



**THE INSTITUTE OF  
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# **SUPPLEMENT EXECUTIVE PROGRAMME**

**ECONOMIC, COMMERCIAL &  
INTELLECTUAL PROPERTY LAWS**

**(FOR DECEMBER 2025 EXAMINATION)**

**GROUP 2**

**PAPER 6**

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# LESSON 1

## LAW RELATING TO FOREIGN EXCHANGE MANAGEMENT

### FOREIGN EXCHANGE (COMPOUNDING PROCEEDINGS) RULES, 2024

In exercise of powers given under section 46 read with section 15 of the Foreign Exchange Management Act (FEMA), 1999, Central Government notified the Foreign Exchange (Compounding Proceedings) Rules, 2024. The Foreign Exchange (Compounding Proceedings) Rules, 2024 superseded the existing Foreign Exchange (Compounding Proceedings) Rules, which were issued in 2000.

#### Compounding Authority

- An officer of the Directorate of Enforcement not below the rank of Deputy Director or Deputy Legal Adviser; or
- An officer of the Reserve Bank not below the rank of the Assistant General Manager.

Compounding Authorities of Reserve Bank to Compound various Contraventions (other than a contravention of section 3(a) of FEMA)

| Compounding Authorities of Reserve Bank | Sum involved in Contravention               |
|-----------------------------------------|---------------------------------------------|
| Assistant General Manager               | Does not exceed sixty lakh rupees           |
| Deputy General Manager                  | Does not exceed two and a half crore rupees |
| General Manager                         | Does not exceed five crore rupees           |
| Chief General Manager                   | Above five crore rupees                     |

### Compounding Authorities of Directorate of Enforcement to Compound Contraventions of section 3(a) of FEMA)

| Compounding Authorities of Directorate of Enforcement   | Sum involved in Contravention                            |
|---------------------------------------------------------|----------------------------------------------------------|
| Deputy Director                                         | Five lakh rupees or below                                |
| Additional Director                                     | More than five lakh rupees but less than ten lakh rupees |
| Special Director                                        | Ten lakh rupees or more but less than fifty lakh rupees  |
| Special Director along with the Deputy Legal Adviser    | Fifty lakh rupees or more but less than one crore rupees |
| Director of Enforcement along with the Special Director | One crore rupees or more                                 |

### Application for Compounding

- An applicant may submit a compounding application, along with the relevant documents, physically or through PRAVAAH Portal of the Reserve Bank, either suo moto or based on a Memorandum of Contraventions issued by the Reserve Bank.
- Where an applicant, after issue of the Memorandum of contraventions issued by the Reserve Bank, does not opt for compounding within the period as may be stated in the Memorandum of Contravention, the relevant provisions of the FEMA, 1999, shall apply.
- All compounding applications shall be submitted along with the prescribed fee of ₹10,000/- (plus applicable GST, which at present is 18%) by way of demand draft in favour of “Reserve Bank of India” and payable at the concerned Regional Office/ CO Cell, New Delhi/ Central Office or through National Electronic Fund Transfer (NEFT), or other permissible electronic or online modes of payment.
- It may be ensured that intimation of payment of application fee, to respective Regional Office, CO Cell, or Central Office, as the case may be, shall be made as soon as possible but not later than 2 hours from time of payment, through an email. In such cases, the compounding application must be accompanied by the payment details including the UTR number evidencing the payment of the application fee.
- Applications submitted to the Reserve Bank must contain the contact details i.e., Name of the applicant/Authorised official or representative of the applicant, telephone/ mobile number and email ID.
- Along with the compounding application in the prescribed format, the applicant shall also furnish the details relating to Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office/ Liaison Office, as applicable; a copy of the

Memorandum of Association, if available, and an undertaking regarding enquiry/ investigation/ adjudication by Directorate of Enforcement (DOE).

- A compounding application shall be returned where administrative action has not been completed by the applicant or the application is incomplete, or the application fee has not been paid by the applicant. The application fee, if paid, shall not be returned in case of return of the compounding application. However, in case such applications are re-submitted, then the application fee need not be paid again.
- The applicants are also advised to bring changes, if any, in the address/ contact details of the applicant to the notice of the compounding authority, during the pendency of the compounding application with the Reserve Bank.
- In case of an incomplete application, wherever the applicant is allowed by the Reserve Bank to submit any necessary information or documents within a reasonable time, then the date of receipt of such information or documents, as the case may be, shall be taken as the date of receipt of the application.

### **Procedure for Compounding**

- On receipt of an application, the Reserve Bank shall examine the application based on the documents and submissions made in the application and assess whether contravention can be compounded in accordance with the Compounding Rules, 2024 and, if so, the sum involved in the contravention.
- The Compounding Authority may call for any information, or any other documents relevant to the compounding proceedings. In case the contravener fails to submit the additional information/documents called for within the specified period, the application for compounding shall be liable to be returned.
- The following factors, which are only indicative, shall be taken into consideration for the purpose of passing compounding order and determining amount on payment of which contravention shall be compounded:
  - a. Undue gains i.e., the amount of gain of unfair advantage, wherever quantifiable, made as a result of the contravention (or) economic benefits accruing to the contravener from delayed compliance or compliance avoided;
  - b. the amount of loss caused to any authority/ exchequer as a result of the contravention;
  - c. the repetitive nature of the contravention, the track record and/or history of non-compliance of the contravener;
  - d. contravener's conduct in undertaking the transaction and in disclosure of full facts in the application and submissions made during the personal hearing; and any other factor as considered relevant and appropriate.

It may be noted that as per provisions under section 13 of FEMA, 1999, the compounding amount can be up to three times the sum involved in the contravention

## **Issue of the Compounding Order**

- The Compounding Authority shall pass a compounding order after affording an opportunity of being heard to the applicant as expeditiously as possible and not later than 180 days from the date of receipt of such compounding application by Reserve Bank and complete in all respects, on the basis of the averments made in the application as well as other documents and submissions made in this context by the contravener during the personal hearings.
- If the applicant opts for the personal hearing, the Reserve Bank would encourage the applicant to appear either personally or through a virtual mode rather than being represented / accompanied by legal experts / consultants, as compounding is a voluntary process and only for admitted contraventions. Appearing for or opting out of personal hearing does not have any bearing whatsoever on the compounding amount that may be specified in the compounding order. If the applicant does not opt for personal hearing or absents on the day of hearing, Compounding Authority may pass the order based on available information/ documents.
- The Compounding Order shall specify the provisions of the FEMA, 1999 or any rule, regulation, notification, direction, or order issued in exercise of the powers under FEMA, 1999 in respect of which contravention has taken place along with details of the contravention.
- One copy of the compounding order shall be provided to the applicant and another copy shall also be provided to the Adjudicating Authority, where the compounding of any contravention is made after making of a complaint under sub- section (3) of section 16 of the FEMA, as the case may be.

