In terms of Section 35 of the Competition Act, 2002 the following are entitled to appear before the Commission to present his or its case:—

(i) a complainant; or
(ii) defendant; or
(iii) the Director General.

They may either appear in person or authorise inter-alia company secretaries as defined in Section 2 (1)(c) of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of Section 6 of that Act.

Thus, the Competition Act\(^1\) unambiguously states that a 'Company Secretary in Practice' is entitled to represent a complainant or a defendant or Director General before the Competition Commission of India (CCI). A Company Secretary in practice can also get himself empanelled with the Director General to prosecute his cases before the Commission. So it is of utmost importance for Company Secretaries to have an in-depth knowledge of the substantive law viz. the Competition Act, 2002 as well as rules and regulations made thereunder to handle effectively, the issues likely to crop up under the Act. At the same time he is expected to have thorough knowledge of the precedents, orders and decisions made by the overseas contemporary authorities as well as the leading decisions of the MRTP Commission handed down over a period of three decades.

1. THE COMPETITION ACT – AN OVERVIEW

With the globalisation of world economy and to create sound business climate, it became necessary to encourage competition to foster speedy economic development. A High Level Committee (Raghavan Committee) was set up by the Government to review the MRTP Act, 1969 and to suggest Competition Law in line with international dimensions suiting Indian conditions. The said Committee observed that the MRTP Act is limited in its sweep and in the present competitive milieu fails to fulfill the need of the Competition Law. It was also noticed that in 1980, less than forty countries had competition law and currently over hundred countries have

* Additional Director General, Competition Commission of India, New Delhi. The Views expressed are personal and not necessarily those of the Commission and Ministry of Company Affairs, Government of India, New Delhi.

1 Under the Competition Act, 2002 —

(i) a complainant; or
(ii) defendant; or
(iii) Director General

are entitled to appear before the Commission. They may either appear in person or authorise any of his officers or any one of the following:

(a) one or more chartered accountants as defined in clause (b) of sub-section (1) of Section 2 of Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice;
(b) company secretaries as defined in Section 2 (1) (c) of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice;
(c) a cost accountant as defined in Section 2(1) (b) of Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice;
(d) legal practitioner that is an advocate, vakil or an attorney of any High Court including a pleader in practice.
competition law. The MRTP Act, based on pre-reform scenario, does not provide for regulation of combinations, but provides for compulsory registration of agreements, complex in arrangements and based on size as a factor. The Government of India therefore thought it fit to enact a new law namely, The Competition Act, 2002. The Act received the assent of the President of India on 13.1.03 and it has been published in the Gazette of India on 14.01.03. The Central Government has also established the Competition Commission of India (CCI) w.e.f. 14.10.03. The Act provides for repeal of the MRTP Act, 1969 and the dissolution of the MRTP Commission from the day it is notified as such by the Central Government (Section 66). The notification is expected to be issued in due course.

As per deliberations in the Parliament, the Act is to be implemented in three phases. In the first phase, the CCI will exclusively focus on “Competition Advocacy” which includes creating awareness, imparting training, capacity building which are key to build strong, competition culture in the economy. In the second phase, the CCI is expected to commence adjudication of cases relating to “Anti-competitive Agreements and Abuse of Dominant Position by an Enterprise. In the third phase, the CCI is expected to commence “Regulation of Combinations”.

1.1 Object of the Act

The preamble of the Act seeks to provide keeping in view the economic development of the country, for the establishment of Competition Commission -

(i) to prevent practices having adverse effect on competition,
(ii) to promote and sustain competition in markets,
(iii) to protect the interest 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 beside repeal of MRTP Act and the dissolution of the MRTP Commission.

It is also obligatory for the Commission to take up ‘Competition Advocacy’ which includes creating awareness and imparting training on competition issues. The Competition Act, 2002 seeks to achieve its objectives by:

(a) prohibiting anti-competitive agreements;
(b) prohibiting abuse of dominant position;
(c) regulating combinations; and
(d) expressing opinion on a competition issue, creating awareness and imparting training about Competition issues.

1.2 Scope, Extent and Commencement

The Act extends to whole of India except the State of Jammu and Kashmir. As per Section 2 of the Act, the Competition Act shall come into force on such date as the Central Government may notify in the Official Gazette. This is an enabling provision which empowers the Government to appoint different dates for different provisions of the Act.

