COMPETITION LAW
- DUE DILIGENCE
**What is competition in the market?**

In common parlance, competition in the market means sellers striving independently for buyers’ patronage to maximize profit (or other business objectives). A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product at a price that maximizes his profit. World Bank 1999.

**Competition and Economic Efficiency**

A number of empirical studies found a positive relationship between competition and innovation, productivity and economic growth. P. Aghion and P. Howitt in Endogenous Growth Theory offered several theoretical situations where competition is conducive to innovation - Intensified product market competition could force managers to speed up the adoption of new technologies.

**Competition law and Policy**

The basic purpose of Competition Policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy. Competition policy typically has two elements: one is a set of policies that enhance competition in local and national markets. The second element is legislation designed to prevent anti-competitive business practices with minimal Government intervention, i.e., a competition law. Competition law by itself cannot produce or ensure competition in the market unless this is facilitated by appropriate Government policies. On the other hand, Government policies without a law to enforce such policies and prevent competition malpractices would also be incomplete.

**Competition Law-Evolution and Development**

The first Indian competition law was enacted in 1969 and was christened as the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The genesis of the MRTP Act, 1969 is traceable to Articles 38 and 39 of the Constitution of India. The Directive Principle of State Policy in those Articles lays down, inter-alia 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:

1. That the ownership and control of material resources of the community are so distributed as best to sub serve the common good; and
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

**Acquisition**

means- acquiring- (a) shares or voting rights of any enterprise; or (b) control over management of any enterprise; or (c) control over assets of any enterprise.

**Agreement includes**

any agreement or understanding or action in contract whether or not such agreement or understanding or action is formal; or in writing; or intended to be enforceable by legal proceedings.

**“Cartel” includes**

an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves limit, control or attempt to control production, distribution, sale or price of goods or services.
“Consumers”

means- any person who-

i. (a) Buys any goods for a consideration, (b) which has been paid or promised or partly paid and partly promised, or (c) under any system of deferred payment, or (d) and includes any user of such goods, (e) other than the person who buys such goods for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, (f) when such use is made with the approval of such person, (g) whether such purchase of goods is for resale or for any other commercial purpose or for personal use.

ii. (a) Hires or avails of any services for a consideration, (b) which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, (c) and includes any beneficiary of such services, (d) other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, (e) when such services are availed of with the approval of the first mentioned person, (g) whether such hiring or availing of services is for any other commercial purpose or for personal use.

“Enterprise”-

a) Enterprise means a person or a department of the government engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods of any kind; or the provision of services of any kind business if acquiring, holding, underwriting or dealing with shares, debentures or any other securities of any body corporate either directly or through one or more of its wits and 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.

b) Enterprise does not include any activity of the Government relatable to sovereign functions of the Government including all activities carried on by the departments of CG dealing with atomic energy, currency, space.

“Goods” means -

Goods as defined in SOGA, 1930 includes- (a) Products manufactured, processed or mined, (b) debentures, stocks and shares after allotment, (c) goods imported into India.

COMPETITION COMMISSION OF INDIA (Sec. 7 and 15)

i. Establishment of CC: - By issuing notification in the Official Gazette. The Commission shall come into existence on such date as may be specified in such notification.

ii. *Offices of the Commission: - (a) Head Office- such place may be decided by CG from time to time, (b) Other offices in India may be established by the Commission.

iii. Characteristics of the Commission: - (a) Body Corporate having perpetual succession and a common seal, (b) Power to contract, (c) Power to sue in its own name, (d) Power to acquire, hold and dispose of property.
iv. Vacancy etc. not to invalidate the proceeding of the Commission. (Sec 15)

No act or proceeding of the Commission shall be invalid merely by reason of- any vacancy in the Commission; or any defect in the Constitution of the Commission; or any defect in the appointment of the Chairperson or a member or any irregularity in the procedure of the Commission not affecting the merits of the case.

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### COMPOSITION OF THE COMMISSION

- **Chairperson & members:**
  - a) **One chairperson**, min 2 members & maximum 6 members.
  - b) **Vacancy** - The senior-most member should act as the Chairperson until the new Chairperson assumes his office (Sec. 10).
  - c) **Inability to functions** - the senior-most member shall discharge the functions of the Chairperson until the Chairperson resumes the change in his functions (Sec. 10).

### COMMON PROVISIONS APPLICABLE TO CHAIRPERSONS AND MEMBERS

1. **Manner of appointment:**
   - Appointment by CG from a panel of names recommended by Selection Committee. The Selection Committee shall consist of:
     - a) The Chief Justice of India or his nominee as the Chairperson for the Selection Committee
     - b) The Secretary in the Ministry of Corporate Affairs - as a member of the Selection Committee
     - c) The Secretary in the Ministry of Law and Justice - as a member of the Selection Committee
     - d) Two experts of repute who have special knowledge of and professional experience in international trade, economics, business commerce, laws, finance, accountancy, management, industry, public affairs, or competition matters including Competition Law and policy - as members of the Selection Committee

   The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

2. **Nature of office** - whole time members
3. **Tenure:** 5 years
4. **Reappointment** - Possible
5. **Maximum Age** - Not to hold office after him as attained the age of 65 years.
6. **Filling of Vacancies** - Fresh appointments shall me made in the prescribed manner.
7. **Oath** - oath of secrecy shall be maintained in the prescribed manner.
8. **Salary and Terms and Conditions** - determined by Rules
9. **Variation in Salary and Terms and Conditions** - no variation prejudicial to chairperson or member
10. Qualification and Experience- the Chairperson and every other member shall be a person of ability, integrity and standing and who has special knowledge of and such professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy, which in opinions of the CG may be useful to the Commission.

RESIGNATION, REMOVAL AND SUSPENSION OF CHAIRPERSON OR OTHER MEMBERS:

i. Right to Resign - the Chairperson or any other member may by notice in writing under his hand addressed to CG, resign his office.

ii. Effect of Resignation - the Chairperson or member shall, unless he is permitted by the CG to relinquish his office sooner, continue to hold office until the expiry of 3 months from the date of receipt of such notice or until a person duly appointed his successor or enter upon his office or until the expiry of his term of office, whichever is the earliest.

ii. Removal - CG may, by order remove the Chairperson or any other member in the following cases - (a) If he is or at any time has been adjudged insolvent, (b) if he has engaged at any time during his term of office in any paid employment, (c) If he has been convicted of an offence, which in the opinion of the CG involves moral turpitude, (d) if he has acquired such financial or other interest as is likely to affect prejudicially his functions as member, (e) if he has so abused his position as to render his continuation in office prejudicial to the public interest, (f) if he has become physically or mentally incapable of acting as member.

However, no member shall be removed from his office on the ground specified in clause (d) or clause (e) unless the Supreme Court, on a relevance being made to it in this behalf by CG on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the members ought on such ground or grounds to be removed.

Restriction on Emp. Of Chairman and other members in certain cases (Sec. 12):

Restriction on Emp.: On Whom? - Chairperson and every member.
Nature of Restriction: No Emp. In any enterprise which has been a party to any proceeding before the Commission.
Time period of Restriction - 2 years from date of cessation of office.
Exempted Enterprises: - (a) CG, (b) SG, (c) Local Authority, (d) Statutory Authority, (e) A corp. established by a central, state or provincial Act, (f) A Govt. Company.

MEETINGS OF THE COMMISSION (Sec. 22)

1. Number of meetings and procedures for meetings - the commission shall meet at such times and such places, and shall observe such rules of the procedure in regard to the transaction of business at its meetings as may be provided by the Regulations.

2. Effects of absence of Chairperson - If the Chairperson is unable to attend any meeting of the Commission (because of any person, the senior-most Member present at the meeting, shall preside at the meeting.
### COMPETITION ADVOCACY (Sec. 49)

1. **Formulation of competition policy** -  
   a) CG may, in formulating a policy on competition (including reviews of laws related to competition) or on any other matter, and SG may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effects of such policy on competition.  
   b) The Commission shall, within 60 days of receipt of such a reference, give its opinion to CG or SG, as the case may be.  
   c) CG or SG may thereafter take such further action as it may deem fit.  
   d) The opinion given by the Commission shall not be binding upon SG or SG, as the case may be.

2. **Duties of the Commission** -  
   a) The promotion of competition advocacy  
   b) Creating awareness about competition issues  
   c) Imparting training about competition issues.

### COMPETITION FUND (Sec. 51)

1. **Administration of Fund** -  
   a) Fund shall be administered by a committee of Commission  
   b) Members of such committee are determined by Chairperson

2. **Credits to the Fund** -  
   a) Government grants received by the Commission  
   b) Fees received under the Act  
   c) Interest accrued on the above amounts.

3. **Utilization of Fund** -  
   a) Payment of Salaries, allowances and other administrative expenses of chairperson, Members, Officers and employees of the Commission.  
   b) Payment of other expenses of the Commission in connection with the discharge of its functions and for purposes of this Act.  
   c) Spending money for carrying out the objects for which Fund is constituted.

### ACCOUNTS AND AUDIT (Sec. 52)

1. **Maintenance of accounts** -  
   a) Accounts and records - must be proper  
   b) Annual accounts - from prescribed by CG in consultation with CAG.

2. **Audit of accounts** -  
   a) by whom? - CAG
POWER OF CG TO SUPERSEDE COMMISSION (Sec. 561)

CG is of the opinion that -

a) Commission is unable to discharge the functions or perform the duties imposed on it on account of circumstances beyond the control of the Commission; or

b) Commission has persistently made default in -
   (i) Complying with any direction given by CG; or
   (ii) Performing its functions or duties, and

As a result of such default, financial position of Commission or administration of Commission has suffered; or

c) Suppression of Commission is necessary in public interest.

ANTI-COMPETITIVE AGREEMENTS (Sec. 31)

Prohibition of anti-competitive agreement [Sec. 3(1)] -

• No enterprise or association of enterprises or person or association of persons
• Shall enter into any agreement
• In respect of production, supply, distribution, storage, acquisition or control
• Of goods or provision of services
• Which causes or is likely to cause
• An appreciable adverse effect on competition within India [Sec. 3(1)].

Effect of anti-competitive agreement [Sec. 3(2)] -

• Any agreement entered into
• In contravention of the provisions of Sec. 3(1)
• Shall be void.

ABUSE OF DOMINANT POSITION (Sec. 4)

Provision on abuse of dominant position [Sec. 4(1)] -

• No enterprise or group
• Shall abuse its dominant position.