## **FOREIGN EXCHANGE MANAGEMENT (MANNER OF RECEIPT AND PAYMENT) REGULATIONS, 2023**

### **Manner of Receipt and Payment**

Regulation 3 of the FEM (Manner of Receipt and Payment) Regulations, 2023 states that save as otherwise in a manner as provided in the Act or the rules or regulations made or directions issued under the Act, no person resident in India shall make or receive payment from a person resident outside India:

It may be noted that the Reserve Bank may, on an application made to it, permit a person resident in India to make or receive payment under the Foreign Exchange Management Act, 1999.

The receipt and payment between a person resident in India and a person resident outside India shall, unless provided otherwise, be made through an Authorised Bank or Authorised Person and in the manner as specified below:

#### **I. Trade transactions –**

(a) receipt/payment for export to or import from the countries given below of eligible goods and services shall be made as under:

- i. Nepal and Bhutan - in Indian Rupees provided that in case of exports from India where the importer in Nepal has been permitted by the Nepal Rashtra Bank to make payment in foreign currency, such receipts towards the amount of the export may be in foreign currency;
- ii. Member countries of ACU, other than Nepal and Bhutan - through ACU mechanism or as per the directions issued by the Reserve Bank to authorised dealer from time to time:

Provided that in case of imports where the goods are shipped to India from a member country of the ACU (other than Nepal and Bhutan) but the supplier is resident of a country other than a member country of the ACU, the payment may be made in a manner as specified at (iii) below.

- iii. Countries other than member countries of ACU - In Indian Rupees or in any foreign currency.

(b) Notwithstanding anything contained in this sub-regulation, receipts and payments may also be made in a manner as may be provided in the extant Foreign Trade Policy framed by the Central Government.

*Explanation:* The expression 'ACU' (Asian Clearing Union) shall have the same meaning assigned to it under Article I of the ACU agreement and the ACU mechanism shall be construed accordingly.

**II. Transactions other than trade transactions - receipt and payment shall be made as under:**

- i. Nepal and Bhutan - In Indian Rupees provided that in case of overseas investment in Bhutan, payment may also be made in foreign currency;
- ii. Other Countries – In Indian Rupees or any foreign currency.

Payment and receipt in India for any current account transaction, other than a trade transaction, between any person resident in India and a person resident outside India, who is on a visit to India, may be made only in Indian Rupees.

It may be noted that any payment or receipt under regulation 3 may also be made by debit/ credit to a bank account maintained in terms of the rules, regulations or directions issued under the Foreign Exchange Management Act, 1999.

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## LESSON 2

# FOREIGN DIRECT INVESTMENT REGULATIONS & POLICY

### FOREIGN DIRECT INVESTMENT POLICY ON SPACE SECTOR

The Government of India has reviewed the extant Foreign Direct Investment (FDI) Policy on Space sector. Accordingly, the following amendments have been made in Consolidated FDI Policy Circular of 2020, as amended from time to time (FDI Policy):

#### Space Sector

| Sector/Activity                                                                                      | Sectoral Cap | Entry Route                  |
|------------------------------------------------------------------------------------------------------|--------------|------------------------------|
| (1) Satellites-Manufacturing & Operation                                                             | 100%         | Up to 74%: Automatic         |
| (2) Satellite Data Products                                                                          |              | Beyond 74%: Government route |
| (3) Ground Segment & User Segment                                                                    |              |                              |
| (1) Launch Vehicles and associated systems or subsystems                                             | 100%         | Up to 49%: Automatic         |
| (2) Creation of Spaceports for launching and receiving Spacecraft                                    |              | Beyond 9%: Government route  |
| Manufacturing of components and systems/ sub-systems for satellites, ground segment and user segment | 100%         | Up to 100%: Automatic        |

The investee entity shall be subject to sectoral guidelines as issued by Department of Space from time to time.

#### Definitions:

**(1) Satellites — Manufacturing & Operation:** End-to-end manufacturing and supply of satellite and/or payload, establishing the satellite systems including control of in-orbit operations of the satellite & payloads.



**(2) Satellite Data Products:** Reception, generation or dissemination of earth observation/remote sensing satellite data and data products including Application Interfaces (API).

**(3) Ground Segment & User Segment:**

**(a) Ground Segment:** Supply of satellite transmit/receive earth stations including earth observation data receive station, gateway, teleports, satellite Telemetry, Tracking and Command (TTC) station, Satellite Control Centre (SCC), etc.

**(b) User Segment:** Supply of user ground terminals for communicating with the satellite, which are not covered under the ground segment.

**(4) Launch Vehicles and Associated Systems or Subsystems:** A vehicle and its stages or components that is designed to operate in or place spacecraft with payloads or persons, in a suborbital trajectory, earth orbit or outer space.

**(5) Creation of Spaceports for launching and receiving Spacecraft:** A spaceport (also referred as launch site) can be regarded as the base from which spacecraft are launched, and consisting of facilities involving devices for transportation to, from and via outer space.

**(6) Manufacturing of Components and Systems/Subsystems for Satellites ground segment and user segment:** Comprises the manufacturing and supply of the electrical, electronic and mechanical components systems/ subsystems for satellites, ground segment and user segment.

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**PURCHASE OR SUBSCRIPTION OF EQUITY SHARES OF COMPANIES INCORPORATED IN INDIA ON INTERNATIONAL EXCHANGES SCHEME BY PERMISSIBLE HOLDER**

***Mode of Payment:***

(1) The amount of consideration for purchase / subscription of equity shares of an Indian company listed on an International Exchange shall be paid, -

(i) through banking channels to a foreign currency account of the Indian company held in accordance with the Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2015, as amended from time to time; or

(ii) as inward remittance from abroad through banking channels.

Explanation: The proceeds of purchase / subscription of equity shares of an Indian company listed on an International Exchange shall either be remitted to a bank account in India or deposited in a foreign currency account of the Indian company held in accordance with the Foreign Exchange Management (Foreign currency accounts by a person resident in India) Regulations, 2015, as amended from time to time.

