

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

66. Between actual or potential competitors operating at the same level of the supply chain.

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

68. AIR 1986 SC 1099.

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 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.

In *M/s Jasper Infotech Private Limited (Snapdeal) v. M/s Kaff Appliances (India) Pvt. Ltd.*,⁶⁹ the CCI held that display of products at prices less than that determined by the dealers/distributors, hinders their ability to compete and is thus a violation of Section 3(4)(e) read with 3(1) of the Act. Similarly, imposition of restrictions on the dealers to deal with competing brands in the market and thereby restricting the inter-brand competition too is a breach of Section 3(4) with section 3(1) of the Act.⁷⁰ However, as decided in *XYZ vs. M/s Penna Cements, M/s India Cements M/s Bharathi Cements M/s Dalmia (Bharat) Cements etc.*⁷¹ the mere allegation of increasing the prices of a product would not make the transaction anti-competitive.

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. For instance, in the case of *Shri Ashok Kumar Sharma v. Agni Devices Pvt. Ltd.*,⁷² it was held that a mere restriction on the use of trademark would not be in violation of Sections 3 or 4 of the Competition Act, 2002.

The Commission examines agreements and its effects in two stages. First, an order passed under Section 26 (1) of the Act directing DG to conduct further investigation when a *prima facie* view is taken about the agreement and its possible effects. Second, when an order is ultimately passed after DG submits a report and at this stage, Commission may pass an order under Section 26 (6) of the Act closing the case or an order under Section 27 of the Act when Commission comes to the conclusion that there is a contravention of Section 3 of the Act.

I. Examination at the Stage of Section 26 (1)

According to Section 26 (1) of the Act “...if the Commission is of the opinion that there exists a *prima facie* case...”, the DG shall be directed to investigate the matter. Although ‘*prima facie*’ has not been defined, it is a settled principle of law⁷³ that a *prima facie* analysis is restricted to an examination of material on record without conducting a detailed analysis of material, examination of evidence or detailed examination of merits of the contentions.

As a quasi-judicial body, the Commission is bound by certain constitutional principles and is bound to

69. Case No. 61 of 2014 decided on 29.12.2014

70. Case No. 81 of 2014, *St. Antony's Cars Pvt. Ltd. Vs. Hyundai Motor India Ltd.* decided on 20.11.2014.

71. Ref. Case No. 7 of 2014 decided on 19.11.2014

72. Case No. 12 of 2015 decided on 07.05.2015.

73. *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Limited & Anr.* 2005 7 SCC 234 and *Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel & Ors.* (2006) 8 SCC 726.

disclose reasons for its rulings⁷⁴ and consequently, the opinion expressed by the Commission under Section 26 (1) of the Act, should not take into account merits of the contentions, should be based on a preliminary review of material on record and finally, the order passed, should have reasons.

Between 2014 and 2015, in approximately 13 cases in 2014 and 7 cases in 2015, CCI directed further investigation based on a prima facie opinion and in approximately 83 cases of 2014 and 29 cases of 2015, CCI directed that the case be closed.

For instance, such an analysis was carried out by the Commission in *M/s. Magnus Graphics v. M/s. Nilpeter India Pvt. Ltd.*⁷⁵, where, based on a preliminary review of the provisions of the agreement and a preliminary examination of the effect of such clauses in terms of Section 3 of the Act, the Commission concluded a prima facie case and directed further investigation. Similarly, in *M/s. Financial Software and System Private Limited v. M/s. ACI Worldwide Solutions Private Limited & Ors.*⁷⁶, based on a preliminary review of the clauses of the relevant agreement and its impact in terms of Section 3 of the Act, the Commission directed the DG to investigate further.

II. Examination at the Stage of Passing an Order under Section 26 (2) of Section 27

In contrast, analysis while passing an order under Section 26 (2) or Section 27 of the Act are more detailed, where the Commission engages in a thorough review of material on record and submissions of the parties and after a detailed analysis, comes to the conclusion whether an agreement has anti-competitive elements or not. An interesting observation was made by the Commission in *Automobiles Case*⁷⁷ where the Commission observed that:

The criterion of attempting to balance the efficiency gains and the foreclosure effects of vertical agreements is to reflect the view that short term efficiency gains must not be outweighed by longer-term losses stemming from the elimination of competition.....[para 20.6.31]

Therefore, the Commission is of the opinion that in instances where an agreement, irrespective of the fact that it may contain certain efficiency enhancing provisions, allows an enterprise to completely eliminate competition in the market, and thereby become a dominant enterprise and indulge in abusive exclusionary behavior, the factors listed in section 19(3)(a)-(c) should be prioritized over the factors listed in section 19(3)(d)-(f). [para 20.6.34]

Thus, an agreement may be designed for efficiency, however, if the effect of the agreement causes adverse effects in respect of factors stated in Section 19 (3) of the Act, and these effects are anti-competitive, the Commission would hold that the agreement violates Section 3 of the Act. However, in the case of *M/s. K Sera Sera Digital Cinema Pvt. Ltd. v. Digital Cinema Initiatives. LLC., The Walt Disney Company India, M/s Fox Star Studios, M/s NBC Universal Media Distribution Services Pvt. Ltd. etc.*⁷⁸ (“K Sera Sera Case”) it was held that if no prima facie case could be established to show an adverse effect on competition, then, the CCI can close such matters under Section 26 (2).

In its detailed analysis and review of agreements for the purpose of Section 3, the Commission therefore goes beyond the text of the relevant agreement and examines the effect in terms of clearly identified parameters in Section 19 of the Act. This approach would help identify contracting parties to identify clauses which may be challenged or struck down by the Commission. In *Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors.*⁷⁹ it was held that an exclusive arrangement between manufacturers and e-portals is not against Section 3. It is rather to help the consumer make an informed choice.

74. *Seimens Engineering & Manufacturing Co. of India Limited v. Union of India & Anr.* (1976) 2 SCC 981.

75. Case No. 65 of 2013, Order dated December 12, 2013.

76. Case No. 52 of 2013, Order dated September 4, 2013.

77. *Supra.*

78. Case No. 30 of 2015 decided on 22.04.2015.

79. Case No. 80 of 2014 decided on 23.04.2015.

A more detailed analysis of the Commissions examination of material in relation to and interpretation of Section 3 is addressed in the subsequent chapters.

An interesting feature is that, while nearly 30 orders were passed under Section 26 (1) of the Act for the years 2013, 2014 and 2015, it was only in about 6 cases, the Commission expressly mentions a possible violation under Section 3. In all the remaining cases, complainants have invoked Section 4 as well and the Commission has also relied on Section 4 to pass an order under Section 26 (1) for further investigation. In certain cases ⁸⁰, the Commission has merely stated that the agreement was violative of Section 3 and the case required further investigation.

80. Case No. 20 of 2013, *Saint Gobain Gas India Ltd. v. Gujarat Gas Company Ltd.*, Order dated May 31, 2013.

6. Abuse of Dominance

Section 4 of the 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*'. 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*⁸¹ 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.'*⁸²

The 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*'.⁸³ 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*'.⁸⁴ The Act further provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors⁸⁵:

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

- 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 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

81. *United Brands v Commission of the European Communities*; [1978] ECR 207.

82. *Ibid.*

83. Section 2 (r) of the Act.

84. Section 2 (s) of the Act.

85. Section 19 (6) of the Act.

position. It is important to note here that the 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.⁸⁶

The Act sets out following factors which the CCI will take into account to establish the dominant position of an enterprise⁸⁷:

- 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;
- 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 costs;
- 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.

Dominance *per se* is not bad. It is only when there is an abuse of the dominant position that Section 4 of the Competition Act is invoked.⁸⁸ Thus, 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. Section 4 (2) sets out a list of activities that shall be deemed abuse of dominant position.

- 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 Article 102 of TEFU. The 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.

I. Examination at the Stage of Section 26 (1)

Similar to orders passed in respect of Section 3, CCI may pass an order at each of the following stages in respect of allegations under Section 4:

86. Section 19 (7) of the Act.

87. Section 19 (4) of the Act.

88. Case No. 07 of 2015, *Shri Brajesh Asthana, Proprietor M/s Arpita Engineering vs. Uflex Limited* decided on 23.04.2015.

- a. Orders passed under Section 26 (1) of the Act directing further investigation,
- b. Orders passed under Section 26 (2) directing that the matter be closed,
- c. Orders passed under Section 26 (6) directing that the matter be closed,
- d. Orders passed under Section 27 holding that a violation has been committed.

In the case of *M/s Fast Track Call Cab Private Limited v. M/s ANI Technologies Pvt. Ltd.*⁸⁹, the CCI was of the *prima facie* view that predatory pricing, providing more incentives and discounts to customers and drivers compared to the revenue earned resulted in ousting the existing players out of the market and created entry barriers for the potential players against provisions of Section 4 of the Act. Moreover, the quantity of resources and the dependence of the consumer in the relevant market with no substitute are relevant factors to be taken into consideration when looking for acts in violation of Section 4.⁹⁰

As was examined in respect of Section 3, the Commission only forms a *prima facie* view while passing an order under Section 26 (1) and Section 26 (6) of the Act. However, while passing an order under Section 26 (2) or an order under Section 27 of the Act, the Commission carries out an 'effects' based approach on the text of the agreement and other factors.

Perhaps as a matter of strategy, complainants raise grounds of abuse of dominance in majority of the cases as well. At the preliminary stage, while passing an order under Section 26 (1) of the Act, the Commission generally examines the number of participants in the market to examine if the opposite party, on a *prima facie* review of material on record shows that the opposite party does enjoy a dominant position. For instance, in cases against Coal India⁹¹, Commission relied on its earlier rulings where Commission had observed that Coal India held a dominant position in the market.

II. Examination at the Stage of Section 26 (2) and 27

The analysis at the stage of examining the merits of the case, entails a more detailed review of material on record, report of the DG (if applicable) and contentions of the parties. Ascertaining whether a party enjoys a dominant position in the market depends on the 'relevant market' and the position of the opposite party in the relevant market. The relevant market is identified by ascertaining either the geographical or product market. Consequently, identification of the relevant market itself, is a contentious issue and CCI identifies relevant market as a preliminary point. Being a popular player in the relevant market alone would not be enough to prove dominance if there are more players in the market.⁹²

It is however noteworthy that merely being in a dominant position is not a violation of Section 4 of the Act; it is only abusive behavior which can cause AAEC in respect of which the Commission will issue a cease and desist order.

89. Case No. 06 of 2015 decided on 24.04.2015.

90. Case No. 88 of 2014, *Sunrise Resident Welfare Association vs. Delhi Development Authority* decided on 23.04.15.

91. Case No. 37 of 2013, *West Bengal Power Development Corporation Limited v. Coal India Limited & Ors.*, Order dated July 5, 2013, Case No. 44 of 2013, *Sponge Iron Manufacturers Association v. Coal India Limited & Ors.*, Order dated July 23, 2013.

92. Case No.14 of 2015, *Ravinder Pal Singh vs. BPTP Limited & Others*, decided on 24.04.2015

7. Jurisprudential Trends – Section 3

In a series of cases that were heard in 2013 and 2014 where allegations of anti-competitive practices were made against Coal India⁹³, CCI examined the effect of the terms of the agreement between the informant in each case and Coal India. As explained in the earlier section / Chapter of this Report, for the purpose of ascertaining whether an agreement is anti-competitive or not, will have to be ascertained keeping in mind the effect of the provisions of the agreement and not merely the text of the agreement. Further, the factors to be identified while ascertaining the agreement are those which are mentioned in Section 19 of the Act.

Significant rulings on Section 3 in 2013 and till October 2014 include those against Coal India, the *Automobiles Case* and the case of cartelization against steel manufacturers, *In Re: Alleged cartelization by Steel Manufacturers*,⁹⁴ (*Steel Manufacturers Case*).

The procedure followed by the CCI in examining cases relating to anti-competitive agreements and the process followed by the DG were similar to those adopted from 2010 till early 2013, when the First Report was published. On receipt of information, a *prima facie* examination is carried out by CCI and where a case is made out, DG is directed to investigate and if required, may be directed to carry out additionally investigation on specified issues. If the resulting material, after considering objections, reveals anti-competitive practices, a conclusion is drawn that the agreement is anti-competitive. Since the First Report, there has generally been no deviation in the procedure as established and the process-steps within each procedure.