(i) S.O. 340(E) – dated 31.03.2003 (regarding bringing into force certain sections of the Competition Act).
(ii) G.S.R. 303(E) – dated 4.04.2003 (regarding the Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003.
(v) G.S.R. 784(E) – dated 06.10.2003 (regarding the Competition Commission of India (Salary, Allowances and other Terms and Conditions of Service of Chairperson and other Members) Rules, 2003.
(vi) S.O. No.1198(E) dated 14.10.03 establishing the Competition Commission of India having its head office at New Delhi.
(vii) S.O. No.1199(E) dated 14.10.03 appointing Shri Vinod Dhall as Member of CCI for a period of five years from the date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier.

(viii) S.O. No.1200(E) dated 14.10.03 appointing Shri Dipak Chatterjee as Chairperson of the CCI for a period of 5 years from the date on which he enters upon his office or till he attains the age of 65 years, whichever is earlier.

(ix) Shri Vinod Dhall entered upon his office on 17.10.03 and has been designated as member Administration by the Central Government on 21.10.03.

2. COMPETITION COMMISSION OF INDIA

The Central Government under Section 7(1) 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 shall have 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 (SEBI) constituted under the SEBI Act, 1992.

2.1 Section 7(3) empowers the Central Government to decide and notify the Head Office of the Competition Commission of India. The Head Office of the Commission has since been notified on 14.10.2003 to be in New Delhi. The Commission has also been authorized to establish its offices at other places in India. Thus, the law provides for setting up of CCI’s offices at places other than its Headquarter.

2.2 The composition of the Commission has been explained under Section 8 of the Act. The Commission is to consist of a Chairperson and not less than two and not more than ten other Members. The Chairperson and the Members are to be appointed by the Central Government. Regarding qualifications of the Chairperson and other Members, they shall be person of ability, integrity and standing and who, has been, or is qualified to be, a judge of a High Court; or, has special knowledge and professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or in any other matter which, may be useful to the Commission in the opinion of the Central Government. The Chairperson and the other Members shall be appointed on whole time basis.

2.3 The Central Government has been authorised to make appropriate Rules in the manner in which the Chairperson and other Members shall be selected. The Central Government vide GSR 303(E) dated 4th April, 2003 has since notified in the Gazette of India Extraordinary, Competition Commission of India (Selection of Chairperson and other Members of Commission) Rules, 2003.

2.4 The term of office for the Chairperson and every other Member is five years from the date on which he enters upon his office. They are however, eligible for being re-appointed. The Chairperson and a Member shall make and subscribe to oath of an office and an oath of secrecy as prescribed before entering upon his office. The Central Government notified Competition Commission of India (Oath of Office and of Secrecy for Chairperson and Other Members) Rules, 2003 vide G.S.R. 757 (E) dated 23.9.03. The age limit of sixty-seven years has been prescribed for holding of the office of Chairperson and an age limit of sixty-five years for holding of the office of a Member. Further, a vacancy caused by resignation or removal of the Chairperson or any other Member under Section 11 or on account of death or otherwise is to be filled by fresh appointment. According to Section 11 a vacancy can be caused on submitting a notice in writing or resignation by Chairperson or any other Member or on account of suspension or removal of Chairperson or any other Member.

2.5 In the event of occurrence of a vacancy in the office of Chairperson by reason of his death, resignation or otherwise, the senior most Member shall act as the Chairperson until a new Chairperson is appointed in accordance with the provisions of the Act to fill such vacancy and enters upon his office.

2.6 In case the Chairperson is unable to discharge the functions of his office owing to illness or any other reasons, the senior most Member shall discharge the functions of the office of Chairperson till the Chairperson resumes the charge of his functions.

2.7 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 10(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 he -

(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 is 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 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, on an inquiry, report that the Member ought on such ground or grounds to be removed.

2.8 Section 12 provides that for a period of one year from the date of which the Chairperson and other Member ceases 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 proceedings 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 Government State or Provincial or a Government Company as defined in Section 617 of the Companies Act, 1956.