### ***Remittance of sale proceeds***

The sale proceeds (net of taxes) of the equity shares may be remitted outside India or may be credited to the bank account of the permissible holder maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

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## **OPERATIONAL FRAMEWORK FOR RECLASSIFICATION OF FOREIGN PORTFOLIO INVESTMENT BY FPI TO FDI**

Reference may be drawn to Schedule II of FEM (NDI) Rules, 2019 (hereinafter referred as “Rules”) which prescribes that investment made by the FPI shall be less than 10 percent of the total paid-up equity capital on a fully diluted basis (hereinafter referred as “prescribed limit”). In terms of Para 1(a)(iii) of Schedule II of the Rules, any FPI investing in breach of the prescribed limit shall have the option of divesting their holdings or reclassifying such holdings as FDI subject to the conditions specified by the RBI and SEBI within five trading days from the date of settlement of the trades causing the breach (hereinafter referred as “prescribed time”). In case the FPI intends to reclassify its foreign portfolio investment into FDI, the FPI shall follow the operational framework as given below:

- (1) The facility of reclassification shall not be permitted in any sector prohibited for FDI.
- (2) The FPI concerned shall obtain the following approvals/concurrence before intending to acquire equity instruments beyond the prescribed limit:
  - i. Necessary approvals from the Government, as applicable, including approvals required in case of investment from land bordering countries and ensure that the acquisition beyond prescribed limit is made in accordance with the provisions applicable for FDI, which means that investment should be in adherence to entry route, sectoral caps, investment limits, pricing guidelines, and other attendant conditions for FDI under Schedule I to the Rules.
  - ii. Concurrence of the Indian investee company concerned for reclassification of the investment to FDI to enable such company to ensure compliance with conditions pertaining to sectors prohibited for FDI, sectoral caps and government approvals, wherever applicable, under the Rules.
- (3) The FPI shall clearly articulate its intent to reclassify existing foreign portfolio investment held in a company into FDI and shall provide the copy of the necessary approvals and concurrence to its Custodian pursuant to which the Custodian shall freeze the purchase transactions by such FPI in equity instruments of such Indian company, till completion of the reclassification:

Provided that where the necessary prior approvals/concurrence have not been obtained by the FPI, the investment beyond the prescribed limit shall be compulsorily divested within the prescribed time.

(4) For reclassification, the entire investment held by such FPI shall be reported within the timelines as specified under Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, in the following manner:

- i. By the Indian company in form FC-GPR where the investment beyond the prescribed limit is resulting from fresh issuance of equity instruments by an Indian company to such FPI.
- ii. By the FPI in form FC-TRS, where the investment beyond the prescribed limit is due to acquisition of equity instruments by such FPI in the secondary market.
- iii. AD bank concerned shall report the amount of reclassified foreign portfolio investment as divestment under the LEC (FII) reporting.

(5) Post completion of reporting as above, the FPI shall approach its Custodian with a request for transferring the equity instruments of the Indian company from its demat account maintained for holding foreign portfolio investments to its demat account maintained for holding FDI. After ensuring that the reporting for reclassification is complete in all aspects, the custodian shall unfreeze the equity instruments and process the request. The date of investment causing breach in such cases shall be considered as the date of reclassification. Thereafter, the entire investment of the FPI in the Indian company shall be considered as FDI and shall continue to be treated as FDI even if the investment falls to a level below ten percent subsequently. The Foreign Portfolio investor along with its investor group shall be treated as a single person for the purpose of reclassification of foreign portfolio investment.

(6) In terms of the provisions contained in Schedule II to the Rules, the reclassification or divestment of the holdings, as the case may be, shall be completed within the prescribed time.

(7) Post reclassification of foreign portfolio investment to FDI, the said investment shall be governed by Schedule I to the Rules.

# LESSON 3

## OVERSEAS DIRECT INVESTMENT

*Overseas Portfolio Investment (OPI) shall not be made in:*

- i. any unlisted debt instruments; or
- ii. any security which is issued by a person resident in India who is not in an IFSC; or
- iii. any derivatives unless otherwise permitted by Reserve Bank; or
- iv. any commodities including Bullion Depository Receipts (BDRs).

OPI by a person resident in India in the listed equity capital of a listed entity, even after its delisting, shall continue to be treated as OPI until any further investment is made in the entity, i.e., any further investment made in the equity capital of the foreign entity after its delisting shall be made as ODI. A listed Indian company may make OPI, including by way of reinvestment, in accordance with schedule II of the OI Rules. 'Reinvestment' means that the OPI proceeds are exempted from repatriation provisions as long as such proceeds are reinvested within the time specified for realisation and repatriation as per Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015.

An unlisted Indian entity may make OPI in accordance with schedule II of the OI Rules.

The investment (including sponsor contribution) in units or any other instrument (by whatever name called) issued by an investment fund overseas, duly regulated by the regulator for the financial sector in the host jurisdiction, shall be treated as OPI. Accordingly, in jurisdictions other than IFSCs, listed Indian companies and resident individuals may make such investment. Whereas in IFSCs, an unlisted Indian entity also may make such OPI in units or any other instrument (by whatever name called) issued by an investment fund or vehicle, in terms of schedule V of the OI Rules subject to limits, as applicable.

Resident individuals may make OPI within the overall limit for Liberalised Remittance Scheme (LRS) in terms of schedule III of the OI Rules. Further, shares or interest acquired by the resident individuals by way of sweat equity shares or minimum qualification shares or under Employee Stock Ownership Plan (ESOP)/ Employee Benefits Scheme up to 10% of the paid-up capital/stock, whether listed or unlisted, of the foreign entity and without control shall also qualify as OPI.

Any investment made overseas in accordance with schedule IV of the OI Rules in securities as stipulated by SEBI by Mutual Funds (MFs), Venture Capital Funds (VCFs) and Alternative Investment Funds (AIFs) registered with SEBI shall be considered as OPI.