Few cases, such as the *Steel Manufacturers Case*, may be considered an exception as its genesis lies in the MRTP Act. In such cases CCI examines whether the substantive law in such cases would be MRTP Act or the Act as a preliminary point before proceeding further. Unlike the First Report which involved several cases involving cartels and cartel-like behavior, in this Report, there are very few cases involving cartels / cartel-like behavior.

I. Steel Manufacturers Case

The MRTP Commission took cognizance on the basis of an article published in the Financial Express which spoke about a sudden spike in prices of steel by steel companies such as SAIL and RINL which would have a grave inflationary effect, affecting prices in other industries such as automobile and construction. Engineering Export Promotion Council (EEPC) subsequently filed a complaint addressed to the DG I&R (Investigation and Registration, under MRTP Act) about a possible cartelization in the Steel Industry. It was contended that between April 2007 and January 2008, there was an average increase in the price of steel by 10%. Consequently, thirty four steel companies were directed to be investigated by DG I&R. Subsequently upon the repeal of the MRTP Act, the matter was transferred to CCI under Section 66 (6) of the Act. CCI concluded that a *prima facie* case existed and directed the DG under the Act to carry out further investigation and submit a report.

The DG conducted an investigation into four steel producers: SAIL, RINL, Tata Steel Limited and JSW Steel Limited. The investigation process was restricted to ascertain conduct of opposite parties in respect of pricing of HR coils and HR Plates (**Flat Products**) and Bars and Rods (**Long Products**), which comprised of around 60% of total non-alloy steel production. The investigation was in respect of the period from April, 2007 to March, 2010.

The pattern in pricing of the four main products viz. HR coils, HR Plates, Wire Rods and TMT was found to be moving in tandem. Data on demand and supply also indicated periodic suppression of supply to prop-up demand and prices. The steel production was found to be highly concentrated among the top four

93. Case No. 08 of 2014, *M/s. GHCL Limited v. M/s. Coal India Limited*, Order dated March 11, 2014 Case No. 88 of 2013, *Wardha Power Company Limited v. Western Coalfields Limited & Anr.*, Order dated January 22, 2014 and Case No. 37 of 2013, *West Bengal Power Development Corporation Limited v. Coal India Limited*, Order dated July 5, 2013.

94. RTPE No. 09 of 2008, initiated under the MRTP Act and disposed off under the Act.

producers. Steel production market was therefore noted as oligopolistic and susceptible to concerted price fixation. DG concluded that there was lack of transparency in price determination. The representative of top steel producers gave varied reasons for price changes which were not supported with any evidence.

Consequently, DG concluded that the steel producers have contravened the provisions of section 3(3) (a) and (b) of the Act due to their informal agreement for determining sale price, limiting and controlling production of steel products. CCI was of the view that there were several inconsistencies in the methodology adopted in the investigation by the DG, including the samples selected and directed the DG to carry out further investigations. The DG did not find any instance of cartelization in the long steel product segment and it was not included in the investigation. It was further noted by the DG that in the flat steel segment, HR coil is the most concentrated segment within the steel industry. The share of top 5 firms is about 90% of the total production. Thus, the nature of market of HR coil was found to be oligopolistic making the possibility of collusion easy among the players. DG concluded that 5 major players produce about 90% of the total domestic production and jointly have about 75% of share in total domestic sales in the HR coil steel segment.

CCI, applying principles stated in the First Report, first examined the presence of an agreement and then the elements of Section 3. Although CCI agreed with the finding of DG that the market was oligopolistic, CCI concluded that pricing policies followed by the major players did not reveal presence of a prior agreement. Materially, CCI concluded that interdependence of parties in an oligopolistic market was not conclusive of presence of an agreement for the purpose of a cartel. CCI also concluded that behavior of firms in pricing showed that manufacturers were not under-cutting one another. Important principles from this ruling are:

- a. Profit margin is an important indicator of price fixing strategies. This can be indicative of whether there is an agreement among the participants in the market;
- b. Price parallelism by itself is not indicative of cartels or cartel-like behavior unless there is additional evidence such as proof of conscious parallel behavior;
- c. Since circumstantial evidence would be relied upon, the material gathered should lead one to the conclusion that there is more than mere parallelism and firms have crossed the 'line' thereby violating the Act.

II. Automobiles Case⁹⁵

Informant alleged that opposite parties, car manufacturers, were indulging in anti-competitive practices in respect of spare parts of cars. Relying on practices in EU and United States, it was contended that car manufacturers in India were charging higher prices for spare parts, repair and maintenance services than their counterparts abroad. Further, there was complete restriction on availability of technological information, diagnostic tools and software programs required for servicing and repairing the automobiles, to the independent repair shops which was contrary to Sections 3(3)(a) and 3(3)(b) of the Act.

An important and contentious issue was identifying the relevant market. Rejecting the contentions of the car manufacturers, CCI concluded that relevant market would be the market for spares and services, thus making each car manufacturer dominant in its relevant market. Although there were no allegations of cartelization or cartel-like behavior, CCI concluded that based on high mark-up in respect of the spares and services and the restrictive nature of clauses relating to supply of spares and services, restrictions were imposed on suppliers. In this context, CCI observed that restrictive clauses imposed by car manufacturers on the suppliers was adversely affecting competition (i.e., causing AAEC) and consequently such clauses which unreasonably affect supply of goods and services in the market would be held to be anti-competitive.

Car manufacturers contended that restrictions on supply of spares were justified as the spares were protected under intellectual property agreements (**IPR Agreements**). Further, restrictions were required for efficiency in the market and as reasonable safeguards. An important defence that was raised and examined

95. For an analysis of the Automobiles Case, see NDA Hotline, *Competition Commission's landmark ruling cracks the whip on auto industry*, available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/competition-commissions-landmark-ruling-cracks-the-whip-on-auto-industry.html?no_cache=1&cHash=f6e2b3bf25b4855dod980114f7a6b605.

in the present case, was the exception under Section 3 (5) of the Act, which provides that:

Nothing contained in this section shall restrict—

- (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under —*
 - (a) the Copyright Act, 1957 (14 of 1957);*
 - (b) the Patents Act, 1970 (39 of 1970);*
 - (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);*
 - (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);*
 - (e) the Designs Act, 2000 (16 of 2000);*
 - (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);*
- (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.*

Rejecting the defences of car manufacturers, CCI held the conduct of the opposite parties to be anti-competitive, rejected the defence on the ground that the opposite parties:

- a. were not able to show that allowing third parties to make available such spares in the market would violate IPR Agreement;
- b. were unable to show that rights under IPR Agreement were violated if spares were sold in the open market;
- c. were not able to show any rights accruing to the each of them under the respective agreements and the technology transfer agreements relied on by the car manufacturers in any event did not confer exclusive rights in a manner comparable to IPR Agreement.

However, while in *Automobiles Case*, restrictive supply of spares and services only through authorised dealers was held to be anti-competitive, in *Snapdeal Case*⁹⁶, a similar condition imposed by SanDisk was considered reasonable condition and was not considered anti-competitive:

.....that the storage devices sold through the online portals should be bought from its authorised distributors by itself cannot be considered as abusive as it is within its rights to protect the sanctity of its distribution channel. In a quality-driven market, brand image and goodwill are important concerns and it appears a prudent business policy that sale of products emanating from unknown/ unverified/ unauthorised sources are not encouraged/allowed. [para 19]

This apparent inconsistency will be resolved once COMPAT adjudicates the appeal in the *Automobiles Case*. Presently, the challenge to the *Automobiles Case* is in the Madras High Court⁹⁷ and in Delhi High Court where the Delhi High Court has stayed the penalty until the litigation pending before Madras High Court gets disposed of.

III. Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab⁹⁸ (*DLMW Cartelization Case*)

The present case relates to Tender No. 201320510 which was floated by Diesel Loco Modernization Works

96. Case No. 17 of 2014, *Asish Ahuja v. Snapdeal & Anr.*, dismissed by Order under Section 26 (2) dated May 19, 2014.

97. Delhi High Court grants 3-weeks protection to Mercedes Benz from CCI Order available at http://articles.economictimes.indiatimes.com/2014-09-24/news/54279448_1_trade-norms-bmw-india-spares-parts See also, *HC seeks CCI response on plea of Mahindra, Tata*, available at <http://www.indolink.com/displayArticleS.php?id=092714102007>.

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

(DLMW) for procurement of feed valves used in diesel locomotives and all the three approved vendors who are the opposite parties quoted identical rates of Rs. 17,147.54 for the feed valves per piece. This rate was further found to be 33% higher than the last purchase rates.

DG had concluded on the basis of its investigation that opposite parties acted in concert in rigging the bids by quoting identical bids on the same date and the parties had quoted more or less the same rate for tenders of different zonal railways.

Opposite Parties (3 entities) contended that:

- a. as such, each of them were eligible and consequently, issue of cartelization was not relevant;
- b. being eligible and succeeding in the bids, was proof that the party was selected on merits. Further, one of the opposite parties, claimed that its price bid was not selected and therefore, the Tender Committee considered relevant factors beyond price;
- c. there was no collusion / agreement and that each of the parties had acted independently and DG had failed to prove any form of agreement;
- d. price bids were submitted electronically and consequently, parties would not know the bid until other parties submitted their respective bids;
- e. in commodity markets there was inter-dependence and in the context of government bids, the bidding would be highly competitive since each vendor would try to match the price of the other. Such inter-dependence / price parallelism was inevitable in an oligopolistic market and was not *per se* illegal.

Commission observed that the definition of 'agreement' was inclusive and that the Act required '*an arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings.*' Commission acknowledged that direct evidence would not be there and therefore Commission would have to examine evidence on the basis of benchmark of '*preponderance of probabilities*'.

Commission noted that the Tender Committee itself suspected collusion by the parties. Commission concluded that parties had provided complementary / cover bids to give the façade of compliance and transparency while they were doing so only with the intention of being rejected to enable the other party to succeed. Commission thus concluded that parties which were passed over and the selection of the meritorious bidder was all part of a preconceived plan in which two other parties would submit defective bids only to enable the third party to be selected.

A careful consideration of entire circumstances i.e. quotation of identical prices despite these units having been located in different geographical locations and different cost of production; filing of the bids on the same date containing minor technical defaults and failure on the part of the opposite parties to provide any plausible explanation for any of the above and the past conduct of the bidders, it was found sufficient to establish that the opposite parties entered into an agreement to determine prices.

CCI concluded that opposite parties bid by quoting identical rates had, indirectly determined prices/ rates in the tenders had indulged in bid rigging/ collusive bidding in contravening of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act. Commission also held that there were no grounds for leniency and that a distinction needed to be made between 'first time contraventions' and the 'first time established contraventions'.

CCI imposed a penalty on each of the contravening company at the rate of 2 % of the average turnover of the company though all companies contended that the relevant tender made up for a small fraction of their respective total turnover (as low as 0.7%).

This ruling is quite contrary to the *Steel Manufacturers Case* where CCI held that price parallelism was not indicative of collusion and bid rigging etc. From the facts, it is difficult to conclude that there were more compelling or incriminating facts in the *DLMW Cartelization Case*. The *Steel Manufactures Case* is not being appealed, however, perhaps with COMPAT ruling on cartelization cases of 2013 would help evolve legal principles on identifying cartel like behaviour.

IV. Kaff Appliances Case⁹⁹

The Informant in this case is a company that owns and operates the online marketplace website www.snapdeal.com and the Opposite Party is a company engaged in manufacturing and selling of a wide variety of kitchen appliances under the brand name 'Kaff'. The Opposite Party informed the public that it will not honour warranties of the products in its brand name sold through the platform of the Informant at discounted prices. The Opposite Party was aggrieved by the fact that the Informant was displaying its products at prices below the least price determined by them and they had an agreement with the authorised dealers which provided that the products should be sold at that price and not below the price agreed.