Meaning of abuse of dominant position [Sec. 4(2)] -

• There shall be an abuse of dominant position,
• If an enterprise or group,
   i. Directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or services; or (ii) price in purchase of sale (including predatory price) of goods and services.
   ii. Limits or restricts - (i) production of goods or provision of services or market thereof; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
   iii. Indulges in practice or practices resulting in denial of market access in any manner; or
   iv. Makes conclusion of contracts subject to acceptance by other parties of supplementary obligation which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
   v. Uses its dominant position in one relevant market to enter into, protect, other relevant market.
Price Fixing (Section 3(3)(a))

Price fixing occurs when two or more firms agree to raise or fix the prices in order to increase their profits by reducing competition. It is an attempt at forming a collective monopoly.

Limiting the Production or supply (Section 3(3)(b))

The object of these agreements or arrangements is to eliminate the competition by limiting the quantity.

Allocation of Market Share (Section 3(3)(c))

It means agreement among enterprises that will have exclusive or preferential rights in a designated area for sale, provision of services or otherwise.
### Bid Rigging (Section 3(3) (d))
An agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids.

### Vertical Agreements (Section 3(4))
These are agreements between enterprises that are at different stages or levels of production chain and therefore in different markets. These agreements are not considered anti-competitive per se as in the case of horizontal agreements and have to be judged by the rule of reason.

### Tie in arrangement (Section 3(4)(a))
It is an agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods.

### Exclusive Supply agreement (Section3(4)(b))
Exclusive supply agreement or exclusive dealings means an arrangement or practice whereby a manufacturer or supplier requires his dealers to deal exclusively in his products and not in the products of his competitors.

### Exclusive Distribution Agreement (Section3(4)(c))
Exclusive distribution agreement or exclusive territory includes agreement between enterprises that will have exclusive or preferential rights in a designated area for sales production, performance of services.

### Refusal to Deal (Section3(4)(d))
The practice of restricting persons or class of persons to whom the goods are sold or from whom the goods are bought.

### Resale price Maintenance (Section3(4)(e))
It is a situation in which the supplier forces the distributor/retail seller to sell the good to the customer at prices stipulated by the supplier.
A case Study on Anti-Competitive Agreement.

Economic, Business & Commercial Laws

Competition Commission of India (CCI) finds cement companies guilty of anti-competitive agreements-cartelization, collusive price, dispatch and supplies parallelism, creating artificial scarcity by limiting output to raise prices.

Facts

Information was filed under section 19 of the Competition Act, 2002 by the Builders’ Association of India ('the informer') against the Cement Manufacturers’ Association (CMA) 11 cement manufacturing companies for alleged violation of section 3 (Anti-competitive agreements) and section 4 (Abuse of dominant position) of the Competition Act, 2002.

Held

Mere examination of data belonging to period prior to 20-5-2009 cannot be constructed to mean that provisions of the Act have been applied retrospectively. Moreover, if the effects of an/conduct, prior to 20-5-2009 continue post notification of the date of coming into force of provisions relating to anti-competitive agreements, the CCI has the necessary jurisdiction to look into such conduct.

Section 3(3) deals with any agreement which directly or indirectly determines the purchase or sale prices, section 3(3) (b) deals with any agreement which limits or controls production, supply, markets, technical development, investment or provision of services.

The word ‘agreement’ used in section 3(3) has been defined in section 2(b). The definition is inclusive and inter-alia includes any arrangement, understanding or action in concert irrespective of whether it is written/formal or otherwise or intended to be legally enforceable. Thus, there is no need for an explicit agreement. The same can be inferred from the intention or conduct of the parties.

Parties to an anti-competitive agreement will not come out in open and reveal their identify to be punished by the competition agencies. This is also the reason why the legislature in its wisdom has made the definition of ‘agreement’ wide and inclusive and not restricted it to a documented written agreement between parties.

In cases of conspiracy or existence of any anti-competitive agreement, prior of formal agreement may not be available and may be established by circumstantial evidence alone.

In addition to the exchange of information on prices and production using CMA as platform, there were other ‘plus’ or ‘facilitating’ factors over and above the existence of price parallelism which indicated collusive behaviour among the cement companies. One of the ‘plus’ factors that suggested a concerted action among the cement companies is the finding by the Director General (DG) as regards the overall low capacity utilisation and lower supply of cement. The overall capacity utilisation of cement companies dropped from 83% in 2009-10 to 73% during 2011-12. The companies were not able to substantiate their low capacity utilisation even during the period as per their version.
The act of these Cement Companies in limiting and controlling supplies in the market and determining price through an anti-competitive agreement is not only detrimental to the cause of the consumers but also to the whole economy since cement is crucial input in construction and infrastructure industry vital for economic development of the country.

The Cement Manufactures were directed to deposit the penalty of ₹6,300 crores (Approx) within 90 days. They were also directed to ‘cease and desist’ from indulging in any activity relating to agreement, understanding or arrangement on prices, production and supply of cement in the market.

CMA was directed to disengage and disassociated itself from collecting wholesale and retail prices through the member cement companies and also from circulating the details on production and dispatches of cement companies to its members.

Abuse of Dominance
(Section 4)

As regards Competition Act, 2002, the following points are significant to understand the concept of ‘Abuse of Dominance’

1. What is Dominance?

Explanation to Section 4(2) of the Competition Act 2002 defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to:
(a) Operate independently of the competitive forces prevailing in the relevant market; or
(b) Affect its competitors or consumers or the relevant market in its favour.

2. What is relevant market?

The definition of the term ‘Dominant Position’ contains the term ‘Relevant Market’ which is very significant to identify whether an enterprise is in a dominant position or not.

The Competition Act, 2002 defines the term ‘Relevant Market’ also.
“Relevant market” means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

“Relevant geographic market” means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or service are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

“Relevant product market” means a market comprising all those products or services which are regarded as interchangeable or subsitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

Dominance as such is not bad

Dominance of market as such is not bad under Competition Act, but its’ abuse is prohibited under the Act.

The Act gives an exhaustive list of practices that constitute abuse of dominant position and, therefor, are prohibited. Such practices shall constitute abuse only when adopted by an enterprise enjoying dominant position in the relevant market in India.
Abuse of dominance is judged in terms of the specified types of acts committed by a dominant enterprise alone or in concert. Such acts are prohibited under the law. Section 4 (2) of the Act specifies the following practices by a dominant enterprises or group of enterprises as abuse of dominant position:

Directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;

Directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) of goods or service;

Limiting or restricting production of goods or provision of services or market;

Limiting or restricting technical or scientific development to the prejudice of consumers;

Denying market access in any manner;

Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

Using its dominant position in one relevant market to enter into, or protect, other relevant market.
Write notes on Cartel under the Competition Act, 2002.

Distinguish between ‘Relevant Geographic Market’ and ‘Relevant Product market’.

**Relevant Geographic Market**

1. Defined under Section 2(s) of the Competition Act, 2002.
2. It consists of an area in which conditions of competition for:
   - Supply of Goods
   - Services
   - Demand for Goods
   - Demand for Services, can be segregated from that of nearby areas.

**Relevant Product Market**

1. Definition provided by virtue of Section 2(t) of the Competition Act, 2002.
2. It consists of those products and services which can be exchanged with each other due to similarity of features, etc.

With reference to the relevant legal enactments, write short notes on the following:

(i) Basic Rights of Consumers
(ii) Competition Advocacy

**Basic Rights of Consumers**

- **Right to Safety**: Every consumer has the right to safety i.e. the right to be protected against the marketing of goods & services which are hazardous to life & liberty.
- **Right to be Informed**: Under the Consumer Protection Act, 1986, a consumer has the right to be informed about the quality, quantity, purity, standard & price of goods & services so as to protect himself against any unfair trade practices.
- **Right to Choose**: Right to choose means right to be assured & have access to a variety of goods & services at competitive prices. In case of monopolies it means right to be assured of satisfactory quality & services at a fair price.
- **Right to be Heard**: Consumer Protection Act, 1986 provides the right to be heard which means that the consumers interest will receive proper & due consideration at appropriate forums. In broad sense, it also includes right to be represented at various forums formed to consider the consumer welfare.
- **Right to seek Redressal**: One of the basic rights of consumers under the Consumer Protection Act, 1986 is the right to seek redressal which means the right to seek redressal against unfair practices or restrictive trade practices. It includes the right to fair settlement of the genuine grievances of the consumers.
- **Right to Consumer Education**: Basic rights of the consumers under the Act include the right to consumer education which means the right to acquire the knowledge & skill to be an informed consumer.
(ii) Competition Advocacy can be explained by the following:

- Provisions relating to competition advocacy are contained under Section 49 of the Competition Act, 2002.
- This Section provides that the Central or State Government can seek any option from CCI i.e. Competition Commission of India.
- Information sought may be with regard to the tentative effects of the policy on Competition.
- It is not necessary to abide by the opinion given by CCI.
- CCI needs to provide its opinion to State/Central Government within a time frame of 60 days of receipt of reference for providing information.

4. What are the factors which the Competition Commission of India will Take into consideration in determining whether an agreement has an appreciable adverse effect on Competition?

Answer: Section 19(3) of Competition Act, 2002 provides that while determining whether an agreement has appreciable adverse effect on Competition, the Competition Commission of India shall give due regard to all or any of the following factors, namely:

- Creation of barriers to new entrants in the market;
- Driving existing competitors out of the market;
- Foreclosure of competition by hindering entry into the market;
- Accrual of benefits to consumers;
- Improvements in production or distribution of goods or provision of services;
- Promotion of technical, scientific an economic development by means of production or distribution of goods or provision of services.

If the benefits are more than drawbacks, the contract can be cleared.

5. State the duties of Director General under the Competition Act, 2002.

Answer: "Director General" means the Director General appointed under sub-section (1) of section 16 of the Competition Act, 2002 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section.

The duties of a Director General are as under:

- Director General to investigate contravention
  - The director General shall, when so directed by the commission, assist the commission in investigation into any contravention of the provisions of this act or any rules or regulations made thereunder.
  - The Director General shall have all the powers as are conferred upon the competition Commission under sub-section (2), of Section 36.
  - Without prejudice to the provisions of Sub- section (2), sections 217 and 220 of the Companies Act, 2013, so far as may be, shall apply to an investigation made by the Director General or any other person.
What is an ‘anti-competitive agreement’ under the Competition Act, 2002? Mention any five such agreements.