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# LESSON 11 COMPETITION LAW

## *Key Concepts One Should Know*

- Competition
- Cartel
- Consumer
- Bid rigging
- Enterprise
- Anti-Competitive Agreement
- Dominant Position
- Combination
- Competition Commission of India
- Director General
- Settlement
- Commitment

## *Learning Objectives*

### To understand:

- Competition Policy
- Anti-Competitive Agreements
- Abuse of Dominant Position
- Overview of Combination
- Regulation of Combinations
- Competition Advocacy
- Competition Commission of India

### *Lesson Outline*

- Competition Law and Policy
- Competition Regime in India
- Anti-Competitive Agreement
- Abuse of Dominant Position
- Combination
- Director General
- Enquiry into Certain Agreements
- Enquiry into Dominant Position of Enterprise
- Enquiry into Combination by Commission
- Competition Commission of India
- Competition Advocacy
- Offences and penalties
- Appeal to Supreme Court
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References (Websites/ Video Links)

## *Regulatory Framework*

- Competition Act, 2002
- Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
- Competition Commission of India (Lesser Penalty) Regulations, 2009
- Competition Commission of India (Determination of Cost of Production) Regulations, 2009

## INTRODUCTION

There is a growing recognition that a flexible, dynamic and competitive private sector is essential to fostering sustained economic development. Promoting effective competition spurs firms to focus on efficiency and improves consumer welfare by offering greater choice of higher-quality products and services at lower prices. It also promotes greater accountability and transparency in government-business relations and decision making, helps reduce corruption, lobbying, and rent seeking. In addition, it provides opportunities for broadly based participation in the economy and for sharing in the benefits of economic growth.

The idea of competition has had, for two centuries or more, a powerful influence on the way we think about our society, the way we organise things and the way we conduct our own economic and personal lives. The competition being an essential element in the efficient working of markets encourages enterprise and efficiency and widens choice. By encouraging efficiency in industry, competition in the domestic market whether between domestic companies alone or between those and overseas companies also contribute to international competitiveness. The full benefits of competition are, however, felt in markets that are open to trade and investment.

Economic theory suggests that prices and quantities in a competitive market equilibrate to levels that generate efficient outcomes at a given point of time. Competition is therefore, beneficial as it provides to consumers wider choice and provides sellers with stronger incentives to minimize costs, so eliminating waste. Competition increases the likelihood that cost savings resulting from efficiency gains will be passed on to a firm's customers, who may be either final consumers or intermediary customers (in which case costs of those firms are also lowered). Ample empirical evidence supports these arguments. The importance of competition for achieving a higher rate of innovation and adoption of new technologies over time is critical for sustaining rapid growth. Yet it is not automatic and is not the same as *laissez faire*.

In fact, there are reasons to believe that less mature markets tend to be more, rather than less, vulnerable to anti-competitive practices than the markets of developed countries. Reasons include: (a) high "natural" entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (b) asymmetries of information in both product and credit markets; and (c) a greater proportion of local (non-tradable) markets. Competition also serves to diffuse socio-economic power, broadening participation in economic, social, and political advances while ensuring opportunities for new entrepreneurs. Moreover, it can facilitate realization of the benefits for the domestic economy of integrating into international trade and investment patterns.

Several studies have demonstrated the stimulating effects of competitive markets in terms of growth and prosperity. William Lewis in his book, *The Power of Productivity* underlines this point forcefully with his observations on the growth of productivity in the late 1990s in the United States. The author has argued that more than technology and other factors, what matters above all is competition. Similarly, economist Paul London in his book, *The Competition Solution* concludes that heightened competition in the US over-shadowed tax cuts or new technologies in explaining the prosperity of the 1990s. Competitive pressures helped suppress inflation and raise living standards through improved productivity. The author noted that competition from imports forced the steel and auto industry, among other manufacturers, to streamline, thereby pushing manufacturing productivity up by 4% a year. Competition has brought down real air fares,

telephone rates and several other costs. Where jobs have been lost in one industry, these have been more than compensated by jobs created elsewhere; thus, employment has not suffered but has shifted from losers to winners. This argument underlines across the board, the benefits of competition to a wide section of society, including consumers, workers and many others.

## **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; Intensive product market competition with incumbent firms engaged in step by step innovative activities could enhance each firm's incentive to acquire or increase its technological lead over its rivals and, if labour markets are flexible, competition will induce skilled workers to move to opportunities employing best practices and technologies. Competition also reduces slack by providing more incentives for managers and workers to increase efforts and improve efficiency. Therefore, the product market competition disciplines firms into efficient operation.

Nickel et. al. in his article *Competition and Corporate Performance* suggested three different channels of incentives – competition creates greater opportunities for comparing performance; a more competitive environment where price elasticity of demand tends to be higher, induces greater efforts among workers and managers for cost reducing improvements in productivity since improvements could generate larger increase in revenue and profits; and a more competitive environment forces managers to improve efficiency, because more intense the competition, greater the chances for inefficient to be extinguished.

*UK White Paper on World Class Competition Regime* clearly brings out the importance of competition in an increasingly innovative and globalised economy. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.

Empirical evidences show that strong competition is closely linked to dynamic and efficient markets. The benefits of competitive forces for economic growth and consumer welfare are widely recognized and evidenced by several studies. Recently, an empirical study in the U.K. by the Centre for Competition Policy, University of East Anglia showed that prices were more than halved through competition in international telephony and airfares, and were significantly reduced in other areas. The survey also brought home the point that competition is not just about prices but is typically multi-faceted, bringing new ways of doing business and leading to technological and other advances.

Michel Porter in his recent work *Can Japan Compete?* shows that in Japan only those sectors characterized by strong domestic competition remain internationally competitive following the country's recent economic downturn, examples include cameras, automobiles and audio equipment. Many leading competition experts believe in the premise that, in the presence of competition, the market will achieve the objective of maximising welfare.

## COMPETITION, COMPETITION LAW AND COMPETITION POLICY

Competition is a complex and technical subject which does not lend itself to easy summary or concise clarification. Of late, with globalisation and opening of the markets worldwide, it has become a subject of great practical importance. It involves the establishment and development of concepts, legal principles and policies for the benefit of consumer interest. The principles and policies are applied to a wide range of private agreements and arrangements, which commercial undertakings enter into for themselves or with each other. In addition, they also apply to the policies and directions of the Government.

In the absence of a generally accepted definition of the phenomenon of competition, it has to be regarded as the object fostered and protected by competition policy and law. The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy*, broadly defines the competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective, for example, profits, sales or market share.”

Competition can also be defined as a process of economic rivalry between market players to attract customers. These market players can be multinational or domestic companies, wholesalers, retailers, or even the neighborhood shopkeeper. In their pursuit to outdo rival enterprises, market players either adopt fair means (producing quality goods, being cost efficient, adopting appropriate technologies, etc.) or indulge in unfair measures (carrying out restrictive business practices – such as predatory pricing, exclusive dealing, tied selling, collusion, cartelisation, abuse of dominant position, etc.). However, in the interest of consumers, and the economy as a whole, it is necessary to promote an environment that facilitates fair competitive outcomes in the market, curb anti-competitive behaviour and discourage market players from adopting unfair measures.