The Informant contended that by threatening not to honour warranties on products sold on the online markets/websites, the Opposite Party is effectively cutting off supplies to distributors who are aiming to sell through online channel. Not honouring warranties for products sold by these dealers would mean that an entire medium of sale/channel of distribution is being discriminated against and wiping out the emerging e-commerce industry in India. The Informant submitted that the Opposite Party's action in discriminating the online sale channel is a 'hub and spoke' arrangement between the Opposite Party and the retail outlets to keep the price of the product artificially high, limit the market for distribution of the products in violation of section 3(3) (a), 3(3) (b) and 3(3) (c) of the Act.

CCI held that price prescription by the Opposite Party to its dealers and the insistence to follow that particular pricing regime, prima facie was in contravention of section 3(4) (e) read with section 3(1) of the Act as it hindered the ability of dealers/distributors to compete on the price of the product causing AAEC. Taking AAEC into consideration, the Commission opined that with a market share of 28% the restrictions imposed by the Opposite Party, *prima facie*, would harm the consumers as well as have an adverse effect on competition in India. Thus, the DG was asked to cause an investigation into the matter.

V. Sera Sera case

The parties are players in the business of Digital Cinema Services which mainly involves digital projection and screening of films in India. It was alleged that the Informant and similarly placed other companies are not allowed by the Opposite Parties to exhibit/screen the movies produced by them and subsequently released in India. In order to defeat competition in the digital cinema market, control the prices for cinema services and to prevent other market players, they have entered into anti-competitive agreement to restrict the rights to release the said movie digitally only through companies certified and accredited to their technologies thereby crushing the relatively small and technologically independent players in the market.

It was held by CCI that the Informant had not been able to show that the alleged conduct is likely to have AAEC and thus prima facie no infringement of section 3 of the Act was made out.

VI. Rulings by COMPAT

Based on appeals in Delhi High Court and further appeals in Supreme Court, it would appear that COMPAT has examined decisions of CCI in appeal and has reached the same conclusion as CCI.

In *Destiny Fan Club v. Iffco- Tokio General Insurance Co. Ltd.*¹⁰⁰, the appeals were dismissed as the complainant could not produce any evidence to support his claim for unfair trade practices, thus, keeping in consonance with the order of the CCI, COMPAT also rejected the interim relief under Section 12-B.

In *OHM Value Services Ltd. vs. Janata Land Promoters Ltd.*,¹⁰¹ where the case was pertaining to Section 4 of the Act, it was held that the appellant had not approached COMPAT with 'clean hands' and could not

99. *Supra*

100. UPTE 81 of 2008 and CA 50 of 2008, Order dated January 05, 2015

101. Appeal No. 49 of 2015, Order dated March 31, 2015.

explain the delay of 4 years in filing the information under Section 19(1), therefore the argument of abuse of dominant position was rejected.

In *Exclusive Motors Pvt. Ltd. V. Automobili Lamborghini*¹⁰² COMPAT reiterated key principles relating to anti-competitive practices in agreements. Appellant in this case alleged that opposite party unfairly sought termination of a dealership agreement and imposed discriminatory terms on it, while affording favorable terms to the subsidiary of the opposite party itself. CCI dismissed the case on the ground that there was no anti-competitive practice and COMPAT upheld the CCI order. The CCI Order upheld the right of opposite party to confer exclusive rights on its own subsidiary and that such an arrangement did not create any entry barrier. The conclusions of fact and application of the Act by CCI was reiterated by COMPAT.

In *International Cylinder (P) Ltd. v. CCI*¹⁰³ and a series of other cases (*LPG Cylinder Case*), COMPAT upheld CCI's order on cartel-like behavior and imposition of penalty on LPG operators.

In this case, allegations of price parallelism and bid rigging were made. Opposite parties made submissions that merely because price followed a similar pattern, the same did not result in a presumption of price parallelism. Additionally, there was no adverse effect on competition. However, CCI, applying principles set out in the *Steel Manufacturers Case* concluded that opposite parties failed to rebut the presumption of collusion. Admittedly the market was an oligopolistic market and the DG Report showed additional or 'plus' factors including factors set out in Section 19 (3) of the Act. CCI therefore concluded that there was a strong probability of collusion. Opposite parties failure to rebut the presumption only reinforced this conclusion. COMPAT approved the approach of CCI and concurred with the finding of CCI that there was cartel like behavior by the opposite parties.

COMPAT upholding CCI orders was the dominant trend, however, in *Fastway Transmissions Pvt. Ltd. & Ors. v. Kansan News & Anr.*¹⁰⁴ COMPAT allowed the appeal and set aside the order of CCI. CCI had concluded that the practice of opposite parties was anti-competitive and that opposite parties were bound to provide broadcasting service, COMPAT set aside the order of CCI. Without relying explicitly on 'must-carry' principles, CCI held termination of the agreement and refusal to broadcast the channel of the informant as anti-competitive. COMPAT ruled that informant in this case had failed to demonstrate that there was access to market as a result of the actions of the opposite party. Additionally, COMPAT also noted CCI finding that:

"There is no case of an agreement within the meaning of Section 3(4)(d) among entities falling along different supply or production chain in the matter which may be said to be anti-competitive." – [para 22]

and consequently refusal to deal by the opposite parties was not anti-competitive.¹⁰⁵ COMPAT agreed with the observations of CCI but disagreed on the conclusions drawn by CCI. COMPAT concluded that opposite parties and informant, were at different levels of the value chain and were not competitors. Even assuming they were competitors, actions by opposite parties did not affect access to market of informant.

Appeal against CCI in *All India Organization of Chemists & Druggists v. CCI*,¹⁰⁶ was admitted and CCI's order was set aside as the Commission violated the principle of proportionality and natural justice in its order. Similarly, *BCCI v. CCI & Anr.*¹⁰⁷ is another example where the decision of the Commission was set aside on grounds of natural justice and unsubstantiated findings as the information downloaded from the internet and other similar sources do not have any evidentiary value.

COMPAT in some cases has partly allowed the appeals. For example in the case of *Inder Mehta v. M/s Pushpa Builders Ltd. & Anr.*,¹⁰⁸ where although the prayer was rejected Tribunal asked the respondents to refund certain sum of money to appellant.

102. Appeal No.1 of 2013, Order dated February 28, 2014.

103. Appeal No. 21 of 2012, along with several other cases where other companies challenged similar orders of CCI.

104. Appeal No. 116 of 2012, Order dated May 2, 2014.

105. CCI Ruling, Case No. 36 of 2011, *Kansan News Pvt. Ltd. v. M/s. Fastway Transmission Pvt. Ltd. & Ors.*, Order date July 3, 2012.

106. Appeal No. 56 of 2014, Order dated April 27, 2015.

107. Appeal No. 17 of 2013, Order dated February 23, 2015.

108. UPTe No. 203/ 1998, Order dated May 05, 2015

An important element that comes through an analysis of COMPAT rulings is that COMPAT has predominantly agreed with CCI on findings of facts. In respect of interpretation of law, in some cases, COMPAT has arrived at a different conclusion from CCI. Presently, since competition law is in its nascent stage, COMPAT may be inclined to examine several appeals till the interpretation of provisions of the Act attains some finality. In times to come, COMPAT may exercise more discretion in entertaining appeals once the position in law attains clarity. The orders discussed above bear a testimony to that fact as it is apparent that Tribunal is no longer in complete consonance with the rulings of the CCI predominantly. There have been instances where the orders have been set aside either fully or partially due to CCI's failure to comply with principles of natural justice and administrative law.

8. Jurisprudential Trends – Section 4

In the First Report following cases were discussed -

- MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors.¹⁰⁹ (*NSE Case*)
- Kapoor Glass Private Limited v. Schott Glass India Private Limited¹¹⁰, (*Kapoor Glass Case*).
- Belaire Owner's Association v. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana (*DLF Case*)

As stated in the First Report, the process for analysis for abuse of dominance is first ascertaining the relevant market and then the role of the opposite party within that market. There was no change in the process to be followed, however, determination of relevant market has been an extremely contentious issue with opposite parties disagreeing with CCI emphatically. Determination of 'relevant market' is an exercise that will attain clarity only after the appeals are determined. The cases discussed in the First Report were illustrative of the varied cases adjudicated by CCI. In the relevant period (i.e., June 2013 till October 2014), in several cases abuse of dominance has been alleged. Two cases pertaining to relevant market which are instructive are the *Automobiles Case* and *Snapdeal Case*.

I. Relevant Market

In this case, the DG concluded that the relevant market would be the market for spares of automobiles and that each automobile manufacturer was dominant in respect of its respective spares. Further, since a customer who purchases a car, cannot substitute spares of a different manufacturer, are 'locked into' certain aftermarket suppliers. The DG concluded that each car manufacturer was in a dominant position in the supply of its spare parts for its own brand of cars.

The effect of treating the market for cars and its spares as separate and distinct markets is that a manufacturer is automatically in a dominant position in respect of its own spares. The Commission agreed with the DG's analysis of relevant market and rejected the contention of the car manufacturers that relevant market should be the car itself. Car manufacturers argued that a consumer purchases a car and accepts that he may incur maintenance costs towards spares for these cars. It was also contended that consumers would adopt life cycle costing. However this was rejected as in the view of the Commission, car manufacturers were unable to demonstrate that consumers did engage in such an exercise.

CCI held that to undertake a life-cost analysis, it was crucial that:

- a. data for life-cost analysis is available with the producer, and,
- b. at the time of purchase product in the primary market, consumers can compute cost likely to be incurred during the life-span of the product.

CCI concluded that manufacturers were unable to demonstrate that they could, or consumers could, compute life-span costs and hence, rejected the systems market contention. Each car manufacturer was the sole seller of its spares and diagnostic tools and that car manufacturers restricted authorized dealers from making sales in the open market. CCI thus rejected 'unified systems market' contention of the car manufacturers and agreed with the distinct market for cars and a distinct market for after sales service.

The objections of the car manufacturers merits consideration since adoption of the separate and distinct market automatically results in a car manufacturer becoming a dominant party and an approach which leads to a foregone conclusion cannot be the basis for ascertaining 'relevant market'. Further, a consumer primarily considers the car and its features and does not give equal consideration to spares and maintenance. Consequently, to have held that spares forms a separate and distinct market has the effect

¹⁰⁹. Case No. 13 of 2009 decided on June 3, 2011,

¹¹⁰. Case No. 22 of 2010 decided on March 29, 2012.

of making the sale of spares determine the sale of the car itself which is not correct.

Admittedly, spares can form a separate and distinct market by themselves. However, the issue is, whether for the purpose of competition law, spares will form a separate and distinct market and the reasoning of the Commission may be faulted on this ground.

In *Snapdeal Case*, there is hardly any analysis by CCI to ascertain what would be the relevant market for the products and services offered by opposite parties in that case (Snapdeal.com and SanDisk Corporation). The information in this matter related to sale of computer related items on snapdeal.com and the underlying agreement related to sales to be made by snapdeal.com through its website.

The present case almost exclusively deals with sales through the website. The discussion on relevant market by CCI is as follows:

'The Commission also notes that both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decides accordingly. If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa. Therefore, the Commission is of the view that these two markets are different channels of distribution of the same product and are not two different relevant markets.' – [para 16].

The approach to identification of relevant market is quite superficial given that it can be argued that online and offline markets are separate and distinct. In this case, since CCI anyway came to the conclusion that there was no contravention, the consequence of identification of relevant market did not have much bearing. However, given that the issue of deep discounts by online companies has garnered a lot of attention, CCI may be called upon to re-examine identifying relevant market in this context.¹¹¹

In *Faridabad Industries Association vs. M/s Adani Gas Limited*¹¹² (**Adani Gas Case**), CCI observed that natural gas had distinct features and characteristics and although end-users used natural gas and fuel oils interchangeably, CCI concluded that natural gas was a separate and distinct market. Additionally, the opposite party was the only licenced gas supplier in Faridabad. Thus, by ignoring the end-users approach, CCI's approach made the opposite party automatically a dominant party.

Unfortunately, it hard to predict any form of trend in identifying relevant market and it is hard to evolve a set of principles that can be applied in future cases. This difficulty can also be attributed to the nature of exercise that is to be adopted for ascertaining relevant market and it is undoubtedly fraught with some uncertainty.