2.9 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 function 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. Pursuant to an order dated 21/10/03, the Central Government has notified Shri Vinod Dhall as member Administration of CCI until further orders.

2.10 The salary and other terms and conditions of service of the Chairperson and Members have been notified by the Central Government vide GSR 784 (E) dated 6.10.03. To ensure freedom in the functioning of the Chairperson and Members, Section 14(2) of the Act provides that the salary, allowance and other terms and conditions of services of the Chairperson or Member shall not be varied to his disadvantage after his appointment.

2.11 No act or proceedings of the Commission shall be invalid merely because there is any vacancy in the Commission or defects in the constitution of the Commission; or any defect in appointment of Chairperson or Member; or any irregularity in the procedure of the Commission not affecting the merit of the case.

2.12 The Act under Section 17 provides for appointment of a Registrar and other officers and employees. The Commission may appoint a Registrar and such officers and other employees, as it considers necessary for the efficient discharge of his duties and function under the Act. Section 17(2) provides that salaries allowances and other terms and conditions of services of the Registrar and other officers and employees of the Commission shall be such as may be prescribed by the Central Government by rules framed in that behalf.
3. DUTIES, POWERS AND FUNCTIONS OF THE COMPETITION COMMISSION

3.1 Duties of Commission

The duties of the Competition Commission have been specifically explained in Section 18 of the Act which are as under:

(a) to eliminate practices having adverse effect on competition;
(b) to promote and sustain competition;
(c) to protect interests of consumers; and
(d) to ensure freedom of trade carried on by other participants, in markets in India.

3.2 It may be pointed out that the duties of the MRTP Commission were not explicitly indicated under the MRTP Act which have now been prescribed by law for the Commission. A proviso to Section 18 empowers the Commission to enter into any memorandum or arrangement with the prior approval of the Central Government, for purposes of discharging the duties and functions under this Act with any agency of any foreign country. This will enable the CCI to exercise extra territorial reach effectively by exchange of information and enforcement of its order. It may be noted that such provision does not exist under the MRTP Act.

4. POWERS AND FUNCTIONS OF THE COMMISSION

4.1 Inquiry into certain agreements and dominant position of enterprise

The Commission may inquire into any agreement entered into by any enterprise or association of enterprises or business or association or person in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which causes or is likely to cause an appreciable adverse affect on competition in markets in India.

4.2 The Commission may also inquire into any abuse of dominant position by an enterprise which amounts to violation of Section 4(1). The Commission may make an inquiry into anti-competitive agreements or abuse of dominant position on its own motion or on –

(a) receipt of a complaint, accompanied by prescribed 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 restrictive agreements or abuse of dominance as is the case under the MRTP Act, 1969.

4.3 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 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 Govt. company, a cooperative society, a local authority and every artificial juridical person. Thus, now a trader or a competitor can also file a complaint directly in its name and can pursue the same as a party to the proceedings.

The term "Consumer" includes buyer of "goods" or a person who avails of "services" for consideration irrespective of fact whether the purchase of "goods" or services are availed for own use or commercial purpose. The term "Enterprise" includes department of the Government rendering non-sovereign functions and also excludes departments dealing with atomic energy, currency, defence and space.

4.4 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.

“Adverse appreciable affect on competition” is a key factor while adjudicating an enquiry under the Act.

4.5 For the purpose of determining whether an enterprise enjoys the 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.

4.6 The terms ‘relevant market’ and “relevant geographic market” have been defined in Section 2 (r) and 2(t) 
of 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 or regular supplies or rapid after-sales services.

4.7 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.
4.8 The prescription of yardsticks for determining existence of the agreement having “appreciable adverse effect” on competition, “dominant position” and its abuse by enterprise, within “relevant market”, “relevant geographic market” and “relevant product market” are intended to bring transparency, consistency and certainty in the working of the Commission which has to consider any or all 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 collection, collation, compilation and analysis 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 engaged beside global scenario especially with regard to trade barriers including import export policy, tariff and subsidy issues, etc.