### ***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.***

Competition refers to a situation in a market place in which firms/ entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share etc. By responding to demand for goods and services with lower prices and higher quality, competing businesses are pressured to reduce costs, innovate in processes and products, invest in technology and better managerial practices and increase productivity. This process leads to achievement of static, dynamic as also resource/allocative efficiencies, sustainable economic growth, development, and poverty alleviation.

Competition is not an end unto itself, rather a means to achieve economic efficiency and welfare objectives. Importantly, competition is not automatic, and requires to be promoted, protected and nurtured through appropriate regulatory frameworks, by minimising market restrictions and



distortions, and provision of related productive inputs such as infrastructure services, finance, human capital etc. However, a Competition Policy has to be evolved to imbibe the principles of competition in various endeavours of the Government, of course in alignment with the national strategic objectives, alongwith social, environmental, public safety, and other considerations.

Competition Policy means government measures, policies, statutes, and regulations including a competition law, aimed at promoting competitive market structure and behavior of entities in an economy. Competition Law is but a sub-set of the Competition Policy. The Raghavan Committee had observed that *“Competition law must emerge out of a national competition policy, which must be evolved to serve the basic goals of economic reforms by building a competitive market economy.”*

Following the Government’s resolve to enact a new competition law, a High Level Committee on Competition Policy and Law (the Raghavan Committee Report) was set up, which in its report recognised the need for a National Competition Policy and noted that:

*“An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation, and in which the abuse of market power is prevented mainly through competition. Where this is not possible, it requires the creation of a suitable regulatory framework for achieving efficiency. In addition, competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities. Trade liberalisation alone is not sufficient to promote competition and there is a need for a separate competition policy.”*

The World Trade Organisation (WTO) defines competition policy as: *“the full range of measures that may be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises”*. World Bank also provides a definition of competition policy as: *“government measures that directly affect the behaviour of enterprises and the structure of industry. An appropriate competition policy includes both: (a) policies that enhance competition in local and national markets, and (b) competition law, also referred to as antitrust or antimonopoly law.”*

Competition Policy is a broader term which includes all government policies and laws whereas competition law is specific statute with a pre-defined mandate to adjudicate on violation(s) of the law. In the case of India, the Competition Act, 2002 deals with anti-competitive agreements such as price fixing, bid rigging, joint boycotts, etc; abusive practices undertaken by dominant entities such as predatory pricing, abusive conditions of supply, etc, and regulation of combinations. It would be seen that a competition law is a regulatory instrument to check the prevalence of anti-competitive practices whereas a competition policy is a proactive and positive effort to build a competition culture in an economy.

The World Bank and OECD in its Report *A Framework for the Design and Implementation of Competition Law and Policy* pointed out that a dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy. Effective enforcement of competition law and active competition advocacy can

also be powerful catalysts for successful economic restructuring. This in turn fosters flexibility and mobility of resources, which in the current global business environment are critical elements for the competitiveness of firms and industries across nations. Although the field of competition law and policy is evolving rapidly and includes many different viewpoints on specific issues, recognition is growing that effective competition law is important in shaping business culture and that its proper implementation needs to allow for the education of business people, government officials, the judiciary, and the interested public.

***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 policies cover a much broader set of instruments than competition law and typically include all policies aimed at increasing the intensity of competition or rivalry in local and national markets by lowering entry barriers and opportunities for harmful coordination, to ensure that markets work effectively and serve the interests of all citizens. Competition law is only a subset of a nation's competition policies. Competition policies typically include pro-competition approaches to trade, investment, sectoral regulation, and consumer protection. The barriers to international or interregional trade, restrictions on Foreign Direct Investment (FDI) and technology transfers, restrictions on entry in regulated network utility industries, regulations affecting the registration of new enterprises and the taxation and corporate governance of existing enterprises and rules on marketing practices all influence the extent of competitive pressures in markets and so are appropriate concerns of competition policies. In many countries, competition authorities have become the focal point for consultations and putting forward pro-competition viewpoints across a broad range of policy areas.

Asian Development Bank in "During economic transition or reforms", observed that "the benefits of an open market economy cannot be fully realized unless restrictions on competition are removed. Opening markets is not enough by itself for countries to begin reaping the benefits of competition; firms will still find incentives to engage in anti-competitive practices. Thus, the intended benefits of trade reforms may not be realized without active enforcement of competition law. This highlights the importance of having faith in the benefits of competition from an early stage of economic growth and of incorporating competition policy into the broader economic policy framework."

Prof. Paul Geroski, former Chairman, Competition Commission of the United Kingdom observed that "Competition policy is about ensuring that markets are, and remain, competitive. This brings benefits to consumers eventually in all the ways. However, eliminating anti-competitive practices and dismantling monopoly positions that lead to abuses also benefit firms whose business suffers

from these practices and abuses. It is worth emphasizing that many of the benefits that emanate from proper application of competition policy are felt in the first instance by firms. This is important for those who seem to think of competition policy as an added and unnecessary burden on business. Competition policy is sometimes a burden on business, but only on those businesses that try to unfairly disadvantage their rivals in ways that reduce their competitive abilities or incentives to compete vigorously”.

Hence, competition policy and competition law need to be distinguished. The former can be regarded as a genus, of which, the latter is specie.

## **COMPETITION REGIME IN INDIA**

### **Historical Perspective**

The Indian economy remained subject to controls and regulations for several decades, such as industrial licensing, foreign exchange restrictions, small scale industry protection, control on foreign investment and technologies, quantitative restrictions on imports, administered prices, and control on capital issues. The domestic industry was thus insulated from competition.

The economic consequences of this policy regime, though initially beneficial, were reflected in a poor rate of economic growth, low levels of productivity and efficiency, absence of international competitiveness, sub-optimal size of businesses, and outdated and inefficient technologies in various sectors.

India has therefore witnessed two phases of development process with different policy regimes and institutional frameworks. In the first phase, since independence, the transformation and development of the Indian economy took place within a planned, rigidly regulated and relatively closed economic framework. In the second phase, since 1991, when the country embarked upon reform process and embraced market-oriented policies.

In the late 1980s and early 1990s, need for liberalization policies was recognized and a range of policy and regulatory reforms were initiated, such as delicensing of industry, shrinking the monopoly of the public sector industries (other than those where strategic and security concerns dominated), removal of quantitative restrictions on imports, market determined exchange rate, liberalization of foreign direct investment, capital market reforms, liberalizing the financial markets, reduction in small scale industry reservations, and a much greater role for the private sector in infrastructure industries such as power, port, transport and communications.