The *Automobiles Case*, *Coal India Case* and *MP Gen Co Case* are in appeal and perhaps with the adjudication of these appeals and other cases as well, there will be more clarity on identifying relevant market.

II. Coal India Case

One of the most significant rulings in 2013 and 2014 is the *Coal India Case* relating to anti-competitive practices adopted by Coal India and its subsidiaries. Based on the market share of Coal India, CCI concluded that *prima facie* Coal India was in a dominant position in the relevant market. In a series of cases, CCI had directed investigation into allegations against Coal India and its subsidiaries in respect of the FSAs.¹¹³ Allegations raised in *Coal India Case* were also raised in *MP Gen Co Case*.¹¹⁴

111. *Future Group's Kishore Biyani, vendors accuse Flipkart of undercutting to destroy competition*, available at http://articles.economictimes.indiatimes.com/2014-10-08/news/54784739_1_future-group-kishore-biyani-marketplaces and *When a huge discount is not anti-competitive*, available at http://www.business-standard.com/article/opinion/when-a-huge-discount-is-not-anti-competitive-114101200700_1.html.

112. Case No. 71 of 2012, Order dated July 3, 2014.

113. Case No. 08 of 2014, *M/s. GHCL Limited v. M/s. Coal India Limited*, Order dated March 11, 2014 Case No. 88 of 2013, *Wardha Power Company Limited v. Western Coalfields Limited & Anr.*, Order dated January 22, 2014 and Case No. 37 of 2013, *West Bengal Power Development Corporation Limited v. Coal India Limited*, Order dated July 5, 2013.

114. Case No. 5 of 2013, along with Case No. 7 of 2013, *M/s. Madhya Pradesh Power Generating Company Limited v. M/s. South Eastern Coalfields Ltd. & Anr.* and Case No. 37 of 2013 *M/s. West Bengal Power Development Corporation Ltd.*

Allegations Against Coal India:

- a. Coal India approved all FSA between the coal companies and the purchaser. Under the existing regulatory and policy regime, Informants were compelled to purchase only from opposite parties.
- b. Coal is to be supplied after testing by both parties to ensure that Gross Calorific Value (GCV) has been mutually agreed. However, opposite parties abused their dominant position and imposed unfavorable terms of testing and sampling on the Informants.
- c. There was considerable difference between GCV as shown in invoices and GCV of coal delivered, particularly in the case of SECL. As a result of this practice, informant had suffered huge losses.
- d. The FSA provided for mandatory acceptance of coal supplied even if the same did not match the grade requested / purchased by the informant.
- e. An earlier clause which envisaged testing of coal at place of issue and place of receipt and incorporated reconciliation of grade of coal, was unilaterally amended by Coal India. The new clause in the FSA only envisaged testing only at the colliery and consequently there was severe grade / band slippage (i.e., difference between grade of coal billed and supplied).
- f. Informant alleged that SECL had failed to take measures under the FSA which would ensure proper sampling and testing.
- g. It was alleged by the Informants that the opposite parties did not follow and execute coal supply agreements (CSAs)/ FSA as required under the Coal Distribution Policy, 2007.

On the basis of the material before it, Commission concluded that a *prima facie* case had been made out and directed the DG to investigate. The DG submitted its report on February 8, 2013.

DG noted that Coal India is the largest producer of coal in India, opposite parties had no competition and consequently held dominant position in terms of the factors set out in section 19 (4) of the Act. The DG examined the FSA and concluded that certain terms were unfair / discriminatory. The DG noted that:

- a. sampling procedure lacked the obligation on opposite parties to incorporate fair and transparent procedure to match the GCV pricing mechanism;
- b. charging the transportation and other expenses from the buyers on supply of ungraded coal was unfair;
- c. unfair and discriminatory conditions regarding the cap on compensation for stones in the FSA with new power producers;
- d. Opposite Parties could unilaterally waive condition precedents in the FSA for new power producers at their sole discretion and the Opposite Parties enjoyed a dominant position;
- e. review and termination of the FSA were found to be unfair and discriminatory;
- f. Certain clauses were modified during the course of the DG's investigation.

The DG concluded that opposite parties imposed unfair/discriminatory provisions and consequently violated section 4(2)(a)(i) of the Act.

Opposite Parties contested the premise of the allegations by challenging jurisdiction of the Commission. Opposite Parties also contested the conclusion of the DG that relevant market was India – Opposite Parties argued that the relevant market should be the whole world.

Opposite Parties placed considerable emphasis on the unique position of Coal India and that it was fettered by government policies and statutory mandates and hence, Coal India did not always operate under free market conditions. It was also submitted that informants had adequate recourse under the FSA to approach the Office of the Coal Controller and government laboratories to address their grievances. Further, the provisions of the FSA were concluded only after negotiations with the Informants and hence the allegations of the Informants were contested. It was contended that as the Standing Linkage Committee¹¹⁵ decided the linkages for each power utility, it did not enjoy any commercial freedom in deciding customers to whom it should supply coal. It was further contended, that CIL did not enjoy any commercial freedom in the quantity

¹¹⁵ Comprises of representatives of the Ministry of Coal, CEA and the Ministry of Power.

of coal, as the same was based on the norms laid down by the Ministry of Power/ CEA.

On the issue of dominant position, the Opposite Parties relied on the judgment of the Supreme Court in *Ashoka Smokeless Coal*¹¹⁶ to argue that the position of Coal India was permissible and in effect mandated under Article 19 (6) of the Constitution. Coal India reiterated its contention that it lacked freedom to design its policies as Central Government played a key role in designing the business of Coal India. It was contended that Ministry of Power, Ministry of Coal, Central Electricity Authority, Planning Commission etc. were all involved in influencing the policies of Coal India and consequently, Coal India did not enjoy commercial freedom.

CCI agreed with the DG's conclusion that imported coal was not substitutable with domestic coal. The Commission also concurred with the DG that condition for supply of coal in the entire country was uniform and homogeneous and hence the relevant market was India. Although various state entities were involved in the formulation of policy, Competition Commission concluded that the pricing policies were ultimately framed by the Board of Coal India.

The Commission concluded that Coal India with its subsidiaries were able to operate in the market independent of market forces and enjoyed undisputed dominance. CCI concluded that Coal India had a superior bargaining power and there were no discussions with power companies prior to execution of FSAs. CCI examined the financial records of Coal India and noted that although profits had increased, there was no corresponding increase in quantity of coal supplied. Further, Coal India did not pay any penalty for failure to supply coal and yet earned incentives for supplying coal above a certain trigger level. CCI also noted that cost of fuel was approximately 70% of the total cost incurred by power plants and hence it was important to be aware of the consequences of pricing policies of Coal India on the ultimate power consumer.

Informants in this case had challenged several provisions of the FSA and CCI concluded that several clauses were held to be unfair and to the prejudice of consumers. CCI noted that Coal India, as a dominant party was able to impose terms on a 'take it or leave it' basis and consequently certain clauses were in violation of the Act. These included:

- a. Providing for sampling and testing only at loading end (i.e., at Coal India's end);
- b. Imposing cost of ungraded coal on buyers and absolving Coal India of cost of supplying coal at less than agreed quality;
- c. Capping of compensation to 0.75% of total quantity of coal for oversized coal / stones;
- d. Adopting different terms for PSUs and private power companies;
- e. *Force majeure* clauses which were widely framed to enable the dominant party to dilute its commitment;

CCI concluded that these terms were in violation of Section 4 (2) (a) (i) of the Act for imposing unfair and discriminatory terms on power producers.

A similar order under Section 27 of the Act was passed in *MP Gen Co Case* where CCI concluded that certain clauses were in violation of the Act. Reiterating its observations against Coal India in the *Coal India Case*, CCI noted that:

.....terms and conditions of MOUs are favourably disposed towards the companies and the consumers do not have any option except appending signatures thereon. [para 95]

Although *Coal India Case* has been challenged¹¹⁷ the observations and conclusions of CCI are extremely important. From a jurisprudential perspective, CCI has observed that policies such as 'take it or leave it' will not be countenanced by CCI. The burden of proof will be on parties that enjoy a dominant position to demonstrate that terms in an agreement are reasonable and the terms were not imposed. If a dominant party executes an agreement without engaging in bilateral discussions, this could be imposition of terms on a contracting party. Adopting different terms for PSUs and another set of terms for private companies may be in violation of the Act.

¹¹⁶. *Supra*.

¹¹⁷. Appeal No. 1 of 2014.

Companies such as Coal India which operate with involvement of various government entities, departments and organizations are not absolved of their obligations to comply with the Act merely because of Supreme Court's observations in *Ashoka Smokeless Case*.

CCI has undertaken a detailed examination of the facts of the Coal India Case, including the terms of the FSAs that were involved. However, the following passage indicates the jurisprudential trend of CCI in such cases:

.....it is pertinent to highlight the fact that under certain market conditions, some contracts become unconscionable especially when the markets are not functioning in a competitive manner. In such a scenario, the party with superior bargaining power is able to dictate terms that are overwhelmingly one-sided. Then the other party is confronted with 'take it or leave it' proposition. [para 161]

A case with a similar fact pattern and outcome is the *Adani Gas Case* where CCI, noting that Adani Gas Limited was a dominant party in the relevant market, held the termination clause and the force majeure clauses to be in violation of Section 4 (2) (a) (i) of the Act.

In *Indian Exhibition Industry Association v. Ministry of Commerce & Industry and Indian Trade Promotion Organization*¹¹⁸ (ITPO Case), the informant alleged that opposite parties had imposed unfavorable clauses on it. The informant, an association of exhibition organizers/ venue owners/ service providers, registered under the Societies Registration Act, 1860 with the objectives of promoting development of Trade Fairs & Exhibition Industry and to support its orderly growth. The informant claimed to be aggrieved by the alleged time gap restriction imposed by ITPO between two exhibitions/ fairs primarily as the same is not applied to ITPO's own events and is an abuse of its dominant position as a venue provider.

Identifying relevant markets, an extremely contentious exercise was easily resolved in this case by identifying 'provision of venue for organizing international and national trade fairs/exhibitions in Delhi' as the relevant market. The main issue in the case was regarding legality of certain clauses. The Commission held that:

- a. Imposition of time gap restrictions on a discriminatory basis was violative of section 4(2)(a)(i) and 4(2)(b)(i) and 4(2)(e) of the Act. Commission noted that with respect to third party events there was a gap of 15 days while it was nearly 90 days in respect of opposite party's own events.
- b. Opposite party denied access to market and access to services by delaying applications for allotment of dates. Thus, delay and failure to allot dates to applicants was found to be violative of Section 4(2)(a)(i) and 4(2)(c).
- c. Issue of compulsion for taking the 'foyer area' along with the allocated area, found to not to raise competition issues.
- d. Clauses that limited liability of opposite party were found to be onerous, imposed unfair conditions on third parties and was an abuse of opposite party's dominant position under Section 4(2)(a)(i) of the Act.

It would be seen that terms of a contract, may not by themselves be unfair – it is in the context in which the terms were agreed to by the parties that may determine whether such terms are fair or reasonable. In cases discussed above, CCI has noted that even reasonable terms may be in violation of the Act if the effect is anti-competitive. The position of the parties and their bargaining power could determine the effect of such clauses. Consequently, it is important to keep these clauses in mind while drafting agreements.

In the ITPO Case it is important to note that even delay in processing an application was found to be unfair. This ruling should make parties that float tenders / process applications to be vigilant about applications. Additionally, the ITPO Case also demonstrates how relief under competition law can be used by an aggrieved party to seek redress as other conventional forms of litigation may not provide sufficient relief.

The effect of CCI rulings should hopefully be contracts that do not discriminate between parties and are not arbitrary.

¹¹⁸ Case No. 74 of 2012.

III. BCCI Case

BCCI, a society registered under Tamil Nadu Societies Registration Act, 1975 is engaged primarily in controlling and promoting cricket in India. The BCCI in the year 2008 had started a professional domestic T20 cricket league tournament known as Indian Premier League (“IPL”), which over the years has developed to become a global brand with an estimated brand value of more than USD 4.1 billion in 2010. However this valuation fell considerably to USD 2.9 billion in 2012 due to the various controversies shrouding the league.