**Answer**

As per Section 3(1) of the Competition Act, 2002

- No Enterprise or
- Person or
- Association of enterprises or
- Association of persons

Shall enter into an Agreement in respect of:

- Production or
- Supply or
- Distribution or
- Storage or
- Acquisition or Control of goods or provision of services

Write short note on ‘Competition policy’
Write short note on ‘Combinations’
Condition conductive to cartelization

**Answer**

As per the provisions of the Act, there some conditions which are conductive to cartelization. Some of these conditions are:

- Few competitors in the market
- High entry & exit barriers
- Similar products
- Similar production costs
- High dependence of the customers on the product
- Excess capacity

Resale price maintenance

**Answer**

- Sub-section 4 of Section 3 of Competition Act, 2002 deals with resale price maintenance.
- It includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.
- Resale price maintenance is a vertical agreement.
- It is anti-competitive agreement; S such an agreement that causes or is likely to cause an appreciable adverse effect on competition in India.
Distinguish between 'Competition Commission' and 'Competition Appellate Tribunal'

**Competition Commission**
1. Section 7 empowers the central government to establish a commission to be known as 'Competition Commission of India'.
2. The commission shall be a body corporate having perpetual succession and common seal.
3. The commission shall consist of a chairman and not less than 2 and more than 6 members.
4. The chairman and all other person shall be appointed by the Central Government.

**Competition Appellate Tribunal**
1. Competition Appellate Tribunal shall be setup by Central Government by virtue of the power entrusted to its under section 53A of Competition Act, 2002.
2. The competition appellate tribunal shall have the power to hear & dispose of appeals against any direction issued or mode or passed by competition commission.
3. Moreover it shall also have the power to adjudicate on claim for compensation that may arise from the findings of the commission.
4. The appeal to the compensation appellate tribunal shall be filed against the order of competition commission within 60 days from the date on which the copy of the direction or order passed is received.
are not being practised in our country. Unfortunately our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe heaven for the suppliers and a position of frustration and uncertainty for the consumers. It should be the function of any consumers legislation to meet this challenge specifically. Consumer protection must have a positive and active role.

Accordingly, the Committee specified certain unfair trade practices which were notorious and suggested prohibition of such practices. The main category of unfair trade practices recommended for prohibition by the Sachar Committee were: (a) misleading advertisements and false representations (b) bargain sale, bait and switch selling; (c) offering gifts or prizes with the intention of not providing them and conducting promotional contests; (d) supplying goods not conforming to safety standards; and (e) hoarding and destruction of goods.

In India, by an amendment to the MRTP Act in the year 1984 Part B Unfair Trade Practices was added to Chapter V. It may be recalled that Part A of Chapter V deals with registration of agreements relating to restrictive trade practices. Section 36A, 36B, 36C, 36D and 36E are relevant for the purposes of understanding the main provisions relating to unfair trade practices.

**Scheme of the Act with respect to Unfair Trade Practices**

The term ‘Unfair Trade Practices’ is defined in Section 36A which enlists a number of practices as unfair trade practices. This definition has been amended vide the MRTP (Amendment) Act, 1991 making its scope wider in application. Section 36B provides for an enquiry into unfair trade practices by the MRTP Commission. Section 36C contains provision for preliminary investigation by the Director General in certain cases. Section 36D deals with the powers of the Commission to inquire into unfair trade practice and pass remedial orders. Section 36E empowers the Commission to exercise same powers in respect of unfair trade practices as it exercises in respect of restrictive trade practices.

**Why do we need competition in the market?**

*Competition is now universally acknowledged as the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet consumer demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.*

**COMPETITION ACT, 2002**

**Short title, extent and commencement**

Section 1 of the Act provides that it shall come into force on such date as the Central Government may notify in the Official Gazette. However, an enabling provision empowering the Government to appoint different dates for different provisions of the Act have been incorporated. The scope of the Act extends to whole of India except the State of Jammu and Kashmir.

**Scheme of the Act**

The Scheme of the Act has been split into nine chapters indicated hereunder: Chapter I contains preliminary provisions viz. Short title, extent and Definition clauses; Chapter II provides for substantive laws i.e. Anti
Competitive Agreements, Abuse of Dominance and Regulation of Combinations; Chapter III contains provisions relating to Establishment of Commission, Composition of Commission, Selection of Committee for Chairperson and other Members, Term of Office of Chairperson etc. Chapter IV elaborately provides the Duties, Powers and Functions of the Commission; Chapter V provides for the Duties of Director General; Chapter VI stipulates Penalties for Contravention of Orders of Commission, Failure to Comply with Directions of Commission and Director-General, Making False Statement or Omission to Furnish Material Information etc; Chapter VII deals with Competition Advocacy; Chapter VIII contains provisions relating to Finance, Accounts and Audit, Chapter VIII A contains provisions relating to “Competition Appellate Tribunal” [inserted by the Competition (Amendment) Act, 2007] and Chapter IX contains Miscellaneous provisions.

**Definitions**

The important concepts incorporated in the Competition Act, 2002 have been defined under Section 2 of the Act. These have been discussed herein below:

**Acquisition**

This term has been specifically defined. It means – directly or indirectly, acquiring or agreeing to acquire: (i) shares, voting rights or assets of any enterprise; (ii) control over management or control over assets of any enterprise. [(Section 2(a)]

The terms ‘acquiring’ or ‘acquisition’ are relevant for “Regulation of Combinations”.

**Agreement**

The term includes any arrangement or understanding or action in concert—

(i) whether or not, such arrangement, understanding or concert is in formal or in writing; or

(ii) whether or not such arrangement, understanding or concert is intended to be enforceable by legal proceedings.

It implies that an arrangement need not necessarily be in writing. The term is relevant in the context of Section 3, which envisages that anti-competitive agreements shall be void and thereby prohibited by the law. [Section 2(b)]

The term “Competition” is not defined in the Act. However, in the corporate world, the term is generally understood as a process whereby the economic enterprises compete with each other to secure customers for their product. In the process, the enterprises compete to outsmart their competitors, sometimes to eliminate their rivals. Competition in the sense of economic rivalry is unstable and has a natural tendency to give way to a monopoly. Thus, competition kills competition.

**Cartel**

“Cartel” includes an association of producers, sellers or distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of or, trade in goods or provision of services. [Section 2(c)]

The nature of a cartel is to raise price above competitive levels, resulting in injury to consumers and to the economy. For the consumers, cartelisation results in higher prices, poor quality and less or no choice for goods or services.

An international cartel is said to exist, when not all of the enterprises in a cartel are based in the same country or when the cartel affects markets of more than one country.
An import cartel comprises enterprises (including an association of enterprises) that get together for the purpose of imports into the country.

An export cartel is made up of enterprises based in one country with an agreement to cartelize markets in other countries. In the Competition Act, cartels meant exclusively for exports have been excluded from the provisions relating to anti-competitive agreements. This is because such cartels do not adversely affect markets in India and are hence outside the purview of the Competition Act.

If there is effective competition in the market, cartels would find it difficult to be formed and sustained.

### Some of the conditions that are conducive to cartelization are:

- **High concentration - few competitors**
- **High entry and exit barriers**
- **Homogeneity of the products (similar products)**
- **Similar production costs**
- **Excess capacity**
- **High dependence of the consumers on the product**
- **History of collusion**

### Chairperson

Chairperson means the Chairperson of Competition Commission of India appointed under Sub-section (1) of Section 8. [Section 2(d)]

### Commission

Commission means Competition Commission of India established under Section 7(1). [Section 2(e)]

### Consumer

Under that Act, the Consumer includes only such purchasers or buyers who make purchases for their own consumption or to earn their livelihood. This deficiency has now been made good – by defining “Consumer” under the Act. Consumer means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment when such services are availed of with the approval of the first mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use. [Section 2(f)]

It may be noted that under the Competition Act even if a person purchases goods or avails of services for
commercial purpose, he will be a Consumer, whereas for purposes of Consumer Protection Act, a person purchasing goods/availing services for commercial purposes is not a “Consumer” and can not seek relief under that Act.

**Director General**

Director General means the Director General appointed under Section 16(1) and includes Additional, Joint or Deputy or Assistant Director Generals. [Section 2(g)]

**Enterprise**

Enterprise means a person or a department of the Government, who or which is, engaged in any activity, relating to production, control of goods or articles or 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 whether such unit or division or subsidiary is located at the same place where the enterprise is located or at different place(s).

However, it does not include any activity of the Central Government relating to sovereign functions of Government including all activities carried on by the Government Departments dealing with atomic energy, currency, defence and space.

‘Activity’ includes profession or occupation. ‘A unit or division’ includes a plant or factory established for production, supply, distribution, acquisition or control of any goods or any branch or office established for provision of any service. [Section 2(h)]

It may thus be noted that sovereign function of Government are excluded from definition of enterprise but Government Departments performing non-sovereign functions for consideration are subject to jurisdiction of Commission.

**Goods**

Goods means goods as defined in Sale of Goods Act, 1930 and includes—

(a) products manufactured, processed or mined;

(b) debentures, shares and stocks after allotment;

(c) in relation to ‘goods supplied’, goods imported into India. [Section 2(i)]

**Member**

Member means a Member of the Commission appointed under Section 8(1) of the Act and includes a Chairperson. [Section 2(j)]

**Notification**

Notification means notification published in the Official Gazette. [Section 2(k)]

**Person**

Person includes (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons; (vi) a corporation established under Central, State Act or a Government Company (vii) a body corporate incorporated by or under a law of a foreign country; (viii) a co-operative society registered under any Law (ix) local authority (x) every artificial juridical person.

‘Government Company’ for this Section will be same as defined under Section 617 of Companies Act, 1956. [Section 2(p)]
Practice
Practice includes any practice relating to carrying on of any trade by a person or enterprise. [Section 2(p)]

Prescribed
Prescribed means prescribed by rules made under the Act by Central Government. [Section 2(n)]

Price
Price, in relation to sale of goods or supply of services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration, which relates to sale of any goods or to performance of any services although ostensibly relating to any other matter or thing. [Section 2(o)]

Public Financial Institution
Public Financial Institution means a Public Financial Institution as defined in Section 4A of Companies Act, 1956 and includes a State Financial, Industrial or Investment corporation. [Section 2(p)]

Regulations
Regulations means the regulations made by the Competition Commission of India. [Section 2(q)]

Relevant Market
Relevant market means the market, which may be determined by the Commission with reference to ‘relevant product market’ or ‘relevant geographic market’ or with reference to both the markets. [Section 2(r)]

Relevant Geographic Market
Relevant Geographic Market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas. [Section 2(s)]

Relevant Product Market
Relevant Product Market means a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of products or services, their prices and intended use. [Section 2(t)]

The terms ‘relevant market’, ‘relevant geographical market’ and ‘relevant product market’ have relevance in determination of the agreements being anti competitive, in evaluating combinations and dominance of an enterprise or group. An agreement in the nature of cartel which limits or controls production, supply, market, technical development, investments etc. need to be looked as being anti competitive with reference to relevant market. Similarly agreement to share the market or sources of production by way of allocation of geographical area of market, types of goods or services or number of customers in the market or by any similar way and these need to be interpreted in the context of the definition of relevant geographical market under Section 2(s).