### **Economic Reforms and Competition**

The world economy has been experiencing a progressive international economic integration for the last half a century. There has been a marked acceleration in this process of globalisation and also liberalisation during the last three decades.

Since 1991, the Government of India has introduced a series of economic reforms, including policies of liberalisation, deregulation, disinvestment and privatisation. The seriousness of macroeconomic imbalances and unanimity towards reform rendered this possible. The broad thrust of the new policies was a move away from the centralised allocation of resources in some key sectors by the government to allocation by market forces. Private participation in economic

development has emerged as an alternative to the state-oriented development strategy in the reform period.

After a decade of reforms, restraints to competition such as state monopolies and protective measures and controls have been replaced by relatively more competitive and de-regulated open market policies. In the post reform period, the private sector participation in production and supply of utility services has increased substantially. Independent regulators have been established for many sectors such as road, power, telecommunications and insurance. These sectoral regulators have been empowered to determine sector specific entry conditions and eventually the level of competition. In nutshell, post reforms period witnessed an open market orientation in industrial policy, foreign trade policy, foreign investment policy and financial sector policy, infrastructure policy, etc.

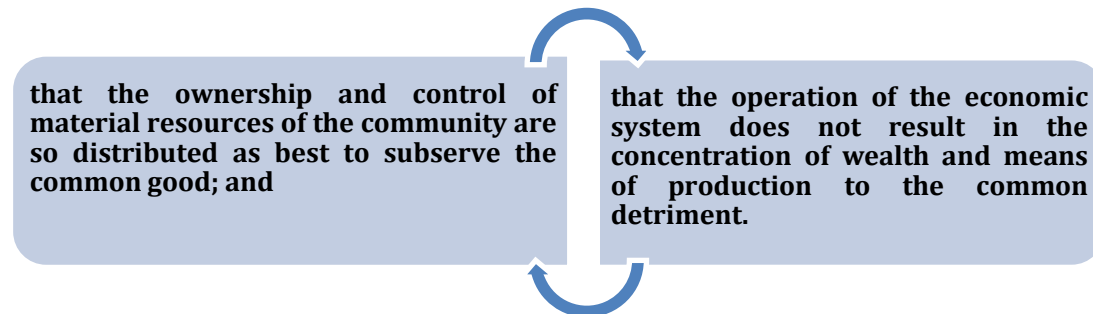
After Independence, India pursued a strategy of planned economic development, with the objective of developing a broad industrial base to achieve speedy economic self-reliance and promoting social justice. The industrial policy assigned commanding heights of the economy to the public sector. The State exercised control over the direction, pattern and quantum of investments through the Industries (Development & Regulation) Act, 1951 and the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). A major part of the financial sector was also kept under Government control while a number of products were also subjected to price and distribution controls coupled with extensive reservations and concessions in favour of small-scale industry. The trade policy too affected competition by providing a high level of protection to domestic industry. These restrictions, which were in consonance with the National Strategic Policies at that time and relevant in the context of limited resources and need of checking monopolies and concentration of economic power, did nevertheless, impacted competition. However, gradually, and from 1980 onwards, incremental changes were brought in to usher in greater competition. The Industrial Policy Statement of 1980 introduced greater competition in the domestic market, technological up-gradation and modernisation. The major reforms initiated from 1991 onwards were, however, on a much broader scale, sweep and scope, and provided a new paradigm shift to economic growth in India, releasing new entrepreneurial energy and dynamism in the Indian industry, diversification of domestic production and stimulating exports, adding to the GDP growth.

Since 1991 have witnessed significant changes in terms of opening of markets, factor mobility and regulatory environment. The benefits have been substantial and manifested in various segments of economy, e.g. telecom, civil aviation, transport, manufacturing, etc. However, the progress has been somewhat uneven, and so also the trickle-down effects on the common man. Underlying this success is a structural shift in India's growth trajectory. Further, like many other similar economies under transition, there have been residual restraints and anti-competitive traits in several areas of economy. While the process of reforms is a continuing one, the pace and direction necessitates the introduction of an overarching National Competition Policy to realise the fuller growth potential of the economy.

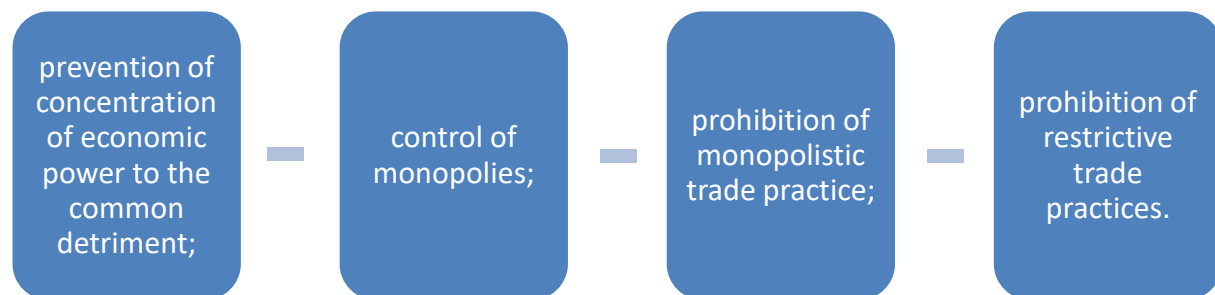
## **Competition Law-Evolution and Development**

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:



***The principal objectives of the Act, as spelt out in the preamble were:***



The MRTP Act, 1969 underwent amendments in 1974, 1980, 1982, 1984, 1986, 1988 and 1991. Major changes introduced in the 1982 and 1984 Amendment Acts were based on the recommendations of the Sachar Committee. The 1984 amendment introduced the concept of unfair trade practice under the Act. Far-reaching changes have been brought about by the 1991 amendment and these were made in the wake of new industrial policy of July, 1991 which is wedded to liberalisation, globalisation and de-regulation.

### **Recommendations of Sachar Committee**

The Government of India appointed a Committee in August, 1977 under the Chairmanship of Justice Rajinder Sachar to look into the simplification of the working of the companies and the MRTP Act. The Committee submitted its report in the year 1978 and as far as recommendations pertaining to the MRTP Act are concerned, far reaching changes were suggested by the Committee. For the first time, the Committee highlighted the need for introduction of suitable provisions to curb unfair trade practices.