Mr. Surinder Singh Barmi, the informant in this case, filed a complaint under Section 19(1) (a) of the Act, against BCCI alleging anti-competitive activities in relation to operation of IPL. He alleged irregularities in the grant of franchise rights for team ownership, irregularities in the grant of media rights for the coverage of the league as well as irregularities in the award of sponsorship rights and other local contracts related to the organisation of the IPL. Based on the above said allegations, the CCI ruled under Section 26(1) that a prima facie case existed and directed the Director General (“DG”) to investigate it. On the basis of the report submitted by the DG, it was observed that the process for grant of franchisee agreements for infinitum tenure was unfair and discriminatory, as also the mechanism of awarding the media rights for a period of 10 years caused appreciable adverse effect on the market. While deciding this case, CCI dealt with several key issues like the legal status of BCCI, whether BCCI could be considered an enterprise for the purposes of the Act, and finally whether BCCI had abused its dominant position in the relevant market in contravention of Section 4 of the Act.

CCI held that BCCI is a de facto regulator of cricket in India and the fact that BCCI is a “not-for-profit” organization does not take it out of the ambit of definition of an “enterprise”, only exception is permissible in relation to sovereign functions of the Government. Further it said that by explicitly agreeing not to sanction any competitive league during the currency of media rights agreement BCCI has used its regulatory powers in arriving at a commercial agreement, which is at the root of a violation of Section 4(2) (c).

Thus, The CCI concluded that BCCI had contravened provisions of the Act and directed them to:-

- Cease and desist from any practice denying market access to potential competitors, including inclusion of similar clauses in any agreement in the future;
- Cease and desist from using its regulatory powers in any way in the process of considering and deciding on any matters relating to its commercial activities;
- Deletion of Clause 9.1(c)(i) in the Media Rights Agreement; and
- Penalty of INR 52.24 Crores.

Aggrieved by the order of the CCI, the BCCI approached COMPAT under Section 53B of the Act on various grounds including violation of principles of natural justice. BCCI contended that the relevant market considered by both the Director-General and CCI differed substantially and no opportunity of hearing had been given to BCCI to rebut it. Further, the Commission had placed reliance on information available in the public domain including unreliable newspaper reports and information available on the internet that was not disclosed to BCCI, thereby depriving them of their right to rebut the same. The DG Report made no reference to Clause 9.1(c) (i) of the Media Rights Agreement, which was heavily relied upon by the Commission, enlarging the scope of the enquiry despite no finding qua that clause by DG or any notice and opportunity being afforded to BCCI. The Commission submitted that all material was provided to the parties and the order did not suffer from any legal infirmity.

COMPAT looked into the procedural requirements and the Commission’s failure to comply with the principles of natural justice. COMPAT has laid stress on the significance of parties being heard as also the opportunity of controverting the evidence placed against it. The merits of the matter were not considered by COMPAT and remanded it back to the Commission for fresh disposal. The importance of abiding by procedure and principles of natural justice have been given importance by COMPAT notwithstanding the force in arguments of the Commission on abuse of dominance by BCCI, ensuring that all future orders by the CCI would need to be in compliance with procedural laws to be tenable under law.

9. International Trends in Competition Law Enforcement

The internationalization of trade and commerce has transformed the outlook of global economy and legal systems. There is increasing awareness that economic benefits and challenges of anti-competitive behavior, abuse of dominant position by market players and cross-border effects of trans-national merger activity go hand in hand. This draws attention to the role and responsibilities of various competition/anti-trust authorities and regulators around the world.¹¹⁹ In the following section, we will discuss the major developments in the competition law sphere in certain significant jurisdictions including United States of America (“USA”), European Union, Japan and China with specific focus on certain industries. Recent high-profile investigations have involved telecommunications, energy, finance and banking, consumer industries and basic commodities industries. This exercise will provide an insight on the enforcement actions taken by competition/anti-trust authorities across several jurisdictions to ensure deterrence to anti-competitive activities.

I. International Cartels

Anti-cartel enforcement is a top priority and no sector is exempted in USA and European Union. China and Japan have also taken pro-active steps to ensure compliance with competition laws. In USA, the Department of Justice (“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. There has also been a marked increase in both the fines being imposed as well as the length of the prison terms.

2014 saw the extradition of two businessmen from Germany and Canada, the first extraditions in the world for antitrust offences in USA.¹²⁰ Nippon Yusen Kabushiki Kaisha, a Japanese freight forwarding firm, pleaded guilty to conspiring to fixing prices in international ocean shipping services. The company paid USD 59.4 million criminal fine and agreed to co-operate with further investigation of the Japanese Fair Trade Commission (“JFTC”) in the industry.¹²¹ The Antitrust Division of the DOJ continues to impose record high fines totaling up to USD 1.27 billion at the end of Financial Year 2014.¹²²

Settlement negotiations are increasingly favoured by companies to avoid the risk of catastrophic sanctions that are imposed by the European Union (“EU”), which witnessed the levy of 1.67 billion in fines in 2014. In *Timab Industries and CFPR v. Commission*, the European Court of Justice (“ECJ”) held that the European Commission is not bound to take the position adopted during settlement negotiations. The European Commission may, in fact, extend the scope of investigation to a party which withdraws from settlement negotiations if the European Commission deems it justified in light of evidence which subsequently comes into picture. Furthermore, the Court confirmed that fines imposed may be higher than that proposed at the time of settlement negotiations in case of withdrawal by the party from such negotiations.

The Competition and Markets Authority (“CMA”) in United Kingdom is expected to step up enforcement in 2015 in several sectors and continue with investigations initiated by Office of Fair Trading (“OFT”) in construction, pharmaceutical as well as other industries in relation to cartel like behaviour. CMA has

119. OECD, Challenges of International Co-operation in Competition Law Enforcement, May 2014 available at <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> [last accessed on June 8, 2015].

120. U.S. Department of Justice, Canadian Executive Extradited on major fraud charges involving a New Jersey Environmental Protection Agency Superfund site, November 17, 2014 available at http://www.justice.gov/atr/public/press_releases/2014/309928.htm [Last accessed on June 8, 2015].

121. U.S. Department of Justice, Third ocean shipping executive pleads guilty to price fixing on ocean shipping services for cars and trucks, March 10, 2015 available at http://www.justice.gov/atr/public/press_releases/2015/312415.htm [last accessed on June 8, 2015]

122. Reuters, Bank of America ordered to pay \$ 1.27 billion for ‘Hustle’ fraud, July 30, 2014 available at <http://www.reuters.com/article/2014/07/30/us-bankofamerica-fraud-idUSKBN0FZ23R20140730> [Last accessed on June 8, 2015]

recently commenced / initiated investigating supply of personal current accounts and banking services provided to small and medium-sized enterprises thus making a foray in the banking sector.

A. Banking and Financial Sector

The banking and financial services industry in US and European Union have also evidenced cartel like behaviour both in 2013 and 2014. The Commission had fined eight international financial institutions about 1.71 billion Euros for participating in illegal cartels in financial derivatives markets covering the European Economic Area (“EEA”). These institutions participated in cartels relating to interest rate derivatives denominated in the euro and Japanese yen currencies. Such collusion between competitors is prohibited by Article 101 of the TFEU and Article 53 of the EEA Agreement. Both decisions were settled as per under the Commission’s cartel settlement procedure. The companies’ fines were reduced by 10% for agreeing to settle. This was followed by the European Commission imposing fines on two international banks, RBS and JP Morgan, last year for engaging in an illegal bilateral cartel influencing the Swiss franc Libor benchmark interest rate in violation of the EU antitrust rules. The banks agreed to settle the case with the Commission under a simplified procedure.¹²³

Huge penalties of more than USD 5 billion were imposed on five global banks which pleaded guilty to criminal charges to resolve a long-running U.S. investigation involving collusion to move foreign-currency rates for their own financial benefit.¹²⁴ Four of the banks, Barclays PLC, Citigroup Inc., J.P Morgan Chase & Co. and Royal Bank of Scotland Group PLC pleaded guilty to conspiring to manipulate prices in the \$500 billion-a-day market for U.S. dollars and euros. The fifth bank, UBS AG, received immunity in the antitrust case but pleaded guilty to manipulating the London Interbank Offered Rate, or Libor.

B. Automobiles Sector

Cartels have also been prevalent in the automobile sector across jurisdictions. Regulators have launched probes of global automakers, technology suppliers and other companies in an apparent effort to force down prices.

Bridgestone Corp. agreed to pay USD 425 million criminal fine for its involvement in price fixing of automotive anti-vibration rubber parts installed in cars sold in US and rest of the world. Bridgestone along with others were alleged to have conducted conspiracy through meetings and conversations discussing and agreeing upon bids, prices and allocating sales of certain automotive anti-vibration rubber products. The European Commission held that after exchanging this information with others, Bridgestone submitted bids and prices in accordance with those agreements and sold and accepted payments for automotive anti-vibration rubber parts at collusive and non-competitive prices.¹²⁵

The Commission detected another cartel between two European companies (SKF and Schaeffler) and four Japanese companies (JTEKT, NSK, NFC and NTN with its French subsidiary *NTN-SNR*) in the market for automotive bearings and imposed fines of Euro 953 million. All the companies participated in a cartel to coordinate the pricing strategy vis-à-vis automotive customers by exchanging commercially confidential information in bilateral and multi-lateral meetings. The parties had a common understanding among participants not to undercut the other competitors’ prices when price increased as a result of an increase in the steel price so as to maintain existing shares of supply.¹²⁶ Such practices were held by the Commission to be concerted practice and in violation of TFEU.

Japanese company JTEKT was not fined as it benefited from immunity under the Commission’s 2006 Leniency Notice for revealing the existence of the cartel to the Commission. NSK, NFC, SKF and Schaeffler

¹²³. Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry, available at http://europa.eu/rapid/press-release_IP-13-1208_en.htm last visited on June 12, 2015

¹²⁴. <http://www.wsj.com/articles/global-banks-to-pay-5-6-billion-in-penalties-in-fx-libor-probe-1432130400> last visited on June 11, 2015.

¹²⁵. Press Release, U.S. Dep’t of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sep. 15, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/275025.htm.

¹²⁶. http://ec.europa.eu/competition/antitrust/cases/dec_docs/39922/39922_2067_2.pdf last visited on June 12, 2015

received reductions of their fines for their cooperation in the investigation under the Commission's leniency programme. Since all companies agreed to settle the case with the European Commission, their fines were further reduced by 10%.

The JFTC in 2014 ordered four vehicle shippers, including Nissan Motor Co. Ltd (USD 4.1 million), Nippon Yusen Kabushiki Kaisha (USD 128.3), Kawasaki Kisen Kaisha Ltd. (USD 55.9 million) and Mitsui OSK Lines Ltd. and Norway's Wallenius Wilhelmsen Logistics AS (USD 33.5 million) to pay more than USD 223 million fines for fixing prices for carrier services.¹²⁷ The investigation revealed that all the companies violated the Anti-monopoly Act, 1947 by fixing prices for vehicle shipping services between January 2008 and September 2012 and colluding to maintain freight rates. Mitsui wasn't fined because it had stopped participating in the alleged conduct prior to a 2012 investigation of its offices, and the JFTC granted its application for leniency. According to JFTC, the companies agreed to refrain from competing for customers by not offering lower freight rates and by raising and maintaining rates, thereby, contrary to the public interest, substantially restricting competition in the fields of particular ocean shipping services for automobiles.

The National Development and Reform Commission ("NDRC"), competition authority in China fined several Japanese auto-parts suppliers a total of USD 202 million – the biggest antitrust fine ever imposed in China for price fixing. NDRC held that the suppliers engaged in bilateral and multilateral meetings to negotiate prices, and reach and implement bidding agreements. Hitachi Ltd and Nachi-Fujikoshi Corp were also investigated and found guilty of violations by the NDRC, but exempted from punishment after they cooperated in the probe. The regulator credited both companies for coming forward to report the cartel activity and providing other "important evidence".

Regulators across jurisdictions continue with their broad and aggressive criminal antitrust investigation of the auto parts industry. The investigations have, so far, resulted in guilty pleas and co-operation with the investigation process by several companies engaged in price-fixing, bid-rigging and other cartel like behavior. Huge amounts of penalties and fines are imposed and leniency programmes implemented to expand enforcement.