Service
Service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement,
construction, repair, conveying of news or information and advertising. [Section 2(u)]

It may be noted that under the Competition Act, the services of industrial or commercial nature also fall within the scope of the Act whereas under the Consumer Protection Act, the services of commercial nature or for business or industrial purposes are excluded for interpreting deficiency in the supply thereof and for determining compensation, if any, payable to them. To this extent, the relief claimable under the Consumer Protection Act, 1986 is limited in scope. It may also be noted that “education” has been specifically included in ambit of “Service” to set at rest the dispute, if any, about the jurisdiction of Commission in such matters.

**Shares**

Shares means shares in the share capital of a company carrying voting rights and includes, –

(i) any security which entitles the holder to receive shares with voting rights;

(ii) stock except where a distinction between stock and share is expressed or implied. [Section 2(v)]

This definition of shares is much wider than what is provided under the Companies Act. It implies that not only shares in the share capital of a company e.g. equity or preference shares are included in the definition of shares but ‘debentures convertible into shares with voting rights’ are also included.

**Statutory Authority**

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

It implies that this definition widens the scope of type of bodies, which are empowered to make a reference for enquiring into anti-competitive agreement or abuse of dominant position or make a reference for opinion on a competition issue.

**Trade**

Trade means any ‘trade’, business, industry, profession or occupation relating to production, supplies, distribution, storage or control of goods and includes the provision of any services.

The definition of the term ‘trade’ is relevant, inter-alia, to the interpretation of any of the type of agreement listed in Section 4 (a), (b), (c), (d) and (e) in relation to the trading goods and provisions of services. [Section 2(x)]

**Turnover**

Turnover includes value of sale of goods or services. [Section 2(y)]

The definition of the term 'turnover', inter-alia, is relevant and significant in determining whether the combination of merging entities exceeds the threshold limit of the turnover specified in Section 5 of the Act. It is also relevant for the purpose of imposition of fines by the Commission.

Section 2 further provides that the words and expression used but not defined in the Competition Act, 2002 and defined in the Companies Act, 1956 [(1) of 1956] shall have the same meaning respectively assigned to them in the Companies Act, 1956 (1 of 1956).

Chapter II of the Competition Act, 2002 stipulates provisions relating to Prohibition of Certain Agreements, Abuse of Dominant Position and Regulations of Combinations.

**Anti Competitive Agreements**

It is provided under Section 3(1) of the Competition Act that no enterprise or association of enterprises or
person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. Section 3(2) further declares that any anti competitive agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as ‘void’ if it contains anti-competitive clauses having appreciable adverse effect on competition. Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or associations of persons or person or enterprise or practice carried on, or decision taken by any association of enterprises or association of persons, including “cartels”, engaged in identical or similar goods or 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; and
(d) directly or indirectly results in bid rigging or collusive bidding;

shall be presumed to have an appreciable adverse effect on the competition and onus to prove otherwise lies on the defendant.

The explanation appended to the Section 3 defines the term ‘bid rigging’ as any agreement between enterprises or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Efficiency enhancing joint ventures entered into by parties engaged in identical or similar goods or services, shall not be presumed to have appreciable adverse effect on competition but judged by rule of reason. The term “cartel” used in the Section is the most severe form of entering into ‘anti competitive agreements’ and has been defined in Section 2(c).

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

**Bid rigging is anti-competitive**

Bidding, as a practice, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government entities) and private bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

Some of the most commonly adopted ways in which collusive bidding or bid rigging may occur are:

- agreements to submit identical bids
- agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids)
- agreements not to bid against each other,
If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending. Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.

Section 3(4) provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

The term “tie-in agreement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. A good example of tie-in agreement is where a gas distributor requires a consumer to buy a gas stove as a pre condition to obtain connection of domestic cooking gas. [Chanakaya and Siddharth Gas company, In-re RTP 11/1985 decided by (MRTP Commission on 27.1.1985)]

“Exclusive supply agreement” includes any agreement restricting in any manner from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Thus, where a manufacturer asks a dealer not to deal in similar products of its competitor directly or indirectly and discontinues the supply on the ground that dealer also deals in product of suppliers’ competitor’s goods is an illustration of exclusive dealing agreement. [Bhartia Curtec Hammer Ltd. In-re (1997) 24 CLA 104 (MRTPC)]

“Exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

Requiring a distributor not to sell the goods of the manufacturer beyond the prescribed territory is a good
example of exclusive distribution agreement. Vadilal Enterprise Ltd. In-re (1998 (91) COMP CAS 824 is a good example of exclusive distribution agreement.

"Refusal to deal" includes any agreement, which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. For eg. an agreement which provides that the franchisees will not deal in products or goods of similar nature for a period of three years from the date of determination of agreement within a radius of five kms from showroom amounts to exclusive dealing agreement. DGIR v. Titan industries (2001) 43 CLA 293 MRTPC.

"Resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Any stipulation that the cement dealer should not sell below the stipulated price is a ‘resale price maintenance’ practice and is an anti competitive practice. (In re-India Cement Ltd. RTP Inquiry 48 /1985).

The agreements falling in Section 3(3) shall be presumed to have appreciable adverse effect on competition and thereby they are construed as deemed restrictive agreements. The agreements falling in Section 3(4) shall be judged by rule of reason and the onus lies on the prosecutor to prove its appreciable adverse effect on competition. The definition of all restrictive concepts covered under Section 3(4) is inclusive one.

Moreover, Section 3 does not restrict 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;
(b) the Patents Act, 1970;
(c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;
(e) the Designs Act, 2000;

That apart, the Act does not restrict any person’s right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provision of services for fulfilling export contracts. The exclusion of ‘export business’ is in view of ‘effect theory’, and doctrine of ‘relevant market’.

**WHAT IS AN ANTI-COMPETITIVE AGREEMENT?**

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

- agreement to limit production and/or supply;
- agreement to allocate markets;
- agreement to fix price;
- bid rigging or collusive bidding;
- conditional purchase/sale (tie-in arrangement);
- exclusive supply/distribution arrangement;
- resale price maintenance; and
- refusal to deal.
Prohibition of abuse of dominant position

Section 4 of the Competition Act, 2002 expressly prohibits any enterprise or group from abusing its dominant position, meaning thereby a position of strength, enjoyed by an enterprise or group, in the relevant market, in India, which enables it to—

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

In line with the latest global trend, the dominance shall not be determined with reference to “assets”, “turnover” or “market share”.

As per Section 2(r) ‘relevant market’ means the market, which may be determined by the Commission with reference to the relevant ‘product market’ or ‘relevant geographic market’ or with reference to both the markets. Thus, for determining dominance, these are relevant concepts.

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

For the purposes of this clause, “activity” includes profession or occupation; “article” includes a new article and “service” includes a new service; “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.

Section 4(2) states that there shall be abuse of dominant position, if an enterprise or group—

(a) directly or indirectly imposes unfair or discriminatory;
   (i) condition in purchase or sale of goods or services; or  
   (ii) price in purchase or sale (including predatory price) of goods or service.

Explanation appended to Section 4 (2) clarifies that the unfair or discriminatory condition in purchase or sale of goods or services shall not include any discriminatory condition or price which may be adopted to meet the competition.

Section 4(2)(b) includes in abuse of dominant position an enterprise or group limiting or restricting

(i) production of goods or provision of services or market therefore; or  
(ii) technical or scientific development relating to goods or services to the prejudice of consumers.

Similarly Section 4 (2) (c), (d) and (e) specify three other forms of abuses namely, if any person indulges in practice or practices resulting in denial of market access in any manner; or makes conclusion of contracts
subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts and also, if any person uses dominant position in one relevant market to enter into, or protect, other relevant market.

The term “predatory price” has been defined as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors. Thus, the two conditions precedent to bring a case with the ambit of predatory pricing are:

(i) selling goods or provision of service at a price which is below its cost of production and
(ii) that practice is resorted to eliminate the competitors or to reduce competition.

The Competition Commission of India has been empowered under Section 19(4) of the Act to determine whether any enterprise or group enjoys a dominant position or not, in the ‘relevant market’ and also to decide whether or not there has been an abuse of dominant position. It may be noted that mere existence of dominance is not to be frowned upon unless the dominance is abused.

**WHAT CONSTITUTES ABUSE OF DOMINANCE?**

*Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favour. Abuse of dominant position impedes fair competition between firms, exploits consumers and makes it difficult for the other players to compete with the dominant undertaking on merit. Abuse of dominant position includes:*

- imposing unfair conditions or price,
- predatory pricing,
- limiting production/market or technical development,
- creating barriers to entry,
- applying dissimilar conditions to similar transactions,
- denying market access, and
- using dominant position in one market to gain advantages in another market.

**Combinations**

Combination has broad coverage and includes acquisition of control, shares, voting rights, assets, merger or amalgamation.

**WHAT IS COMBINATION?**

*Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and outside India. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.*
Threshold of Combination specified under section 5 of the Act in tabular form given below:

On March 4, 2016, the Central Government issued notifications pertaining to the statutory thresholds for the purposes of “combinations” under Section 5 of the Competition Act, 2002 (“Act”).

1. **Increase in thresholds:** Pursuant to Notification No. S.O. 675(E) dated March 4, 2016, the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the Act. Accordingly, the revised thresholds for notification to the Competition Commission of India (“Commission”) are:

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<tr>
<th>THRESHOLDS FOR FILING NOTICE</th>
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<tbody>
<tr>
<td>Enterprise Level</td>
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<tr>
<td>India</td>
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<tr>
<td>Worldwide with India Leg</td>
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<td>OR</td>
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<tr>
<td>Group Level</td>
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<tr>
<td>India</td>
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<td>Worldwide with India Leg</td>
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1. **Increase in thresholds of De Minimis Exemption:** Pursuant to Notification No. S.O. 674 (E) dated March 4, 2016, acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets of not more than Rs. 350 crore in India or turnover of not more than Rs. 1000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Accordingly, the revised threshold for availing of the De Minimis exemption for acquisitions are:

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<tr>
<th>THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION FOR ACQUISITIONS</th>
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<tbody>
<tr>
<td>Target Enterprise</td>
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<tr>
<td>In India</td>
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1. **Definition of Group:** As per Notification No. S.O. 673 (E) dated March 4, 2016, the exemption to the “group” exercising less than fifty per cent of voting rights in other enterprise from the provisions of Section 5 of the Act under Notification No. S.O. 481 (E) dated March 4, 2011, has been continued for a further period of 5 years.