In its view, the assumption that curbing monopolistic and restrictive trade practices and thereby preventing distortion of competition automatically results in the consumers getting a fair deal was only partly true. It was felt necessary to protect the consumers from practices adopted by

trade and industry to mislead or dupe them.

The Committee pointed out that advertisements and sales promotion having become well established modes of modern business techniques, representations through such advertisements to the consumer should not become deceptive. If a consumer was falsely induced to enter into buying goods which do not possess the quality and did not have the cure for the ailment advertised, it was apparent that the consumer was being made to pay for quality of things on false representation. Such a situation could not be accepted.

Therefore, an obligation is to be cast on the seller to speak the truth when he advertises and also to avoid half-truths, the purpose being preventing false or misleading advertisements.

The Committee also noted that fictitious bargain was another common form of deception and many devices were used to lure buyers into believing that they were getting something for nothing or at a nominal value for their money. The Committee observed: Prices may be advertised as greatly reduced and cut when in reality the goods may be sold at sellers regular prices. Advertised statements that could have two meanings, one of which is false, are also considered misleading. In America, it was held that statement that a tooth paste fights decay could be interpreted as a promise of complete protection and was thus deceptive. Mock-ups on television put up by companies including Colgate Palmolive had also received the attention of the Enforcement Agencies in America and have been held to be deceptive.

We cannot say that the type of misleading and deceptive practices which are to be found in other countries 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 haven for the suppliers and a position of frustration and uncertainty for the consumers.

It should be the function of any consumer's 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.

### **Recommendations of Raghavan Committee**

As India moved steadily on the path of reforms comprising of Liberalisation, Privatisation and Globalisation, it did away with the MRTP Act, 1969 as it was realised that the Act had outlived its utility and control of monopoly was not appropriate to support the growth aspirations of more than 1 billion Indians. Indeed, need was felt to promote and sustain competition in the market

place. The then Finance Minister (Shri.Yashwant Sinha) in the budget speech in 1999 had announced:

*“The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions.”*

Accordingly, a High-Level Committee on Competition Policy and Law was constituted under Chairmanship of Mr.

S.V.S Raghavan. The Committee submitted its report on 22nd May 2000 recommending replacement of the MRTP Act with a modern competition law for fostering competition and for eliminating anticompetitive practices in the economy. After consulting the stakeholders, Competition Bill, 2001 was introduced in the Parliament which eventually became the Competition Act, 2002.

The purpose of the Competition Act, as stated in its preamble is: *“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”*

#### ***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**

***The Competition Act, 2002 has been enacted to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto.***

The provisions relating to prohibition of anti-competitive agreements and abuse of dominant position came into effect from May 20, 2009 and the merger regulation regime has been enforced with effect from June 1, 2011. The Competition Act, 2002 last amended by Competition (Amendment) Act, 2023.

### 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 “Appellate Tribunal” and Chapter IX contains Miscellaneous provisions.

### CASE LAWS

Hon'ble Supreme Court in ***CCI v. Bharati Airtel Civil Appeals arising out of SLP (C) No. 35574 of 2017 & Ors December 05, 2018*** observed that in the wake of globalisation and keeping in view the economic development of the country, responding to opening of its economy and resorting to liberalisation, need was felt to enact a law that ensures fair competition in India by prohibiting trade practices which cause an appreciable adverse effect on competition within markets in India and for establishment of an expert body in the form of Competition Commission of India, which would discharge the duty of curbing negative aspects of competition, the Competition Act, 2002 has been enacted by the Parliament.

The Act deals with three kinds of practices which are treated as anti-competitive and are prohibited. These are:

- a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;
- b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and
- c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain.

Hon'ble Supreme Court in Competition Commission of ***India v. SAIL (2010) 10 SCC 744*** observed that it is well settled that the Competition Act, 2002 is a regulatory legislation enacted to maintain free market so that the Adam Smith's concept of invincible hands operate unhindered in the background. Further it is clear from the Statement of objects and reason that this law was foreseen as a tool against concentration of unjust monopolistic powers at the hands of private individuals which might be detrimental for freedom of trade. Competition law in India aims to achieve highest



sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices.

Therefore, an interpretation should be provided which is in consonance with the aforesaid objectives. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

In the case of ***Excel Crop Care Limited v. Competition Commission of India and Another (Civil Appeal No. 2480 of 2014)*** judgement dated May 08, 2017 the Hon'ble Supreme Court of India observed that the Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. It is to ensure that there is a healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure 'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself, other than competitors in the market. In this way, the pursuit of fair and effective competition can contribute to improvements in economic efficiency, economic growth and development of consumer welfare. How these benefits accrue is explained in ASEAN Regional Guidelines on Competition Policy.

In the case of ***Excel Crop Care Limited v. Competition Commission of India and Another*** the Hon'ble Supreme Court of India observed that the Act, which prohibits anti-competitive agreements, has a laudable purpose behind it. The benefits of which are explained in ASEAN Regional Guidelines on Competition Policy and are as follows:

## **"2.2 Main Objectives and Benefits of Competition Policy"**

**2.2.1.1 Economic efficiency:** *Economic efficiency refers to the effective use and allocation of the economy's resources. Competition tends to bring about enhanced efficiency, in both a static and a dynamic sense, by disciplining firms to produce at the lowest possible cost and pass these cost savings on to consumers, and motivating firms to undertake research and development to meet customer needs.*

**2.2.1.2 Economic growth and development:** *Economic growth—the increase in the value of goods and services produced by an economy – is a key indicator of economic development. Economic development refers to a broader definition of an economy's well-being, including employment growth,*

*literacy and mortality rates and other measures of quality of life. Competition may bring about greater economic growth and development through improvements in economic efficiency and the reduction of wastage in the production of goods and services. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over time, sustained economic growth tends to lead to an enhanced quality of life and greater economic development.*

**2.2.1.3 Consumer Welfare:** *Competition policy contributes to economic growth to the ultimate benefit of consumers, in terms of better choice (new products), better quality and lower prices. Consumer welfare protection may be required in order to redress a perceived imbalance between the market power of consumers and producers. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction costs. Competition policy may serve as a complement to consumer protection policies to address such market failures.”*

**The aforesaid guidelines also spell out few more benefits of such laws incorporating competition policies by highlighting the following advantages:**

*“2.2.2 In addition, competition policy is also beneficial to developing countries. Due to worldwide deregulation, privatisation and liberalisation of markets, developing countries need a competition policy, in order to monitor and control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.*