5. **INQUIRY INTO COMBINATION BY COMMISSION**

5.1 The Commission may inquire into the appreciable adverse affect caused or likely to be caused on competition in markets, in India as a result of “combination” either upon its own knowledge or information (suo-motu) or upon receipt of information relating to acquisition referred to in Section 5 (a) or acquiring of control referred to in clause 5(b) or merger or amalgamation referred to in Section 5 (c) of the Act. The term “Combination” includes acquisition of shares/voting rights, acquiring of control and merger/amalgamation between or amongst enterprises. The law has prescribed the threshold limits and only when the assets or turnover of enterprises involved exceeds the limits prescribed, the provisions are attracted. These limits are to be revised bi-annually. The notification is voluntary and in case nothing is heard from CCI within 90 working days from the date of publication of details as provided in Section 29(2), the combination is deemed to have been approved by CCI.

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, law has provided a time limit within which inquiry into combinations can be initiated. This provision dispels the fear of an enquiry into combination between merging entities after the expiry of stipulated period.

5.2 On receipt of the notice under Section 6(2) from the person or enterprise which proposes to enter into a combination upon own information or knowledge, under Section 20(1), it is mandatory for the Commission to inquire whether the combination referred to in that notice or reference, has caused or is likely to cause an appreciable adverse affect 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 on 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.

5.3 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) or on receipt of a reference under Section 20(1) or an inquiry instituted by the Commission 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 “balance of convenience”. 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.

5.4 Reference by statutory authority

The term “statutory authority” has been defined in Section 2(w) of the Act. The Act contains provisions under which a reference can be made to the Commission by statutory authorities. Where 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 two things which emerge from the above provision are that the Commission is mandated to give its opinion within 60 days on any issue referred to it and the statutory authority is not bound by the opinion given by the Commission.

5.5 The Commission’s jurisdiction, powers and authority may be exercised by Benches formed by the Chairperson consisting of not less than two Members out of which at least one shall be a Judicial Member. (Judicial Member is one who is or has been or is qualified to be a Judge of the High Court). A Bench presided over by the Chairperson is known as ‘Principal Bench’ and all other Benches are known as ‘Additional Benches’. A ‘Merger Bench’ or ‘Merger Benches’ is constituted by the Chairperson exclusively to deal with matters referred to in Sections 5 or 6.

5.6 If the Members of the Bench differ in opinion on any point among themselves, they shall state points on which they differ, and make a reference to the Chairperson. The Chairperson shall either hear the point or points himself or refer the case for hearing of such point or points by one or more other Members (other than those hearing the case) and such point or points shall be decided according to the opinion of majority of Members who have heard the case, including those who first heard it.

5.7 In case of difference of opinion among members when the matter is referred by the Chairman to one or more other Members not only the view of such Member or Members but also the views of the Members referring the point or points will be taken into account.

6. DUTIES OF DIRECTOR GENERAL

6.1 It may be noted that the Director General is an important functionary under the Act. He assists the Commission by conducting/carrying out investigation and furnishing investigation Report in respect of such matters as are referred to him by the Commission. He also assists the Commission in carriage of proceedings of enquiries which are initiated suo motu by the Commission.

6.2 Section 16 (1) empowers the Central Government to appoint a Director General and appoint such number of additional, joint, deputy or assistant Director General or other advisers, consultants or officers for the purposes of assisting the Commission in conducting inquiry into contravention of any provision of the Act. In addition the Director General shall undertake carriage of proceedings before the Commission and perform such other functions as are, or may be provided by or under this Act.

6.3 It may be noted that the Central Govt. is the appointing authority for Director General so as to ensure freedom in his functioning.
Additional, Joint, Deputy and Assistant Director General, other officers, consultant and officers shall however, exercise his powers and discharge his functions subject to the general control, supervision and directions of the Director General.

6.4 The salary, allowances and other terms and conditions and service of Director General, consultants, advisers 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 shall be appointed from amongst the person 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.

6.5 **Powers of Director General**

The Act provides that the Director General when so directed by the Commission, assist the Commission in investigation into any contravention of the provisions of the Act. The Director General is bound to comply with such a direction or 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 on a civil court under the Code of Civil Procedure (1908) (5 of 1908), while trying a suit, in respect of the following matters, namely;

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) issuing commissions for the examination of witnesses or documents;
(e) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
(f) dismissing an application in default or deciding it ex-parte;
(g) any other matter, which may be prescribed.