**Regulation of Combinations**

Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.
and if such a combination is formed, it shall be void. Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form, prescribed and submit the form together with the fee prescribed by regulations. Such intimation should be submitted within 30 days of—

(a) approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

A newly inserted sub-section (2A) envisages that no combination shall come into effect until 210 days have passed from the day of notice or the Commission has passed orders, whichever is earlier.

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with provisions of Sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under Section 6(2) is correct and whether the combination has, or is likely to have, an appreciable adverse effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. This exemption appears to have been provided in the Act to facilitate raising of funds by an enterprise in the course of its normal business. Under Section 6(5), the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement, within seven days from the date of such acquisition or entering into such agreement, as the case may be.

As per the explanation appended to Section 6(5)

(a) “foreign institutional investor” has the same meaning as assigned to it in clause (a) of the Explanation to Section 115AD of the Income-tax Act, 1961;

(b) “venture capital fund” has the same meaning as assigned to it in clause (b) of the Explanation to clause (23 FB) of Section 10 of the Income-tax Act, 1961.

It may be noted that under the law, the combinations are only regulated whereas anti-competitive agreements and abuse of dominance are prohibited. Further, under the MRTP Act prior to 27.9.91, undertakings of certain size were required to be registered and such undertakings were required to seek prior approval of the Central Government before embarking upon expansion plans. In the present Act, there is no requirement of registration of an undertaking and further, there is no need to have prior approval of the Central Government but CCI will only examine as to whether or not combination is or is likely to have an appreciable adverse effect on competition.

The Competition Act with many innovative concepts coupled with power to impose fine is likely to let in harsh glare of sunlight to disinfect pernicious anti-competitive practices.

**Competition Commission of India**

**Establishment of Commission**

The Central Government under Section 7 has been empowered to establish a Commission to be called
“Competition Commission of India” by issue of a Notification. The Commission is a body corporate having perpetual succession and a common seal. The Commission has power to acquire, hold movable or immovable property and to enter into contract in its name and by the said name, sue or be sued. In the premises, the set up of Commission corresponds to that of Securities & Exchange Board of India constituted under the SEBI Act, 1992.

The Head Office of the Commission shall be at such place as the Central Government may decide from time to time. Vide Notification: SO 1198(E) dated 14th Oct., 2003, the Central Government established the Competition Commission of India having its Head Office at New Delhi.

The Commission has also been authorized to establish its office at other places in India. Thus, the law provides for setting up of CCI’s offices at places other than that of its Headquarter.

### Composition of Commission

The composition of the Commission as spelled out under Section 8 of the Act consists of a Chairperson and not less than two and not more than six other Members. The Chairperson and the Members are to be appointed by the Central Government. Regarding the qualifications of the Chairman and other Members, Section 8(2) provides that they shall be person of ability, integrity and standing and who has special knowledge of and such professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy which in the opinion of the Central Government, may be useful to the Commission. The Chairperson and other Members are to be appointed on whole time basis.

### Selection of Chairperson and Members of Commission

Section 9(1) envisages that the Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of the Chief Justice of India or his nominee, as Chairperson; and the Secretary in the Ministry of Corporate Affairs, Member; the Secretary in the Ministry of Law and Justice, Member; and two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy, as member.

### Term of office of Chairperson and other Members

The Act stipulates that the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.

A vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9. The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office. When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.
Resignation of Chairperson etc.

It has been provided under section 11 that the Chairperson or any other Member may resign his office by notice in writing under his hand addressed to the Central Government. However, until the Chairperson or a Member is permitted by the Central Government to relinquish his office, he will continue to hold his office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as a successor enters into his office or until the expiry of his term, which ever is the earliest. Under Section 11(2), it is provided that in the following circumstances the Central Government may, by order, remove the Chairperson or any Member from his office if such Chairman or Member as the case may be, -

(a) is, or at any time has been, adjudged as an insolvent; or
(b) has engaged at any time, during his term of office, in any paid employment; or
(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
(d) has acquired such financial or other interest as it likely to affect prejudicially his functions as a Member; or
(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or
(f) has become physically or mentally incapable of acting as a Member.

However, no Member shall be removed from his office on the ground that he has acquired such financial or other interest as is likely to affect prejudicially his function as a Member or has so abused his position as to render his continuance in public office prejudicial to the public interest unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has on an inquiry as prescribed reported that the Member ought on such ground or grounds to be removed.

Section 12 provides that for a period of two years from the date on which the Chairperson and other Member cease to hold office shall not accept any appointment in or connected with the management or administration of, any enterprise which has been a party to the proceeding before the Commission. This restriction, however, shall not apply to any employment under the Central Government or a State Government or local authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956 (10 of 1956).

Financial and Administrative Powers of Member Administration

A Member of the Commission as per Section 13 may be designated by the Central Government as Member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules made by the Central Government. However, the Member Administration shall have authority to delegate such of his financial and administrative powers to any other officer of the Commission as he may deem fit subject to the condition that, while exercising delegated powers such official shall continue to act under the direction, superintendence and control of the Member Administration.

Salary and Terms and Conditions of Service

The salary allowances and other terms and conditions of service of the Chairman and other member including travel expenses, house rent allowance, conveyance facility, sumptuary allowance and medical facilities shall be such as may be prescribed. Further, to ensure freedom in the functioning of the Chairperson and the Member, Section 14(2) provides that the salary allowance and other terms and conditions of service of the Chairperson or Member shall not be varied to his disadvantage after his appointment.
No act or proceedings of the Commission shall be invalid merely because there is any vacancy in the Commission or defect in the constitution of the Commission; or any defect in the appointment of Chairperson or a Member; or any irregularity in the procedure of the Commission not affecting the merits of the case.

**Appointment of Director General**

Director General is an important functionary under the Act. He is to assist the Commission in conducting inquiry into contravention of any of the provisions of the Act and for performing such other functions as are, or may be, provided by or under the Act.

Section 16 (1) empowers the Central Government to appoint a Director General and such number of additional, joint, deputy or assistant Director Generals or other advisers, consultants or officers for the purposes of assisting the Commission in conducting inquiry into the contravention of any provision of the Act.

Additional, joint, deputy and assistant Director Generals, other advisors, consultants and officers shall however, exercise powers and discharge functions subject to the general control, supervision and directions of the Director General.

The salary, allowances and other terms and conditions and service of Director General, consultants, advisors or other officers assisting him shall be such as may be prescribed by the Central Government. The Director General, advisers, consultants and officers assisting him are to be appointed from amongst the persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

The Commission may appoint a Secretary and such officers and other employees, as it considers necessary for the efficient performance of his functions under the Act. The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under the Act.

**Duties, Powers and Functions of Commission**

As per Section 18 of the Act, duties of the CCI are:—

- To eliminate practices having adverse effect on competition
- To promote and sustain competition
- To protect interests of consumers
- To ensure freedom of trade carried on by other participants, in markets in India
Section 18 empowers the Commission to enter into any memorandum or arrangement, with the prior approval of the Central Government, for the purpose of discharging the duties and functions under this Act with any agency of any foreign country. This will enable the CCI to have extra territorial reach and shall facilitate exchange of information and enforcement of its order.

Inquiry into certain agreements and dominant position of enterprise

The Commission may inquire into any alleged contravention of Section 3(1) or 4(1) on its own motion or on

(a) receipt of any information in such manner and accompanied by such fee, from any person, consumer or consumer association or trade association; or

(b) a reference made to it by the Central Government or State Government or a statutory authority.

The Director General is not vested with a right to move an application for institution of an enquiry relating to anti-competitive agreements or abuse of dominance.

The terms ‘person’ and ‘statutory authority’ have been defined under Sections 2(l) and 2(w) respectively. The term ‘person’ has been given wide connotation and it includes an individual, a HUF, a company, a firm, an association of persons, any corporation established under any Central, State or Provincial Act or a Government company, a co-operative society, a local authority and every artificial juridical person.

Section 19(3) provides that while determining whether an agreement has appreciable adverse effect on competition, the Commission shall give due regard to all or any of the following factors, namely–

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

The first three factors are anti-competitive, while the latter three factors deal with benign effects.

“Adverse appreciable affect on competition” is a key factor while enquiring into anti-competitive agreement. The touch stone of appreciable adverse effect on competition need not be proved while enquiring into abuse of dominance.
For the purpose of determining whether an enterprise enjoys dominant position or not under Section 4, the Commission shall have due regard to all or any of the following factors, namely –

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

The present law makes explicit the issues and the parameters which will be considered while deciding “abuse of dominance”. The Commission shall have due regard to the, “relevant geographic market” and “relevant product market” for determining as to what constitutes a “relevant market”.

The terms ‘relevant market’ and “relevant geographic market” have been defined in Sections 2 (r) and 2(s) of the Act. For determining the “relevant geographic market”, the Commission shall have due regard to all or any of the following factors, namely; –

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

Similarly, while determining 'relevant product market' the Commission shall have due regard to all or any of the following factors namely;

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

The prescription of parameters for determining "appreciable adverse effect" on competition of agreement, "dominant position", within "relevant market", are intended to bring consistency and certainty in the working of the Commission which has to consider all or any of the applicable factors, as the case may be. It is quite apparent that any inquiry by the CCI will be a detailed exercise, which will not only involve gathering of information in regard to technological or marketing factors but also the government policy which relate to the trade or business in which the enterprise is involved beside global scenario especially with regard to regulatory trade barriers including import-export policy, tariff and subsidy issues will also be taken into account by the Commission.

**Inquiry into Combination by Commission**

The Commission under Section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination either upon its own knowledge or information (suo motu) or upon receipt of notice under Section 6(2) relating to acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b) or merger or amalgamation referred to in Section 5(c) of the Act. It has also been provided that an enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the law has provided a time limit within which suo moto inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

On receipt of the notice under Section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition in India.
The Commission shall have due regard to all or any of the factors for the purposes of determining whether the combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, namely—

(a) actual and potential level of competition through imports in the market;
(b) extent of barriers to entry into the market;
(c) level of combination in the market;
(d) degree of countervailing power in the market;
(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
(f) extent of effective competition likely to sustain in a market;
(g) extent to which substitutes are available or are likely to be available in the market;
(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
(j) nature and extent of vertical integration in the market;
(k) possibility of a failing business;
(l) nature and extent of innovation;
(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The above yardsticks are to be taken into account irrespective of fact whether an inquiry is instituted, on receipt of notice under Section 6(2) upon its own knowledge. The scope of assessment of adverse effect on competition will be confined to the “relevant market”. Most of the facts enumerated in Section 20 (4) are external to an enterprise. It is noteworthy that sub clause (n) of Section 20 (4) requires to invoke principles of a “balancing”. It requires the Commission to evaluate whether the benefits of the combination outweigh the adverse impact of the combination, if any. In other words if the benefits of the combination outweigh the adverse effect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as void.