C. Information Technology

Today the IT sector is booming and probably the fastest growing sector worldwide. The European Union witnessed several cartel cases in the IT sector in the last five years. In the Smart Card Chips case, the Commission held that Infineon, Philips, Samsung and Renesas coordinated their market behaviour for smart card chips in the EEA in breach of EU rules that prohibit cartels causing appreciable adverse effect in the market and harmed the consumers. Renesas received full immunity from fines under the Commission's leniency programme, as it was the first to provide information about the cartel. The companies colluded through bilateral contacts between September 2003 and September 2005 in order to determine their respective responses to customers' requests to lower prices.¹²⁸ They discussed and exchanged sensitive commercial information on pricing, customers, contract negotiations, production capacity or capacity utilisation and their future market conduct. The Commission imposed fines of Euros 138 million on Infineon, Philips & Samsung in 2014.¹²⁹

The Commission had fined six LCD panel producers, for operating a cartel where companies agreed prices, exchanged information on future production planning, capacity utilization, pricing and other commercial conditions. The Commission held that while all the cartel participants were foreign companies including Korean and Taiwanese electronics companies — Chimei InnoLux Corp., AU Optronics Corp., Chunghwa Picture Tubes Ltd. and HannStar Display Corp, it noted the effect on customers in Europe and announced a total of €649 million in fines. Recently, the Court of Justice has upheld the fines imposed on LG of Euro 210 million in the LCD panel case.¹³⁰ Samsung Electronics received full immunity from fines under the

127. <http://www.jftc.go.jp/en/pressreleases/yearly-2014/March/140318.html> last visited on June 11, 2015.

128. Antitrust: Commission fines smart card chips producers € 138 million for cartel, available at http://europa.eu/rapid/press-release_IP-14-960_en.htm, last visited on June 12, 2015.

129. <http://www.reuters.com/article/2014/09/03/eu-cartel-philips-infineon-technol-idUSL5NoR41Y720140903> last visited on June 8, 2015

130. <http://www.out-law.com/en/articles/2015/april/eu-court-confirms-210m-fine-for-lg-over-lcd-panels-cartel-> last visited on June 03, 2015.

Commission's leniency programme, as it was the first to provide information about the cartel.

The growing trend in all jurisdictions clearly reflect that 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 anti-trust agencies. In addition antitrust agencies are increasingly co-operating with each other to investigate international cartels.

II. Intellectual Property and Competition Law

There has always been an inherent tension between intellectual property rights and monopoly it seeks to engage in abuse of this monopoly in pharmaceutical and IT industry. Companies in the information technology and telecommunications industries frequently ensure inter-operability 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.

The smartphone cases involving Samsung and Motorola are excellent example of European Commission trying to balance between intellectual property rights and obligations under competition law requiring compliance with FRAND terms and protecting rights of patent holders as well as preventing abuse of dominance by companies developing the technology. In the Motorola case,¹³¹ the Commission adopted a decision stating that seeking and enforcement of an injunction against Apple before a German court on the basis of a smartphone SEP constitutes an abuse of a dominant position prohibited by EU antitrust rules in view of the particular circumstances in which the injunction was used. The Commission ordered Motorola to eliminate the negative effects resulting from it. No fine was however imposed because of the lack of precedents.

In the Samsung case,¹³² Samsung Electronics offered commitments to address the competition concerns related to them seeking of preliminary and permanent injunctions against Apple Inc. ('Apple') before the courts of various Member States on the basis of SEPs which it has committed to license on FRAND terms during the standard-setting process in the European Telecommunications Standards Institute ('ETSI'). The Commission held the commitments to be binding under EU antitrust rules. Samsung accepted not to seek

131. Antitrust: Commission finds that Motorola Mobility infringed EU competition rules by misusing standard essential patents, available at http://europa.eu/rapid/press-release_IP-14-489_en.htm, last visited on June 5, 2015.

132. Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions, available at http://europa.eu/rapid/press-release_IP-14-490_en.htm, last visited on June 6, 2015.

injunctions in Europe on the basis of its SEPs for smartphones and tablets against licensees who sign up to a specified licensing framework. Under this framework, any dispute over what are FRAND terms for the SEPs in question will be determined by a court, or if both parties agree, by an arbitrator. The commitments therefore provided a safe harbour for all potential licensees of the relevant Samsung SEPs.

Like US and EU, China has also tried to keep a balance between intellectual property rights and obligations under competition laws. The NDRC has imposed a record fine of USD 975 million on Qualcomm for abusing its patents and dominant position in the SEPs licensing.¹³³ Qualcomm has already complied with the issues raised by NDRC and have reduced royalty rates and enhanced patent buy-back rights for Chinese licensees, thus settling the matter along with paying huge amount of penalty. This case has dealt with relevant issues pertaining to imposition of unfair terms, refusal to supply and charging excessive royalty. Further, the Chinese Supreme People's Court ("**SPC**") delivered its judgment in the first case under the Anti-Monopoly Law last year in the IT sector involving one of China's largest instant messaging providers Tencent, and the provider of anti-virus software Qihoo in relation to abuse of dominance and engaging in tying in relations with competitors.¹³⁴ The SPC distinguished the relevant market and adopted an effects based approach. The SPC examined the effect created whether it had caused any significant change in the market or had resulted in any significant exclusion of Qihoo's business or even of other antivirus software.¹³⁵ The JFTC, leading competition regulator in Japan conducted raids at five companies in the electronics sector to gather information related to alleged bid-rigging and has evolved over a period of time.¹³⁶

These cases highlight the inherent tension between competition law and intellectual property rights and are instances 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 anti-trust / competition law. It has been a constant theme 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.

A. Pharmaceutical Industry

The pharmaceutical industry plays an important role in improving global health care and therefore is heavily regulated. Below is a brief overview how anti-trust / competition authorities have tried regulating it by way of enforcement actions and permitting mergers and acquisitions. The enforcement of anti-trust laws started ages back in US and pharmaceutical industry has also seen its effect. The Federal Trade Commission had framed charges against generic producers for restraint of trade and conspiracy to monopolize markets in 2000. Payment for delay cases denying entry to generic drugs have also been held responsible for violation of US anti-trust laws. European Union has seen a lot of recent developments in the pharmaceutical sector and fines imposed by the authorities for blocking entry of generic drugs, curtailing innovation and patent infringement. The European Court of Justice in 2012 affirmed Commission's findings of abuse of dominant position by *AstraZeneca* in providing misleading information to patent offices and deregistering product to inhibit generic entry and imposed fine of €52.5 million.¹³⁷

The Commission further imposed a fine of €93.8 million on Lundbeck, while the generic companies (Ranbaxy, Merck KGaA/Generics UK, Alpharma and Arrow) were given fines totaling €52.2 million after a 10 year investigation in this sector in June, 2013.¹³⁸ The Commission held that Lundbeck had entered into several patent settlement agreements (*reverse payment settlement*) with generic manufacturers to delay the entry of certain medicines in the market for payment and provide incentives allowing Lundbeck to maintain high prices for the essential drugs, against the very principles of competition law. This decision

133. <https://www.competitionpolicyinternational.com/antitrust-enforcement-with-respect-to-intellectual-property-in-china> last visited on June 4, 2015.

134. http://www.crai.com/sites/default/files/publications/China-Highlights-Qihoo-360-v-Tencent-0215_0.pdf, last visited on June 6, 2015.

135. China's Supreme Court Upholds High Court's AML Ruling in Tencent Case, available at <http://blogs.orrick.com/antitrust/2014/12/15/chinas-supreme-court-upholds-high-courts-aml-ruling-in-tencent-case/>, last visited on June 12, 2015

136. Global Competition Review, JFTC raids radio makers, November 18, 2014 available at <http://globalcompetitionreview.com/news/article/37294/jftc-raids-radio-makers/> [last accessed on June 8, 2015].

137. United Nations Development Programme, 2014, *Using Competition Law to Promote Access to Health Technologies: A Guidebook for Low- and Middle-Income Countries*, New York.

138. Antitrust: Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines, available at http://europa.eu/rapid/press-release_IP-13-563_en.htm, last visited on June 3, 2015.

has been appealed by the generic companies on the validity of the settlement agreements and the unjustified expansion of European law under Article 101(1) of the TFEU. The decision is awaited to clarify the law on validity of patent settlement agreements and lay down clear guidance or objective criteria on distinguishing between infringing and non-infringing settlement agreements.

The other big pharmaceutical companies have also faced competition law issues in the European Union including Johnson & Johnson and Novartis for entering into anti-competitive agreements and delaying entry of generic drugs and have been imposed fines of €10.8 million and €5.5 million respectively¹³⁹ for causing harm to the consumers and affecting the market. The agreements were considered anti-competitive and in violation of Article 101 of the TFEU. No appeals have been filed till date. The decisions from Commission have definitely deterred such practices. The CMA in UK has also initiated investigation against certain pharmaceutical companies for violation of Article 102 of TFEU but no conclusion has been drawn.

Various other jurisdictions have been increasingly active in developing competition regulation with Singapore imposing its first fine.¹⁴⁰ Several ASEAN nations such as Malaysia and Philippines¹⁴¹ have enacted their competition legislations in consonance with the ASEAN regional guidelines.¹⁴² With over 125 jurisdictions active in the competition law sphere, international trends will play a significant role in influencing jurisprudence worldwide. India has not been far behind in developing competition law jurisprudence and implementing strict enforcement procedures. However, CCI in India is still evolving and learning from the experiences of EU and US.

139. Antitrust: Commission fines Johnson & Johnson and Novartis € 16 million for delaying market entry of generic pain-killer fentanyl, available at http://europa.eu/rapid/press-release_IP-13-1233_en.htm, last visited on June 3, 2015.

140. Reuters, Singapore fines Japanese ball bearing producer firms S\$9.3 million for price fixing, May 27, 2014 available at <http://www.reuters.com/article/2014/05/28/singapore-antitrust-japan-idUSL3NoOC0Y20140528> [last accessed on June 8, 2015]

141. The Asia Pacific Anti-trust Review, Philippines: Overview, available at <http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2762/> [last accessed on June 8, 2015]

142. ASEAN, ASEAN Regional guidelines on Competition policy, available at <http://www.asean.org/archive/publications/ASEANRegionalGuidelineson-CompetitionPolicy.pdf> last accessed on June 8, 2015

Conclusion

Perhaps the most important area for CCI to address is evolving principles on imposing penalty. From a jurisprudential perspective, it is also important for CCI to set out principles for determining relevant market since the implications from a relevant market are quite severe.

CCI's approach on analyzing terms of a contract is quite pragmatic and the principles should help companies manage their affairs. However, for their part, it is very important that companies be alive to their obligations under the Act and should also be vigilant about its rights.

A heartening and encouraging aspect about CCI rulings are CCI's generally cautious approach to laying down principles – generally each ruling serves as an order in respect of only that case. While CCI relies on prior rulings and rulings from foreign jurisdictions, it has generally refrained from laying down principles which are too broad.

With passage of time and adjudication of appeals by COMPAT and the Supreme Court, jurisprudence will also strengthen and with it, the institution itself.

Annexure A

Cases Discussed in First Report

I. Varca Druggist & Chemist & Others v/s Chemist & Druggists Association, Goa¹⁴³ (*'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 companies¹⁴⁴ (*'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 Manufacturers¹⁴⁵ (*'LPG Cylinder'*)

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

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

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

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

The CCI also observed that all the bidding companies who had infringed the provision of section 3(3) of the 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.¹⁴⁶ (*'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 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.¹⁴⁷ (*'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 Guild of India Ltd. (FTPGL) 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 FTPGL were the members of UPDF. It was further alleged that UPDF, AMPTPP and FTPGL 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.

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.

¹⁴⁶. CCI Case No. 52 of 2010 and Case No. 56 of 2010.

¹⁴⁷. CCI Case No. 1 of 2009; decided on May 25, 2012.

VI. Film & Television Producers Guild of India v/s Multiplex Association of India & Ors.¹⁴⁸ (*'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 Act) and that MAI was abusing its dominant position (Section (2) (a) and 4 (2) (c) of the Act).