6.6 Without prejudice to the above powers as are vested in a Civil Court by the Code of Civil Procedure, the provisions of Sections 240 and 240A of the Companies Act, 1956 (1 of 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, (1 of 1956). These include power to search and seizure of the record of any person in respect of which an investigation has been directed by the Commission with the prior approval of the Court.

7. **PROCEDURE FOR INQUIRY ON COMPLAINTS UNDER SECTION 19**

7.1 If the Commission is of the opinion that there exists a *prima facie* case of contravention of Section 3 or 4, on receipt of a complaint or on a reference from Central Government or State Government or of a statutory authority or on a matter which comes to its knowledge or information under Section 19, it shall direct the Director General to cause an investigation to be made into the matter. Thus, causing an investigation by DG is a condition precedent to institution of an enquiry relating to anti-competitive agreement or abuse of dominant position.

7.2 The Director General shall investigate into the complaint or reference or matter taken up by the Commission upon its own knowledge or information, as the case may be, 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 DG.

7.3 If upon receipt of a complaint under clause 19 (1) (a), the Commission is of the opinion that there is no prima-facie case, it shall pass an order dismissing the complaint and may also pass such orders as to imposition of costs against the one who made frivolous complaint/reference, as it deems fit and necessary. Under the existing M.R.T.P Act, there is no provision to impose cost against a person who makes frivolous complaint.

7.4 Upon receipt of a report from the Director General, the Commission shall forward a copy thereof to
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 complaint 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 complainant and after hearing the complainant, if the Commission agrees with the recommendation of the Director General, it shall dismiss complaint. According to Section 26 (7) if, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.

7.5 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, it shall return the reference otherwise shall proceed with a reference.

7.6 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 called for, it shall inquire into such contravention in accordance with the provisions of the Act. This section indicates that it is mandatory that complaint or reference received or a matter which comes to the knowledge or information of the Commission regarding violation of the provisions of Section 3 and/or 4 of the Act, it must be referred to the Director General for a thorough investigation in the matter. A copy of the report of the Director General is required to be sent to the complainant or to the Central Government or State Government or a statutory authority, as the case may be, for their comment 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 a contravention of any 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.

7.7 **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 prohibited agreement in contravention of Section 3 or are abusing dominant position within the meaning of Section 4.

In case any agreement which falls under Section 3(3) including cartels, the Commission shall impose upon each producer, seller, distributor, trader or service provider participating in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or a penalty equivalent to ten percent of the average turnover of the cartel for preceding three financial years, whichever is higher. The fine provision is stiffer in case of “Cartel”. The power to impose fines against delinquent enterprise did not exist under the M.R.T.P. Act.

(a) The Commission may order for recovering of compensation from any enterprise for any loss or damage shown to have been suffered by applicant person as a result of any contravention of the provisions of Chapter II (which includes prohibition of certain agreements, abuse of dominant position and regulation of combination) committed by such enterprise.

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

(c) 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.
(d) The Commission may recommend to the Central Government for the division of an enterprise enjoying dominant position. It be noted that The Commission itself cannot order a division of any enterprise and its recommendation to the Central Government is advisory in nature. It is for the Central Government, on receipt of the recommendation of the Commission, to deal with the recommendations in the manner as it deems fit and pass appropriate orders for division of enterprise so as to ensure that it does not abuse its dominant position in future.

(e) to pass such order as it may deem fit.

8. PROCEDURE FOR INVESTIGATION OF COMBINATION

The procedure for investigation by the Commission has been stipulated under Section 29 and it involves following stages:

(i) The Commission first has to form an 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) The parties to the combination must respond within thirty days from the receipt of the notice from the Commission;

(iii) When pursuant to response of parties the Commission is of the opinion that prima-facie the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven days of the receipt of response 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.

9. INQUIRY INTO DISCLOSURES UNDER SECTION 6(2)

9.1 Section 6 (2) entitles any person or enterprise who or which proposes to enter into a combination, at its option to give notice to the Commission disclosing the details of the proposed combination –

(j) within seven days of the approval of the proposal relating to merger or amalgamation by the board of directors of the company or enterprise concerned and; or

(ii) execution of any agreement or other document under Section 5 (a) or acquiring of control referred to in Section 5 (b) of that Section of the Act.