Reference by statutory authority

The term “statutory authority” has been defined in Section 2(w). If in the course of a proceeding before any statutory authority, an issue is raised by any party that any decision which such authority has taken or proposes to take, is or would be, contrary to the provisions of the Competition Act 2002, it may make a reference in respect of such issue to the Commission and seek its opinion. The Commission shall, on receipt of the reference, after hearing the parties to the proceedings, give its opinion within 60 days of receipt of such reference to such authority on the issues referred to it. The statutory authority shall thereafter pass
such order on the issues referred to the Commission as it deems fit. The statutory authority may, *suo motu* make such reference in respect of such issue to the Commission. Likewise, the Commission either in the course of proceedings before it or *suo motu* may make a reference for opinion to a statutory authority and the latter has to render its opinion within 60 days of making a reference.

**Meetings of Commission**

Section 22 provides that the Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations. The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting. All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote. However, the quorum for such meeting shall be three Members.

**Procedure for inquiry on complaints under Section 19**

If the Commission is of the opinion that there exists a prima facie case, on receipt of an information from any person, consumer, their association or trade association or on a reference from Central Government or State Government or of a statutory authority or on its knowledge or information under Section 19, it shall direct the Director General to cause an investigation to be made into the matter. The Director General shall investigate into the matter and submit a report of its findings within the period as may be specified by the Commission. It is, however, not binding on the Commission to accept the report of the Director General.

Where upon receipt of a reference or information, the Commission is of the opinion that there is no prima-facie case, it shall pass an order dismissing the reference/information, as it deems fit and necessary.

Upon receipt of a report from the Director General, the Commission shall forward a copy thereof to (a) the parties concerned or (b) Central Government or (c) State Government or (d) statutory authority as the case may be. If the Director General, in relation to a matter referred to it, recommends that there is no contravention of any of the provisions of the Act, the Commission shall give an opportunity of hearing to the informant and after hearing, if the Commission agrees with the recommendation of the Director General, it shall dismiss the information. According to Section 26(7) if, after hearing information provider, the Commission is of the opinion that further inquiry is called for, it shall direct the enquiry to proceed further.

Where the report of the Director General relates to matter referred to Commission by the Central Government or a State Government or a statutory authority and the report contains recommendation that there is no contravention of the provisions of the Act, the Commission shall invite the comments of the Central Government or the State Government or statutory authority, as the case may be, on such report. On receipt of the comments, if there is no prima-facie case, in the opinion of the Commission the Commission shall return the reference. However, if the Commission feels that there is a prima-facie case it shall proceed with a reference.

Section 26(9) provides that the Commission on receipt of recommendation of Director General that there is contravention of any of the provisions of the Act, and a further inquiry is called for, shall inquire into such contravention in accordance with the provisions of the Act.

The provisions of the Section indicate that it is mandatory that information or reference received or a matter which comes to the knowledge of the Commission regarding alleged violation of the provisions of the Act, must be referred to the Director General for an investigation in the matter. A copy of the report of the Director General is required to be sent to the information provider or to the Central Government or State Government.
or a statutory authority, as the case may be, for their comments and an opportunity of hearing is required to be given to the parties as this is warranted by the principles of natural justice. Where the Director General recommends that there is contravention of any of the provisions of the Act, and that the Commission is of opinion that further inquiry is called for, it shall institute an inquiry into the matter and pass a reasoned order. The Commission may or may not subscribe to the recommendations of the Director General.

**Orders by Commission after inquiry into agreements or abuse of dominant position**

Section 27 envisages that the Commission after any inquiry into agreement entered into by any enterprise or association of enterprises or person or association of persons, or an inquiry into abuse of dominant position may pass all or any of the following orders, namely,—

(i) direct that such agreement, or abuse of dominant position shall be discontinued and such agreement, which is in contravention of Section 3 shall not be re-entered or the abuse of dominant position in contravention of Section 4 shall be discontinued, as the case may be. The direction to discontinue and not to recur is commonly known as “Cease & desist” order.

(ii) the Commission may impose penalty not exceeding ten percent of the average turnover of last three preceding financial years, upon each of person or enterprises which are parties to such agreement in contravention of Section 3 or are abusing dominant position within meaning of Section 4. In case any agreement which is prohibited by Section 3 has been entered into by any cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider participating in that cartel, a penalty up to three times of its profits for each year of the continuance of such agreement whichever is higher.

(iii) The Commission may direct that the agreements shall stand modified to the extent and in the manner as specified in the order.

(iv) The Commission may direct the enterprises concerned to comply with such other orders and directions, including payment of cost, if any, as it deems fit.

(v) to pass such order or issue such directions as it may deem fit.

**Division of enterprise enjoying dominant position**

The Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise or group does not abuse its dominant position.

The order of the Commission referred to above may provide for all or any of the following matters, namely—

(a) the transfer or vesting of property, rights, liabilities or obligations;

(b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

(c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;

(d) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;

(e) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;

(f) any other matter which may be necessary to give effect to the division of the enterprise or group.
Procedure for investigation of combination

The procedure for investigation by the Commission has been stipulated under Section 29 of the Act. It involves following stages -

(i) The Commission first has to form a prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination, calling upon them to show cause why an investigation in respect of such combination should not be conducted;

(ii) After receipt of the response of the parties to the combination Commission may call for the report of the Director General.

(iii) When pursuant to response of parties or on receipt of report of the Director General whichever is later, the Commission prima-facie is of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven days direct the parties to the combination to publish within ten working days, the details of the combination, in such manner as it thinks appropriate so as, to bring to the information of public and persons likely to be affected by such combination.

(iv) The Commission may invite any person affected or likely to be affected by the said combination, to file his written objections within fifteen working days of the publishing of the public notice, with the Commission for its consideration.

(v) The Commission may, within fifteen working days of the filing of written objections, call for such additional or other information as it deem fit from the parties to the said combination and the information shall be furnished by the parties above referred within fifteen days from the expiry of the period notified by the Commission.

(vi) After receipt of all the information and within forty-five days from expiry of period for filing further information, the Commission shall proceed to deal with the case, in accordance with provisions contained in Section 31 of the Act.

Thus, the provisions of Section 29 provide for a specified timetable within which the parties to the combination or parties likely to be affected by the combination are required to submit the information or further information to the Commission to ensure prompt and timely conduct of the investigation. It further imposes on Commission a time limit of forty-five working days from the receipt of additional or other information called for by it under sub-Section (4) of Section 29 for dealing with the case of investigation into a combination, which may have an adverse effect of the competition.

Inquiry into disclosures under Section 6(2)

Section 6(2) casts an obligation on any person or enterprise, who or which proposes to enter into combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination within thirty days of—

(i) approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned with such merger or amalgamation;

(ii) execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

Non-filing of notice attracts penalty in terms of Section 43A of the Act.

The newly inserted section 6(2A) envisages that no combination shall come into effect until two hundred and
ten days have passed from the day on which notice has been given to Commission or the Commission has passed orders, whichever is earlier.

Upon receipt of such notice, the Commission shall examine such notice and form its prima facie opinion as to whether the combination has, or is likely to have, an appreciable adverse effect on the competition in the relevant market in India.

### Orders of Commission on Certain Combinations

The Commission, after consideration of the relevant facts and circumstances of the case under investigation, by it under Sections 28 or 30 and assessing the effect of any combination on the relevant market in India, may pass any of the written orders indicated herein below. Where the Commission comes to a conclusion that any combination does not, or is not likely to, have an appreciable adverse effect on the Competition in relevant market in India, it may, approve that Combination.

1. In the case where the Commission is of the opinion that the combination has, or is likely to have an adverse effect on competition, it shall direct that the combination shall not take effect.
2. Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on competition can be eliminated by modifying such Combination then it shall direct the parties to such combination to carry out necessary modifications to the Combination.
3. The parties accepting the proposed modification shall carry out such modification within the period specified by the Commission.
4. Where the parties who have accepted the modification, fail to carry out such modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition and shall be dealt with by the Commission in accordance with the provisions of the Act.
5. If the parties to the Combination do not accept the proposed modification such parties may within thirty days of modification proposed by the Commission, submit amendment to the modification proposed by the Commission.
6. If the Commission agrees with the agreement submitted by the parties it shall, by an order approve the combination.
7. If the Commission does not accept the amendment then, parties shall be allowed a further period of thirty days for accepting the amendment proposed by the Commission.
8. Where the parties to the combination fail to accept the modification within thirty days, then it shall be deemed that the combination has an appreciable adverse effect on Competition and will be dealt with in accordance with the provisions of the Act.
9. Where the Commission directs under Section 31 (2) that the combination shall not take effect or it has, or is likely to have an appreciable adverse effect, it may order that,
   - the acquisition referred to in Section 5 (a); or
   - the acquiring of control referred to in Section 5(b); or
   - the merger or the amalgamation referred to in Section 5(c) shall not be given effect to by the parties.

As per proviso the Commission may, if it considers appropriate, frame a scheme to implement its order in regard to the above matters under Section 31(10).
A deeming provision has been introduced by Section 31(11). It provides that, if the Commission does not, on expiry of a period of two hundred ten days from the date of filing of notice under Section 6(2) pass an order or issue any direction in accordance with the provisions of Section 29(1) or Section 29(2) or Section 29(7), the combination shall be deemed to have been approved by the Commission. In reckoning the period of two hundred ten days, the period of thirty days specified in Section 29(6) and further period of thirty working days specified in Section 29(8) granted by Commission shall be excluded.

Further more where extension of time is granted on the request of parties the period of two hundred ten days shall be reckoned after deducting extended time granted at the request of the parties.

Where the Commission has ordered that a combination is void, as it has an appreciable adverse effect on competition, the acquisition or acquiring of control or merger or amalgamation referred to in Section 5, shall be dealt with by other concerned authorities under any other law for the time being in force as if such acquisition or acquiring of control or merger or amalgamation had not taken place and the parties to the combination shall be dealt with accordingly.

Section 29(14) makes it clear that nothing contained in Chapter IV of the Act shall affect any proceeding initiated or may be initiated under any other law for the time being in force. It implies that provisions of this Act are in addition to and not in derogation of provisions of other Acts.

Thus, approval under one law does not make out a case for approval under another law.