The CCI framed two issues – whether the Opposite Parties ('OPs') acted in violation of Section 3 and Section 4 of the 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.¹⁴⁹ (*'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 Delhi High Court 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.

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 India¹⁵⁰ (*'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 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.

¹⁴⁸. CCI Case No. 37 of 2011; decided on January 3, 2013.

¹⁴⁹. CCI Case No. 3 of 2009, decided on October 4, 2011.

¹⁵⁰. MRTP Case No. 161 of 2008 decided on January 24, 2012.

IX. All India Tyre Dealers' Federation v/s Tyre Manufacturers¹⁵¹ ('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 Act.

A. 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)¹⁵² (agreements or arrangements directly or indirectly determining purchase or sale prices) and 3(3)(b)¹⁵³ (agreements or arrangements limiting or controlling production, supply, markets, technical development, investment or provision of services) of the Act. In almost all of the cases examined by us a trade association was involved and impleaded in the proceedings.¹⁵⁴ 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.¹⁵⁵ 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 analyzed by us we note that the CCI had taken cognizance of these on the basis of news articles published in newspapers and business magazines.¹⁵⁶

B. 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 analyzed 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

¹⁵¹ MRTP Case RTPE No. 20 of 2008 decided on October 30, 2012.

¹⁵² See for instance *Tyre Dealers Federation, Film & Television Producers Guild, FICCI – Multiplex Association of India, Cement Manufacturer Association*.

¹⁵³ See for instance *Eros International, Uniglobe, FICCI Multiplex Association, Film Producers Guild and Varca Druggist*.

¹⁵⁴ See for instance *Eros International, Uniglobe, FICCI Multiplex Association, Film Producers Guild and Varca Druggist, Tyre Dealers Federation*

¹⁵⁵ See for instance, *Tyre Dealers Federation, Cement Manufacturer Association, Eros International, Film Producers Guild and Varca Druggist*.

¹⁵⁶ 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.

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 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.¹⁵⁷

C. Defenses taken by the Opposite Parties in Aforementioned Cases

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

i. 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.¹⁵⁸ 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.¹⁵⁹

ii. 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 Act¹⁶⁰ 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.

iii. No Evidence of an 'Agreement' Found

Opposite Parties have also commonly stated that the DG has failed to provide the existence of an 'agreement'¹⁶¹ amongst the Opposite Parties.¹⁶² 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.

157. 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.

158. 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 relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

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

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

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

161. 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;"

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

iv. 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 Act is limited to circumstantial evidence and this by itself is not sufficient to conclude that a conspiracy amongst the Opposite Parties existed.¹⁶³

v. 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*, 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*, 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.

1. Price Parallelism

A. What is Price Parallelism?

Price parallelism is a mirroring effect where traders independently pursue their 'unilateral non-cooperative actions' in view of what other rivals are doing.¹⁶⁴ Therefore, there is neither an explicit agreement nor a tacit understanding among the traders. Parallel pricing occurs if firms change their prices 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 permits inference on existence of a conspiracy between competitors.¹⁶⁵

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 behavior deriving from independent observation and reaction by rivals in the marketplace, is not unlawful.

B. International Jurisprudence on Price Parallelism

International jurisprudence generally recognizes that parallel conduct alone is not sufficient proof of cartel agreement.¹⁶⁶ There must be additional evidence which tends to prove the existence of unlawful agreement, usually known as 'plus factors'.¹⁶⁷ This can be represented by the judgment of the U.S. Supreme Court in *Theatre Enterprises Inc. v. Paramount Film Distribution Corporation*¹⁶⁸ where it was stated:

¹⁶³. See *Cement Manufacturers Association, Tyre Dealers Federation, LPG cylinder*.

¹⁶⁴. J. David Robertson, *East Asian Trade after the Uruguay Round*, (Cambridge University Press, 1997) at p 202.

¹⁶⁵. The Alkali Manufacturers Association of India (AMAI) and others v. American Natural Soda Ash Corporation (1998) 3 CompLJ 152 MRTPC.

¹⁶⁶. 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.'

¹⁶⁷. 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.'

¹⁶⁸. 346 U.S. 537 (1954).

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*¹⁶⁹ 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*¹⁷⁰, 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.

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."¹⁷¹

Similarly, in the case of *In Re High Fructose Corn Syrup*¹⁷² 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 noneconomic 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 cartelized 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*¹⁷³ 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. The Court 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.'

C. Price Parallelism in the Context of CCI's Orders

As stated above, from the decisions of the CCI analyzed 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 be of 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 Act'*¹⁷⁴, however it is not clear whether this view has been consistently followed

¹⁶⁹. *Bell Atlantic Corporation v. Twombly* 550 U.S. 544 (2007)

¹⁷⁰. 385 F.3d at 360 (2004).

¹⁷¹. See also *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d.1224 (1993).

¹⁷². *In re High Fructose Corn Syrup Antitrust Litigation.*, 295 F.3d 651 (7th Cir. 2002).

¹⁷³. *Blomkest Fertilizer v. Potash Corp. of Saskatchewan Inc.*, 203 F. 3d 1028 (8th Cir. 2000)

¹⁷⁴. *In re: Domestic Air Lines decided on January 11, 2012; Tyre Case.*

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.¹⁷⁵ 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*, 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.¹⁷⁶ 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.

2. Circumstantial Evidence

The *OECD Report on Prosecuting Cartels without Direct Evidence* of 2006 gives a good overview of the 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 evidence¹¹⁰ and economic evidence¹¹¹. 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.¹⁷⁷ In its reliance the CCI has

¹⁷⁵ Cement Manufacturers Association.

¹⁷⁶ Tyre Dealers Federation case at Paragraph 322 of the order

¹⁷⁷ See for example *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*.

always quoted the following excerpt from the OECD Report on Prosecuting Cartels without Direct Evidence of 2006 when it comes to circumstantial evidence.¹⁷⁸

'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 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.'

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 cartelization. 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.¹⁷⁹ 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'.¹⁸⁰ 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.¹⁸¹ 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.¹⁸²

3. Trade Associations

A. 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 the Wealth of Nations ¹⁸³:

'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'

¹⁷⁸. See *Cement Manufacturers Association, Tyre Dealers Federation*.

¹⁷⁹. See OECD on Prosecuting Cartels without Direct Evidence, 2006.

¹⁸⁰. *Cholan Roadways Limited Vs. G. Thirugnanasambandam* [2004 (10) SCALE 578].

¹⁸¹. 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>.

¹⁸². 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 rigor of preponderance, so as to tilt the balance to the side of the revenue in an accentuated manner.

¹⁸³. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1904, 5th Ed. London: Methuen & Co., Ltd.), at page 80 I.10.82 available at <http://www.econlib.org/library/Smith/smWN4.html#BI, Ch.10, Of Wages and Profit in the Different Employments of Labour and Stock>

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.¹⁸⁴ In fact even the CCI has recognized that a trade association needs to regulate to protect the interests of the industries.¹⁸⁵

B. 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.'*¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹

184. 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.

185. See *Uniglobe*

186. 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."

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

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

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

C. 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.¹⁹⁰

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.

D. 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 Act¹⁹¹ 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.¹⁹²

E. Agreement

The CCI in *Neeraj Malhotra v. Deutsche Post Bank*¹⁹³, has stated that in order to establish a finding of

190. 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.

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

192. 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;

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.

193. See CCI Case No. 05 of 2009.

infringement under section 3(1) read with 3(3) of the Competition Act, the agreement must be established unequivocally.

In some of the cases analyzed 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 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*¹⁹⁴ 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.

¹⁹⁴. See *Cement Manufacturers' Association*.

Annexure B-1

Orders under Section 26 (1) of the Act Directing Investigation by 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
1.	82/2014 20/11/2014	St. Antony's Cars Pvt. Ltd. vs Hyundai Motor India Ltd.	Automobiles	Automobiles
2.	61/2014 29/12/2014	M/s Jasper Infotech Private Limited (Snapdeal) vs M/s Kaff Appliances (India) Pvt. Ltd.	Online Portals	Kitchen appliances
3.	63/2014 29/12/2014	Shri Saurabh Tripathy vs M/s Great Eastern Energy Corporation Ltd.	Private Individual	Production and Distribution of Gas
4.	33/2014 13/01/2015	XYZ vs REC Power Distribution Company Limited	Private Individual	Public Sector Enterprise
5.	73/2014 04/02/2015	Amit Mittal vs M/s DLF Limited & Ors.	Private Individual	Real Estate
6.	84/2014 05/02/2015	Mr. Vijay Kapoor vs DLF Universal Limited	Private Individual	Real Estate
7.	88/2014 23/04/2015	Sunrise Resident Welfare Association vs Delhi Development Authority (DDA)	Registered Society- Real Estate	Public Sector Enterprise (statutory body for development of real estate in Delhi)
8.	06/2015 24/04/2015	M/s Fast Track Call Cab Private Limited vs M/s ANI Technologies Pvt. Ltd.	Radio Taxi Services	Radio Taxi services
9.	04/2015 12/05/2015	M/s Best IT World (India) Private Limited (iBall) vs M/s Telefonaktiebolaget L M Ericsson (Publ) & Others.	IT & Electronics	IT & Telecommunications (Sweden Company)
10.	99/2014 21/05/2015	Mrs. Naveen Kataria vs M/s Jaypee Greens.	Private Individual	Real Estate Development

Annexure B-2

Orders Passed under Section 26 (2) of the Act by the Commission Dismissing the Case

No.	Case No./ Date of Decision	Case name	Industry Sector in which the Informant/ complainant was engaged	Industry Sector in which OP1 was engaged
1.	45/2014 27/10/2014	Ohm Value Services Limited vs Janta Land Promoters Limited	Setting up Industries	Real Estate
2.	Ref. Case No. 03/2014 29/10/2014	Reference under section 19(1)(b) of the Competition Act, 2002 filed on behalf of Ministry of Tourism, Government of India, Transport Bhawan, Parliament Street, New Delhi-110001 vs M/s Span Communications	Ministry of Tourism	Media and Entertainment
3.	50/2014 29/10/2014	XYZ vs Principal Secretary, PWD, Govt of Madhya Pradesh & Ors.	Private Individual	Govt dept for architectural surveys
4.	54/2014 29/10/2014	M/s Red Giant Movies vs The Secretary to Government Commercial Taxes & Registration Department, Government of Tamil Nadu & Ors.	Movie Production	Govt. of Tamil Nadu
5.	55/2014 29/10/2014	Shri Nandan Kumar vs Association of Healthcare Providers (India) & Ors.	Private Individual	Healthcare
6.	31/2014 18/11/2014	The Malwa Industrial & Marketing Fertilizer, vs The Registrar & Ors.	Marketing and sale of the finished goods of the society to Cooperative Agricultural Service Society	Cooperative Society
7.	Ref. Case No. 7/2014 19/11/2014	XYZ Vs M/s Penna Cements & Others.	Private Individual	Cement
8.	57/2014 20/11/2014	Shri Om Prakash & Ors. vs Media Video Limited (MVL) & Ors.	Private Individual	Housing
9.	62/2014 21/11/2014	Ohm Forex Services Ltd.(OFSL) vs ICICI Bank Limited & Ors.	Money Changer	Bank
10.	58/2014 21/11/2014	XYZ vs M/s Super Smelters Limited	Private Individual	Steel
11.	59/2014 05/12/2014	Dr. Rajender Kumar Gupta vs Shri B.D. Park, Managing Director & Ors.	Private Individual	Mobile Services
12.	67/2014 05/12/2014	Shri Uday Sakharam Yadav vs Excise, Entertainment & Luxury Tax Department	Private Individual	Information Management System
13.	68/2014 22/12/2014	Shri Umesh Chaudhary vs CSC e-governance Services India Ltd. & Ors.	Private Individual	E governance services
14.	75/2014 22/12/2014	Mr. Mohan Dharamshi Madhvi vs Chairman and Managing Director, Royal Sundaram Alliance Insurance Company Ltd. & Ors.	Private Individual	Insurance

Orders Passed under Section 26 (2) of the Act by the Commission Dismissing the Case