9.2 Upon receipt of such notice, the Commission shall inquire –

(a) whether the disclosure made in the notice is correct;
(b) whether the combination has, or is likely to have, an appreciable adverse effect on the competition in the relevant market in India.

9.3 In case of suo-moto notice by parties to Combination under Section 6(2) it is mandatory for the Commission to carry out an investigation as per Section 30 of the Act.

10. ORDERS OF COMMISSION ON CERTAIN COMBINATIONS

10.1 The Commission, after consideration of the relevant fact and circumstances of the case under investigation, under Sections 28 or 30 and assessing the effect of any combination on the relevant market in India, may pass any of the following written orders -

(i) 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 including a combination intimated by the parties to the Commission under Section 6(2) of the Act.

(ii) In the case where the Commission is of the opinion that the combination has, or is likely to have an adverse affect on the competition, it shall direct that the combination shall not take effect.

(iii) Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on the 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.

(iv) The parties accepting the proposed modification shall carry out such modification within the period specified by the Commission.

(v) Where the parties fail to carry out modification within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on the competition and shall be dealt with by the Commission in accordance with the provisions of the Act.

(vi) The parties to the Commission, who do not accept the modification made within thirty days of modification proposed by the Commission, may submit amendment to the modification contained in the proposal of the Commission.

(vii) If the Commission agrees with the amendment submitted by the parties it shall, by an order approve the combination.

(viii) 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.

(ix) 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 the Competition and will be dealt within accordance with the provisions of the Act.

(x) Where the Commission directs under Section 31(2) that the combination shall not effect or it has, or is likely to have been appreciable adverse effect, it may order that –

(a) the acquisition referred to in Section 5(a); or

(b) the acquisition of control referred to in clause (b) of Section (5); or

(c) the merger or the amalgamation referred to in clause (c) of Section 5 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).

(xi) A deeming provision has been introduced by Section 31(11), providing that, if the Commission does not, on expiry of a period of ninety working days from the date of publication of notice under Section 29(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 ninety days, the period of thirty days specified in Section 29(6) and if further period of thirty working days as specified in Section 29(8) granted by Commission shall be excluded. Thus, depending on the facts of the case if provisions of sub-Section (6) or sub-Section (8) are attracted,
the period of ninety days allowed to the Commission to pass the final order shall be further extended by thirty days or sixty days as the case may be.

(xii) Further more, where extension of time is granted on the request of parties the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties.

(xiii) Where the Commission has ordered that a combination is void, as it has an appreciable adverse effect on the 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.

(xiv) Section 29 (13) implies that where Commission declares Combination to be void even if the acquisition or acquiring of control or merger or amalgamation of an enterprise shall be dealt with by authorities under any other law, as if it has not taken effect,

(xv) Section 29 sub-Section (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.

11. ACTS TAKING PLACE OUTSIDE INDIA BUT HAVING AN EFFECT ON COMPETITION IN INDIA

11.1 Section 32 extends the jurisdiction of Competition Commission of India to to enquire 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 —

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

11.2 The above clearly demonstrates that acts taking place outside India but having an effect on competition in market 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 or Combination entered into by them has an appreciable adverse effect on competition in the relevant market of India. If a party outside India is abusing its dominant position, the Commission will have jurisdiction and pass appropriate orders in this regard.

12. POWER TO GRANT INTERIM RELIEF

12.1 The Commission may, by order grant a temporary injunction restraining any party from carrying acts until the conclusion without giving notice to the opposite party where the Commission deems fit necessary, if it is proved to the satisfaction of Commission, by affidavit or otherwise, that an act is in contravention of Section 3 (1) or; an Act and in contravention of Section 4 (1) or; or any Act under Section 6 has been committed and continues to be committed or that such act is about to be committed. The interim relief is invariable during the pendency of an inquiry.

12.2 Sub Section (2) of Section 33 empowers the Commission to grant a temporary injunction restraining any party from importing any goods without giving notice to the opposite party, where during an inquiry it is proved to be satisfaction of Commission by affidavit or otherwise that, import of any goods is likely to contravene Section 3 (1); or Section 4 (1); or Section 6. Where it deems necessary a copy of the order shall be sent to the concerned authorities.