**Acts taking place outside India but having an effect on Competition in India**

Section 32 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

- an agreement referred to in Section 3 has been entered into outside India; or
- any party to such agreement is outside India; or
- any enterprise abusing the dominant position is outside India; or
- a combination has taken place outside India; or
- any party to combination is outside India; or
- any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

The above clearly demonstrates that acts taking place outside India but having an effect on competition in India will be subject to the jurisdiction of Commission. The Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

**Appearance before Commission**

As per Section 35 of the Act, following persons are entitled to appear before the Commission—

- a complainant; or
- a defendant; or
- the Director General
They may either appear in person or authorise any of the following:

(a) a chartered accountant as defined in Section 2(1)(b) of Chartered Accountants Act, 1949 (38 of 1949) who has obtained a certificate of practice; or

(b) a company secretary as defined in Section 2(1)(c) of the Company Secretaries Act, 1980 (56 of 1980) who has obtained a certificate of practice;

(c) a cost accountant as defined in Section 2(1)(b) of the Cost and Works Accountants Act, 1959 (23 of 1959) who has obtained a certificate of practice;

(d) a legal practitioner that is an advocate, vakil or an attorney of any High Court including a pleader in practice.

The above provisions unambiguously state that a ‘Company Secretary in Practice’ is entitled to represent an informant or a defendant or Director General. A Company Secretary in Practice can also get himself empanelled with the Director General to prosecute his cases before the Commission.

Power of Commission to regulate its own procedure

The Competition Commission of India has been empowered to lay down its own procedure and regulations. It is not bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall have to observe the principles of natural justice and subject to the provisions of the Act. The Competition Commission of India shall also be subject to the rules made by the Central Government. Section 36(2) makes it clear that the Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying the suit, in respect of the following matters, namely:

- Summoning and enforcing the attendance of any person and examining him on oath
- Requiring the discovery and production of documents
- Receiving evidence on affidavits
- Issuing commissions for the examination of witnesses or documents
- Subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office.

In terms of Section 36(3), the Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any discipline as it deems necessary to assist the Commission in the conduct of any enquiry by it.
In terms of Section 36(4), the Commission may direct any person –

(a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of the Act;

(b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of the Act.

The Competition Commission in thus empowered to appoint experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist in the conduct of any inquiry or proceeding before it.

As stated earlier, Director General is an important functionary assisting the Commission and the Commission may ask the Director General to investigate into any trade practice and for the purpose of examination of books, or account and other document of the parties concerned. The Director General is also vested with all the powers as are conferred upon the Commission under Section 36(2) of Act.

Ratification of orders

The Commission may amend any order passed by it under the provisions of this Act with a view to rectifying any mistake apparent from the record. Section 38(2) provides that subject to other provisions of this Act, the Commission may make –

(a) an amendment of an order of its own motion;

(b) an amendment for rectifying any mistake apparent from record, which has been brought to its notice by any party to the order.

An explanation below the Section clarifies that while rectifying any mistake apparent from the record, the Commission shall not amend substantive part of the order passed by it under the provisions of this Act.

Execution of Orders of the Commission Imposing Monetary penalty

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

Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income–tax Act, 1961 and to the Commission instead of the Assessing Officer.

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

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

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

It would be noted that Commission may by its Regulations has been empowered to evolve procedure of recovering monetary penalty. It may also make reference to Income Tax Authority for recovering of penalty as tax due under the said Act.

As per Section 39, every order passed by the Commission under this Act shall be executed in the same manner as if it were a decree or order made by the High Court or the Principal Civil Court in any suit pending therein.

It shall be lawful for the Commission to send, in event of its inability to execute it such order to the High Court or to the Principal Civil Court, as the case may be, within the limits of whose jurisdiction—

(a) in the case of an order passed against any company or firm; the registered office or the sole or principal office of the business of company in India or where a company also has a subordinate office, that subordinate office, is situated;

(b) in the case of an order passed against any other person, the place, where he voluntarily resides of carries on business or personally works for gain, is situated.

There upon the court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution.

Duties of Director General

The Act provides that the Director General when so directed by the Commission, is to assist the Commission in investigation into any contravention of the provisions of this Act. The Director General is bound to comply with such a direction to render requisite assistance to the Commission.

The Director General, in order to effectively discharge his functions, has been given the same powers as are conferred upon the Commission under section 36(2). Under section 36(2) the Commission is having same powers as are vested in Civil Court under the Code of Civil Procedure (1908) while trying a suit, in respect of the following matters, namely;

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or copy of such record or document from any office;
Without prejudice to the above powers, the provisions of Sections 240 and 240A of the Companies Act, 1956, so far as may be, shall apply to an investigation made by the Director General or by a person authorised by him, as they apply to an inspector under the Companies Act 1956. This power includes search and seizure of the record of any person in respect of which an investigation has been directed by the Commission. It has been provided that wherever the approval of the Central Government is required, the same shall be given by the Commission and the word ‘magistrate’ appearing in Section 240A shall be construed as the Chief Metropolitan Magistrate.

**Penalties**

The Competition Act prescribes penalties for contravention of orders of the Commission. As per Section 42, the Commission may cause an inquiry to be made into compliance of its orders or directions and —

(a) if any person, without any reasonable cause, fails to comply with any order of the Commission, or condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act; or

(b) if any person fails to pay the penalty imposed under the Act,

he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to rupees twenty five crores or with both, as the Chief Metropolitan Magistrate may deem fit. The Chief Metropolitan Magistrate, Delhi, however, shall not take cognizance of any offence save as a complaint filed by Commission or any of its officers authorized by it.

**Compensation in case of Contravention of Orders of Commission**

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

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

Section 43 of the Act provides that if any person fails to comply, without reasonable cause, with a direction given by the Commission under Sub-sections (2) and (4) of section 36; or the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission

**Power to impose penalty for non-furnishing of information on combination**

Section 43A provides that if any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.

Thus, failure to file notice of combination falling under Section 5 attract deterrent penalty.

**Penalty for making false statement**

Section 44 provides that if any person, being a party to a combination, makes a statement which is false in
any material particular, or knowing it to be false; or omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

**Power to impose lesser penalty**

If any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of alleged violations and such a disclosure is vital, the Commission may impose upon him a lesser penalty than as prescribed under the Act or rules or regulations.

However, the lesser penalty shall not be imposed where before making such disclosure, the report of Director General under Section 26 has been received in the Commission. Further, the lesser penalty shall be imposed only in respect of the producer, seller, distributor, trader or service provider included in the cartel, who has made a full, true and vital disclosures under this Section. Any producer, seller, trader or service provider included in the cartel shall also be liable to imposition of penalty, if in the course of proceedings, had,—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or  
(b) given false evidence; or  
(c) the disclosure made is not vital.

The lesser penalty is for a member of a ring who breaks the rank. There is no provision to provide any protection or incentive to a whistle blower, which is conferred upon Authorities in contemporary legislations abroad.

The Act does not vest power in the Commission to compound an offence as was the position under the MRTP Act. It is viewed that long drawn investigation and enquiries could be arrested by provision such as compounding which allows an offence to be settled quickly. The Commission is also not vested with power to contempt.

**Contravention by Companies**

A company means a body corporate and includes a firm or other association of individuals; director, in relation to a firm, means a partner in the firm for the purposes of penalties in connection with contravention of the provisions of the Act by companies.

Where any rule, regulation, order made by the Commission or any direction issued thereunder is contravened by a company, every person who, at the time the contravention was committed, was in charge, and was responsible to the company for conducting business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished. However it will be a good defence by a person liable to any punishment if he proves that the contravention was committed without his knowledge or that he has exercised all due diligence to prevent the commission of an offence.

Where a contravention of any of the provisions of this Act or any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that contravention has taken place with the consent or connivance of, or it is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.
The word company in this Section, has been used in a wider sense and also includes a ‘firm’ or an ‘association of persons’. Though the word ‘director’ is normally used in a company, in the light of the wider definition, the term director is interpreted to include a partner of the firm. The company being a legal person, its affairs are conducted by a board of directors, manager, secretary or other officer, therefore, according to Section 48 (2) such director, manager, secretary or other officer, in addition to the company itself shall be deemed to be liable to be proceeded against for contravention of any provisions of this Act or any rule, regulation, order made or direction issued thereunder by the Commission or the Director General of Investigation.

### Competition Advocacy

Under Section 49 the Central Government/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. In this context, Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within sixty days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central Government/State Government in formulating such a policy. The Commission is also empowered to take suitable measures for the

(a) promotion of competition advocacy;

(b) creating awareness about the competition; and

(c) imparting training about competition issues.

The creating awareness about benefits of competition and imparting training in competition issues is expected to generate conducive environment to promote and foster competition, which is sine-qua non for accelerating economic growth.

### Finance, Accounts and Audit

#### Grants by Central Government

The Central Government may make to the Commission grants of such sums of money as it may think fit for being utilised for the purposes of the Act. Such grant is to be made after due appropriation made by the Parliament.

#### Constitution of Fund

The Act provides for the constitution of a fund called the “Competition Fund” for meeting the establishment and other expenses of the Competition Commission in connection with the discharge of its functions and for the purposes of this Act. The following shall be credited to the “Competition Fund”, -

(a) all government grants received by the commission;

(b) Omitted

(c) the fees received under the Act;

(d) the interest on the amounts accrued on the monies referred under clauses (a) to (c).

**Fee realized alongwith notice disclosing combination shall form part of ‘Competition Fund’.

The Fund shall be administered by a Committee of such Members of the Commission, as may be
determined by the Chairperson and the Committee so appointed, shall spend monies out of the Fund only for the objects for which the Fund has been constituted.

**Accounts and Audit**

Proper accounts and other relevant records shall be maintained by the Commission and an annual statement of accounts shall be prepared by it in prescribed form in consultation with the Comptroller and Auditor General of India (CAG). The CAG shall specify the intervals within which the accounts of the Commission shall be audited by him.

Explanation to Section 52(2) clarifies that the orders passed by the Commission, being matters appealable to the Supreme Court, shall not be subject to audit by the CAG. The expenses, if any, incurred in connection with such audit shall be payable by the Commission to the CAG.

The CAG or any person appointed by him in connection with the audit of the accounts of the Commission shall have same rights, privileges and authority in connection with such audit as CAG has in connection with the audit of Government accounts and, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

Only accounts as certified by the CAG and any other person authorised by him in this behalf together with the audit report thereon shall be forwarded to the Central Government and the Government shall cause it to be laid before each House of Parliament.

**Furnishing of Returns, etc., to Central Government**

The Commission shall furnish to the Central Government such returns and statements and such particulars in regard to any proposed or existing measures for promotion of competition advocacy, creating awareness and imparting training about competition issues, in such form and such manner as the Central Government may prescribe. An annual report giving a true and full account of activities of the Commission during the previous year shall be prepared once in every year by the Commission and submitted to the Central Government.

A copy of the annual report of the Commission received by the Government shall cause to be laid before the Central Government before each House of Parliament.