Provided upon request only

15.	78/2014 23/12/2014	Shri Siddhartha Upadhyaya & Ors. vs Shri Sushil Ansal and Shri Pranav Ansal, M/s Ansal Proprieties & Industries Ltd. Order Under Section 38 (dated: 13.01.2015)	Private Individual	Construction
16.	60/2014 29/12/2014	XYZ vs Bengal Ambuja Housing Development Limited	Private Individual	Real Estate
17.	77/2014 30/12/2014	Sh. Ankit Jain vs M/s BPTP Limited & Ors.	Private Individual	Real Estate
18.	81/2014 30/12/2014	Muthoot Mercantile Limited vs State Bank of India (Through the Chairman) & Ors.	Non-Banking Financial Company (NBFC)	Commercial Bank
19.	70/2014 12/01/2015	Shri Rajat Verma vs Public Works (B&R) Department, Government of Haryana & Ors. Main Order, Dissent Note	Private Individual	Construction
20.	76/2014 29/01/2015	Brihan Mumbai Electric Supply and Transport Undertaking of Municipal Corporation of Greater Mumbai (BEST) vs Tata Power Company Limited	Electricity	Electricity
21.	79/2014 29/01/2015	Balbit Singh Jamwal vs Paras Buildtech India Pvt. Ltd.	Private Individual	Maintenance Services
22.	85/2014 29/01/2015	Ravinder Kaur Sethi vs DLF Universal Limited & Ors.	Private Individual	Real Estate
23.	92/2014 29/01/2015	XYZ vs Shri Hiralal Sharma	Private Individual	Education
24.	66/2014 29/01/2015	Mr. Ramesh Mehta vs M/s North Star Apartments Pvt. Ltd.	Private Individual	Real Estate
25.	69/2014 29/01/2015	Mr. Gautam Dhawan vs M/s. Parsvanath Hessa Developers Pvt. Ltd. & Ors.	Private Individual	Real Estate
26.	74/2014 30/01/2015	Shri Abhinandan Kumar vs MVL Limited.	Private Individual	Real Estate
27.	96/2014 04/02/2015	Shri Sanjay Goel vs The Chief Executive Officer, Greater Noida Industrial Development Authority	Private Individual	Real estate
28.	86/2014 11/02/2015	M/s Bhasin Motors (India) Private Limited vs M/s Volkswagen Group Sales India Private Limited	Automobile	Automobile
29.	83/2014 17/02/2015	M/s VidaySagar Realtors Pvt. Ltd. vs M/s Bestech India Pvt. Ltd. & Ors.	Real Estate	Real Estate
30.	87/2014 24/02/2015	Bharat Garage vs Indian Oil Corporation Ltd. & Ors.	Distribution of Compressed Natural Gas (CNG)	Distribution of Compressed Natural Gas (CNG).
31.	100/2014 26/02/2015	Shri Amitabh vs M/s KENT RO Systems	Private Individual	Water Purifiers
32.	95/2014 18/03/2015	Brickwork Ratings India Private Limited vs CRISIL Limited, A Standard & Poor's Company & Ors.	credit rating agency	credit rating agency
33.	01/2015 19/03/2015	Shri Shrikant Shivram Kale vs M/s Suzuki Motorcycle India Private Limited	Private Individual	Automobile
34.	02/2015 24/03/2015	Matha Timbers Private Ltd. vs Tamil Nad Mercantile Bank Ltd.	Import, Distribution and Sale of Timber	Banking

35.	93/2014 24/03/2015	CSC Forum vs CSC e-governance Services India Ltd.	Communication & Information Technology	Ministry of Communication & Information Technology
36.	97/2014 24/03/2015	Dr. (Col.) Subhash Chandra Talwar vs Chief Secretary, Govt. of Haryana & Ors.	Private Individual	Govt. Of Haryana
37.	101/2014 01/04/2015	Shri Dominic Da'Silva vs M/s Vatika Group.	Private Individual	Real Estate
38.	30/2015 22/04/2015	M/s. K Sera Sera Digital Cinema Pvt. Ltd. vs Digital Cinema Initiatives. LLC. & Ors.	Digital Cinema Services	Digital Cinema
39.	80/2014 23/04/2015	Mr. Mohit Manglani vs M/s Flipkart India Private Limited & Ors.	Private Individual	E commerce website
40.	03/2015 23/04/2015	Shri Jitendra M. Malkan vs M/s Godrej Properties Ltd & Ors.	Real Estate	Real Estate
41.	07/2015 23/04/2015	Shri Brajesh Asthana, Proprietor M/s Arpita Engineering vs Uflex Limited	Private Individual	Pouch packing machine business
42.	15/2015 23/04/2015	M/s Mahadev Buildtech Pvt. Ltd. vs M/s Hema Surgicals Pvt. Ltd. & Ors.	Liquor	Liquor- Retail and Wholesale business
43.	14/2015 24/04/2015	Mr. Ravinder Pal Singh vs BPTP Limited & Ors.	Private Individual	Real Estate Developer
44.	12/2015 07/05/2015	Shri Ashok Kumar Sharma vs Agni Devices Pvt. Ltd.	Private Individual	Security Systems
45.	90/2014 13/05/2015	Shri Ramamurthy Rajagopal vs Doctor's Associates Inc. & Ors.	Private Individual	Restaurants
46.	10, 17, 18, 25, 26 & 27/2015 19/05/2015	Nitin Radheyshyam Agarwal & Other (10/2015), Shri Dharmendra M. Gada (17/2015), Shri Deepak Pancharia & Other (18/2015), Shri Dinesh Chand R Modi (25/2015), Shri Rajesh Mayani & Other (26/2015), M/s Malhar Traders Private Limited (27/2015) vs Bombay Dyeing & Manufacturing Company Limited & Ors.	Private Individual	Textile & Real Estate
47.	13/2015 22/05/2015	Shri Sanjay Goel vs Greater Noida Industrial Development Authority & Others.	Private Individual	Govt organisation for development

Annexure B-3

Orders under Section 26 (6) of the Act directing further investigation

No.	Case No./ Date of Decision	Case name	Industry Sector in which the Informant/ complain- ant was engaged	Industry Sector in which OP1 was engaged	Outcome
1.	65/2013 02/12/2014	M/s Magnus Graphics vs M/s Nilpeter India Pvt. Ltd. & Ors.	Label printing	Printing machines	Matter dismissed.
2.	52/2013 13/01/2015	Financial Software and Systems Private Limited vs M/s ACI Worldwide Solutions Private Limited & Ors.	Financial transaction processing	Software developer	Contravention of 4(2) (a)(ii), 4(2)(b)(i), 4(2)(b) (ii), 4(2)(c), 4(2)(d) and 4(2)(e)
3.	20/2013 23/04/2015	M/s Saint Gobain Glass India Limited vs M/s Gujarat Gas Company Limited.	Manufacture glass	Distribution of Natural Gas	<i>No case of contravention of section 4 made out. Matter is ordered to be closed.</i>
4.	42/2013 12/05/2015	Builders Association of India (Kerala Chapter) vs The State of Kerala & Ors.	Construction machinery	Govt. of Kerala	No case of contravention of section 3 & 4 made out. Matter is ordered to be closed.

Annexure B-4

Orders under Section 27 of the Act holding conduct of opposite party in violation of the Act

No.	Case No./ Date of Decision	Case name	Industry Sector in which the Informant/ complain-ant was engaged	Industry Sector in which OP1 was engaged	Outcome
1.	38/2011 31/10/2014	Indian Sugar Mills Association & Ors. vs Indian Jute Mills Association & Ors.	Sugar	Textile	Violation of section 4 & 3 and penalty was imposed
2.	62/2012 23/12/2014	M/s Cinemax India Limited (now known as M/s PVR Ltd.) vs M/s Film Distributors Association (Kerala)	Exhibition of films	Media and Entertainment	Violation of section 3 and penalty was imposed
3.	32/2013 23/12/2014	Shri P.V. Basheer Ahamed vs M/s Film Distributors Association, Kerala	Private Individual	Media and Entertainment	Violation of section 3 and penalty was imposed
4.	42/2012 21/01/2015	M/s Swastik Stevedores Private Limited vs M/s Dumper Owner's Association & Ors.	Cargo Transportation	Manufacturing	Violation of section 3 and penalty was imposed
5.	78/2012 29/01/2015	M/s Rohit Medical Store vs Macleods Pharmaceutical Limited & Ors.	Pharmaceutical	Pharmaceutical	Violation of section 3 and penalty was imposed
6.	59/2011 03/02/2015 26/02/2015	Shri Jyoti Swaroop Arora vs M/s Tulip Infratech Ltd. & Ors. Order under section 38	Private Individual	Town & Country Planning	Request of the applicant is misconceived in as much as the Opposite Party has got sufficient opportunity to meet the allegations and findings of the DG. The request is accordingly declined
7.	43/2013 04/02/2015	M/s Shivam Enterprises vs Kiratpur Sahib Truck Operators Co-operative Transport Society Limited & Ors.	Transport	Transport	Violation of section 3 & 4 and penalty was imposed
8.	08/2014 16/02/2015	M/s GHCL Limited vs M/s Coal India Limited & Ors.	Soda Ash	Coal	Violation of section 4 and no penalty was imposed
9.	61/2012 16/02/2015	Indian Foundation of Transport Research & Training vs Sh. Bal Malkait Singh, President and Ors.	Transport/ Automotive	All India Motor Transport Congress	Violation of section 3, cease activities and penalty was imposed
10.	56/2012 10/04/2015	M/s Atos Worldline India Pvt. Ltd. vs M/s Verifone India Sales Pvt. Ltd. and Ors.	Information Technology Services	Electronic Payment Technologies	Violation of section 4, Order to cease and desist from such activities and penalty was imposed

Orders under Section 27 of the Act holding conduct of opposite party in violation of the Act

Provided upon request only

11.	13/2013 10/04/2015	M/s Three D Integrated Solutions Ltd. vs M/s VeriFone India Sales Pvt. Ltd.	Video Broadcasting	Electronic Ticketing Machines Manufacturer	Violation of section 4, cease activities and penalty was imposed
12.	13 & 21/2010 & 55/2012 12/05/2015	Mr. Pankaj Aggarwal (13/2010), Mr. Sachin Aggarwal (21/2010) & Mr. Anil Kumar (55/2012) vs DLF Gurgaon Home Developers Private Limited	Private Individual	Real Estate	Violation of section 4 and no financial penalty was imposed but cease and desist orders were passed.

Annexure C

Orders Passed by Delhi High Court

No.	Case No./ Date of Decision	Case name	Industry Sector in which the Informant/ complain- ant was engaged	Outcome
1.	W.P. (C) No. 7084/2014	Google Inc. and Ors. Vs. Competition Commission of India and Ors.	IT	CCI has the power to recall/review the orders under Section 26(1) of the Act but within certain parameters and subject to certain restrictions.
2.	LPA 715/2014	Competition Commission of India Vs. JCB India Ltd.	Construction	CCI has locus standi to prefer appeal before High Court when its regulatory powers related to investigation process is hampered.
3.	W.P. (C) 5947/2014	Rajkumar Dyeing and Printing Works Private Limited Vs. Competition Commission of India	Printing	Failure to file an undertaking in support of a “cease and desist” order is only formal and not substantive non-compliance. Therefore, punitive penalties under Section 42 must be proportionate and the same was reduced to the extent of 95% by COMPAT in the present case being a small scale industry.
4.	W.P. (C) 6361, 6362/2014-	DLF Home Developers Limited Vs. Competition Commission of India	Real estate	Writ Petition seeking direction to CCI to decide preliminary issues of jurisdiction prior to dealing with merits of the matter was held not maintainable. It can be appealed at a later stage before the High Court.
5.	W.P.(C) No. 2844/2014	Dinkar Kumar Vs. Union of India	--	Writ petition under Article 226 of the Constitution though not barred by the Competition Act, 2002, was not maintainable in view of the remedy of appeal to the Supreme Court provided vide Section 53T of the Act.
6.	LPA No. 154/2015	Delhi Development Authority and Ors. Vs. CCI and Ors.	Govt. of Delhi- Real Estate	Appeal allowed clarifying an order of a Single Judge confirming that jurisdiction, being a pure question of law, needs to be separately adjudicated upon, at first instance.

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