12.3 The Commission, in exercising the powers to grant temporary injunction shall apply provisions of Rules 2A
to 5 (both inclusive) of Order XXXIX of the First Schedule on Code of Civil Procedure, 1908 as they apply to temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to an enquiry before the Commission.

12.4 The temporary injunction can be granted only during an inquiry by the Commission. The grant of temporary injunction is generally granted in extraordinary circumstances and it is governed by three well established principles in civil suits by court of equity, namely –

(i) where the petitioner have made out a prima-facie case that parties to enquiry have contravened provision of the Act (Section 3 (1) or Section 4 (1) or Section 6);

(ii) where the ‘balance of convenience’ lies in the favour of the applicant; and

(iii) where by non-grant of injunction, the petitioner would suffer an irreparable loss or injury.

13. POWER TO AWARD COMPENSATION

13.1 Any person may make an application to the Commission for an order for recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of any contravention of the provisions of Chapter II, having been committed by such enterprise. This power of the Commission to award compensation is without prejudice to any other provision contained in the Act. The Commission may, after making an appropriate inquiry into the allegations stated in the application pass an order directing the enterprise to make payment to the applicant of the compensation amount determined that realisable from the enterprise for the loss or damage caused to the applicant as a result of any contravention of the provisions of the Chapter II by such enterprise.

The Commission may permit a reference or application by a person on behalf of numerous persons having the same interest, where loss or damage is caused to them. Such an application may be made on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908, shall apply and the Commission may dispose-off such an application by a common compensation order to all such parties. Enquiring into violation of the provisions contained in Sections 3 to 6 of the Act resulting in loss or damage are condition precedent to the award of compensation to an aggrieved person.

13.2 The power to pass "Cease & Desist Order" supplemented by power to award compensation and to impose fines linked with average turnover of enterprise for last 3 years shall dissuade delinquent enterprises not to indulge in and/or to repeat the contravention of the Act.

14. REVIEW OF ORDERS OF COMMISSION

14.1 Any person may, within thirty days of an order passed by the Commission, apply to the Commission for review of its order against which no appeal has been preferred. The Commission may make such order on the application as it thinks fit.

14.2 The Commission may entertain an application for review after expiry of the period of thirty days, after the order, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time. However, no order shall be modified or set aside by the Commission without giving an opportunity of being heard to -

(a) the person whose favour the order is given; and
(b) the Director General where he was a party to the proceedings.

14.3 Mention should be made that Section 13 (2) of the MRTP Act also empowers the MRTP Commission to review its own order. Therefore, the principle laid down in the landmark cases will also apply to dispose of cases of review of the order by the Commission.

14.4 Though the power of review is conferred, it cannot permit re-hearing on the same facts without anything more. New evidence created after original decision, however, cannot be considered in review application. Power of review is independent of power of appeal and thus, review is entertainable only when appeal has not been preferred.

15. RECTIFICATION OF ORDERS

The Commission may amend any order passed by it under the provisions of the 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 proceedings.

The explanation to this 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.

16. APPEAL

16.1 Any person aggrieved by any decision or order of the Commission may file an Appeal to the Supreme Court within sixty days from the date of communication of the order of the Commission to him and on one or more of the grounds specified in Section 100 of the Code of Civil Procedure 1908.

16.2 The Supreme Court may, however, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow the appeal to be filed within further period not exceeding sixty days from the date of the communication of order of the Commission.

16.3 No appeal shall lie against any decision or order of the Commission made with the consent of the parties.

16.4 The party desirous of filing of Appeal has to adhere rules framed by the Supreme Court.

17. CONTRAVENTION BY COMPANIES

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

It be noted that Company Secretary is inter-alia deemed to be as officer in default and thus it should be endeavour of Company Secretaries to ensure not to commit an offence under the Act. The word company in this Section, as is clear from the explanation below it, 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 light of the wider definition, the term director is interpreted to include a partner of a firm. The company being a legal person, its affairs are conducted by board of directors, manager, secretary or other officer of the company, 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.

The Competition Commission is presently, operating from ‘B’ Block, 3rd Floor, Paryavaran Bhavan, CGO Complex, Lodi Road, New Delhi – 110003.

The Readers can have more information from the Commission’s website:
www.competition-commission-india.nic.in