**Right to legal representation**

A person preferring an appeal to the Appellate Tribunal may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Appellate Tribunal.

The Central Government or a State Government or a local authority or any enterprise preferring an appeal to the Appellate Tribunal may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

The Commission may authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers and every person so authorized may present the case with respect to any appeal before the Appellate Tribunal.

*Explanation* – The expressions “chartered accountant” or “company secretary” or “cost accountant” or “legal practitioner” shall have the meanings respectively assigned to them in the Explanation to section 35.
**Appeal to Supreme Court**

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them. The Supreme court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days.

**Power to Punish for contempt**

The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to modifications that,—

(a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal;

(b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.

**MISCELLANEOUS**

**Power to exempt**

The Central Government may, by notification exempt from the application of the Act, or any provision thereof—

(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;

(c) any enterprise, which performs a sovereign function on behalf of the Central Government or a State Government.

Thus, the power to grant exemption can be invoked by the Central Government in specified circumstances and conditions.

Where any enterprise is engaged in activities, which includes any activity relatable to the sovereign functions of the Government, exemption may be granted by the Central Government only in respect of the activity relatable to the sovereign functions.

**Power of Central Government to issue directions**

The Central Government may give in writing to the Commission such directions on questions of policy, other than those relating to technical and administrative matters and the Commission shall be bound by such directions. The Commission shall be given an opportunity to express its views to the Central Government before any direction is given by the Government to the Commission. The decision of the Central Government as to whether the question is of one of policy or not, shall be final.
**Power of Central Government to supersede Commission**

It is stipulated under section 56 of the Act that if at any time the Central Government is of the opinion, -

(a) that the Commission, on account of circumstances beyond its control is unable to discharge the functions or perform the duties imposed on it by or under the provisions of the Act; or

(b) that the commission has persistently made default in complying with any direction given by the Central Government under this Act or in discharge of functions or performance of duties imposed on it by or under the provisions of the Act and as a result of such default the financial position or the administration of the Commission has suffered; or

(c) that the circumstances exist which render it necessary in the public interest to do so, the Central Government may, by notification and for the reasons stated therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification.

Thus, power to supersede CCI vests in the Central Government. However before issuing any such notification, the Central Government shall give to the Commission a reasonable opportunity to make representations against the proposed supersession for its consideration. Upon publication of a notification superseding the Commission—

(a) the Chairperson and other members shall vacate the office from the date of supersession;

(b) until Commission is reconstituted, all powers functions and duties of the Commission shall be discharged by the Central Government or by an authority specified by the Central Government in this behalf;

(c) until the Commission is reconstituted all of its properties shall vest in the Central Government.

The Central Government shall reconstitute the Commission by a fresh appointment of its Chairman and other Members on or before the expiration of six months from the date of order of the Central Government superseding the Commission. Any Chairperson or Member who vacates the office because the Commission is unable to discharge its functions or perform duties imposed on it by or under the provisions of this Act on account of circumstance beyond its control shall not be deemed to be disqualified for re-appointment upon re-constitution of the Commission by the Government.

The Central Government shall cause a notification superseding the Commission and a full report of any action taken under this Section and circumstances leading to such action, be laid before each House of the Parliament at the earliest.

**Restriction on disclosure of information**

The Commission from time to time may require any enterprise to submit information for the purposes of the Act. The information may relate to sensitive business secrets and patents of such an enterprise. In order to ensure complete secrecy of such information, Section 57 provides that no information relating to an enterprise obtained by or on behalf of the Commission for the purposes of the Act shall be disclosed except with the previous permission of the enterprise in writing otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force.

**Protection of action taken in good faith**

While acting or purporting to act in pursuance of any of the provisions of this Act, the Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Registrar
and officers and other employees shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. However the Act provides for protection of action taken in good faith. As per Section 59 no suit or legal proceedings shall lie against the Central Government or Commission or any Chairperson or any Member or Director General or Registrar or other officers or employees of the Commission for anything, which is done or intended to be done in good faith under the Act or rules or regulations, made thereunder.

**Exclusion of jurisdiction of Civil Courts**

A civil court is precluded to exercise jurisdiction in respect of any matter, which the Commission is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.

**Application of other laws not barred**

The provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.

**Power to make rules**

The Central Government may, by notification, make rules to carry out provisions of this Act. In particular, the Central Government may make rules to provide for all or any of the following matters; namely-

(a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of Section 9;

(b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under Sub-section (3) of Section 10;

(c) Omitted by the Competition (Amendment) Act, 2007;

(d) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under Sub-section (1) of Section 14;

(da) the number of Additional, Joint, Deputy or Assistant Director General or such officers or other employees in the office of DG and the manner in which such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees may be appointed under sub-section (1A) of Section 16.

(e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under Sub-section (3) of Section 16;

(f) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under Sub-section (4) of Section 16;

(g) the salaries and allowances and other terms and conditions of service of the Secretary and officers and other employees payable, and the number of such officers and employees under Sub-section (2) of Section 17;

(h) for securing any case or matter which requires to be decided by a Bench composed of more than two Members under Sub-section (4) of Section 23; (Omitted by the Competition (Amendment) Act, 2007)
(i) any other matter in respect of which the Commission shall have power under clause (g) of Sub-section (2) of Section 36; (Omitted by the Competition (Amendment) Act, 2007)

(j) the promotion of competition advocacy, creating awareness and imparting training about competition issues under Sub-section (3) of Section 49; (Omitted by the Competition (Amendment) Act, 2007)

(k) the form in which the annual statement of accounts shall be prepared under Sub-section (1) of Section 52;

(l) the time within which and the form and manner in which the Commission may furnish returns, statements & such particulars as the Central Government may require under Sub-section (1) of Section 53;

(m) the form in which and the time within which the annual report shall be prepared under Sub-section (2) of Section 53;

(ma) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal;

(mb) the term of the Selection Committee and the manner of selection of panel of names under sub-section(2) of section 53E;

(mc) the salaries and allowances and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of section 53G;

(md) the salaries and allowances and other conditions of service of the officers and other employees of the Appellate Tribunal under sub-section (3) of section 53M;

(me) the fee which shall be accompanied with every application made under sub-section (2) of section 53N;

(mf) the other matters under clause (i) of sub-section(2) of section 53O in respect of which the Appellate Tribunal shall have powers under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit;

(n) the manner in which the monies transferred to the Central Government shall be dealt with by that Government under the fourth proviso to Sub-section (2) of Section 66;

(o) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be, or may be, made by rules.

Every notification for making such rules shall be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions. If both Houses agree that notification is not to be issued or rule should not be made, then rule shall not be made or if the House decides that notification or rules should have effect in such modified form then the rule or notification shall be enforced in modified form. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under the notification or rule, as the case may be.

**Power to make Regulations**

The Commission may, by notification, make regulations, which are consistent with the Act. Without prejudice to the generality of the foregoing provision, such regulations may provide for all or any of the following matters, namely, -

(a) the cost of production to be determined under clause (b) of the Explanation to Section 4;

(b) the form of notice as may be specified and the fee which may be determined under Sub-section (2)
of Section 6;
(c) the form in which details of acquisition shall be filed under Sub-section (5) of Section 6;
(d) the procedure to be followed for engaging the experts and the professionals under sub-section (3) of Section 17;
(e) the fee which may be determined under clause (a) of Sub-section (1) of Section 19;
(f) the rules of procedure in regard to transaction of business at the meetings of the Commission under sub-section (1) of Section 22;
(g) the manner in which penalty shall be recovered under sub-section (1) of Section 39;
(h) any other matter in respect of which provision is to be, or may be made by regulations.

Every regulation shall be laid before both the Houses of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

**Power to remove difficulties**

The Central government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act as may appear to be necessary to remove difficulties which may arise in giving effect to the provisions of the Act. However, no such order shall be made after expiry of a period of two years from the commencement of the Act. Every order made under this Section shall be laid before both the Houses of Parliament as soon as may be, after it is made.

**Repeal and Saving**

Section 66 provides that the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(1A) The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

(a) the previous operation of the Act so repealed or anything duly done or suffered there under; or
(b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or
(c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or
(d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

(2) On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or
Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service:

Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission appointed on deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relatable to the officers and other employees whose services have been transferred by or under this Act to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in, the Competition Commission of India or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.

(3) All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 stand
transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

“Explanation.— For the removal of doubts, it is hereby declared that all cases referred to in this sub-section, sub-section (4) and subsection (5) shall be deemed to include all applications made for the losses or damages under section 12B of the Monopolies and Restrictive Trade Practices Act, 1969 as it stood before its repeal;

(4) Subject to the provisions of sub-section(3), all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section(1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission immediately before the commencement of the Competition (Amendment) Act, 2009, shall, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such cases as if they were cases filed under that Act:

Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act.

“Provided further that all the cases relating to the unfair trade practices pending, before the National Commission under this sub-section, on or before the date on which the Competition (Amendment) Act, 2009 receives the assent of the President, shall, on and from that date, stand transferred to the Appellate Tribunal and be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.”

(5) All cases pertaining to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the Competition (Amendment) Act, 2009 stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act.

(6) All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

(7) All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

“Provided that all investigations or proceedings, relating to unfair trade practices pending before the National Commission, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President shall, on and from that date, stand transferred to the Appellate Tribunal and the Appellate Tribunal may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.”
(8) All investigations or proceedings relating to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit.

(9) Save as otherwise provided under sub-sections (3) to (8), all cases or proceedings pending before the Monopolies and Restrictive Trade Practices Commission shall abate.

(10) The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

**LESSON ROUND-UP**

- Competition Act, 2002 seeks to provide, keeping in view the economic development of the country, for the establishment of Competition 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 and for matters connected therewith or incidental thereto besides repeal of the MRTP Act and the dissolution of the MRTP Commission.
- No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition.
- Competition Act expressly prohibits any enterprise or group from abusing its dominant position. Dominant Position meaning thereby a position of strength, enjoyed by an enterprise or group, 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.
- Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed it shall be void.
- While formulating a policy on the competition the Central/State Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition.
- Competition Appellate Tribunal to hear and dispose of appeals against the direction issued or decision made or orders passed by the Commission under the Act, and to adjudicate on claim of compensation.
- The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court.

**SELF-TEST QUESTIONS**

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Define and discuss the Relevant Market, Relevant Geographic Market, and Relevant Product Market.
2. What are anti-competitive agreements? Discuss the procedure for enquiry into anti-competitive agreements.
3. The Competition Act does not prohibit dominance, but the abuse of dominant position. Explain.

4. Discuss the composition and functions of Competition Commission of India.

5. Write short notes on:
   (i) Combinations.
   (ii) Competition Advocacy.