*2.2.3 Besides contributing to trade and investment policies, competition policy can accommodate other policy objectives (both economic and social) such as the integration of national markets and promotion of regional integration, the promotion or protection of small businesses, the promotion of technological advancement, the promotion of product and process innovation, the promotion of industrial diversification, environment protection, fighting inflation, job creation, equal treatment of workers according to race and gender or the promotion of welfare of particular consumer groups.*

*In particular, competition policy may have a positive impact on employment policies, reducing redundant employment (which often results from inefficiencies generated by large incumbents and from the fact that more dynamic enterprises are prevented from entering the market) and favouring jobs creation by new efficient competitors.*

*2.2.4 Competition policy complements trade policy, industrial policy and regulatory reform. Competition policy targets business conduct that limits market access and which reduces actual and potential competition, while trade and industrial policies encourage adjustment to the trade and industrial structures in order to promote productivity-based growth and regulatory reform eliminates domestic regulation that restricts entry and exit in the markets. Effective competition policy can also increase investor confidence and prevent the benefits of trade from being lost through anticompetitive practices. In this way, competition policy can be an important factor in enhancing the attractiveness of an economy to foreign direct investment, and in maximizing the benefits of foreign investment.”*

Further, the Apex Court inter alia observed that in fact, there is broad empirical evidence supporting the proposition that competition is beneficial for the economy. Economists agree that it has an important role to play in improving productivity and, therefore, the growth prospects of an economy. It is achieved in the following manner:

**“International Competition Network - Economic Growth and Productivity:**

Competition contributes to increased productivity through:

***Pressure on firms to control costs:*** In a competitive environment, firms must constantly strive to lower their production costs so that they can charge competitive prices, and they must also improve their goods and services so that they correspond to consumer demands.

***Easy market entry and exit:*** Entry and exit of firms reallocates resources from less to more efficient firms. Overall productivity increases when an entrant is more efficient than the average incumbent and when an exiting firm is less efficient than the average incumbent. Entry – and the threat of entry – incentivizes firms to continuously improve in order not to lose market share to or be forced out of the market by new entrants.

***Encouraging innovation:*** Innovation acts as a strong driver of economic growth through the introduction of new or substantially improved products or services and the development of new and improved processes that lower the cost and increase the efficiency of production. Incentives to innovate are affected by the degree and type of competition in a market.

***Pressure to Improve Infrastructure:*** Competition puts pressure on communities to keep local producers competitive by improving roads, bridges, docks, airports, and communications, as well as improving educational opportunities.

***Benchmarking:*** Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals.” Productivity is increased through competition by putting pressure on firms to control costs as the producers strive to lower their production costs so that they can charge competitive prices. It also improves the quality of their goods and services so that they correspond to consumers’ demands. Competition law enforcement deals with anti-competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation. Enforcement provides remedies to avoid situations that will lead to decreased competition in markets. Effective enforcement is important not only to sanction anti-competitive conduct but also to deter future anti-competitive practices.

Keeping in view the aforesaid objectives that need to be achieved, Indian Parliament enacted Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalisation and privatisation as it was found that the law prevailing at that time, namely, Monopolistic Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle

the competition aspects of the Indian economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anti-competitive agreements.

## IMPORTANT DEFINITIONS

**“Acquisition”** means, directly or indirectly, acquiring or agreeing to acquire—

- i. shares, voting rights or assets of any enterprise; or
- ii. control over management or control over assets of any enterprise. [Section 2(a)]

**“Agreement”** includes any arrangement or understanding or action in concert, —

- i. whether or not, such arrangement, understanding or action is formal or in writing; or
- ii. whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. [Section 2(b)]

**“Appellate Tribunal”** means the National Company Law Appellate Tribunal referred to in sub-section (1) of section 53A. [Section 2(ba)]

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

### ***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

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.

**“Chairperson”** means the Chairperson of the Commission appointed under sub-section (1) of section 8. [Section 2(d)]

**“Commission”** means the Competition Commission of India established under sub-section (1) of section 7. [Section 2(e)]

**“Commitment”** means the commitment referred to in section 48B. [Section 2(ea)]

**“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 partly paid or partly 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 and includes any beneficiary of such services 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, 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)]

**“Director General”** means the Director General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section. [Section 2(g)]

**“Enterprise”** means a person or a department of the Government, including units, divisions, subsidiaries, who or which is, or has been, engaged in any economic 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, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

*Explanation.* —For the purposes of this clause, —

- a. “activity” includes profession or occupation;
- b. “article” includes a new article and “service” includes a new service;
- c. “unit” or “division”, in relation to an enterprise, includes—
  - a. a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
  - b. any branch or office established for the provision of any service. [Section 2(h)]

**“Goods”** means goods as defined in the Sale of Goods Act, 1930 and includes—

- a. products manufactured, processed or mined;
- b. debentures, stocks and shares after allotment;
- c. in relation to goods supplied, distributed or controlled in India, goods imported into India. Section 2(i)]

**“Member”** means a Member of the Commission appointed under sub-section (1) of section 8 and includes the Chairperson. [Section 2(j)]

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

**“Party”** includes a consumer or an enterprise or a person or an information provider, or a consumer association or a trade association, or the Central Government or any State Government or any statutory authority, as the case may be, and shall include an enterprise or a person against whom any inquiry or proceeding is instituted; and any enterprise or person impleaded by the Commission to join the proceedings. Section 2(ka)]

**“Person”** includes—

- i. an individual;
- ii. a Hindu undivided family;
- iii. a company;
- iv. a firm;
- v. an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- vi. any corporation established by or under any Central, State or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;
- vii. any body corporate incorporated by or under the laws of a country outside India;
- viii. a co-operative society registered under any law relating to co-operative societies;
- ix. a local authority;
- x. every artificial juridical person, not falling within any of the preceding sub-clauses. [Section 2(l)]

**“Practice”** includes any practice relating to the carrying on of any trade by a person or an enterprise. [Section 2(m)]

**“Prescribed”** means prescribed by rules made under this Act. [Section 2(n)]

**“Price”**, in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration

which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing. [Section 2(o)]

**“Public Financial Institution”** means public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013 and includes a State Financial Corporation, State Industrial Corporation or State Investment Corporation. [Section 2(p)]

**“Regulations”** means the regulations made by the Commission under section 64. [Section 2(q)]

**“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. [Section 2(r)]

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

**“Relevant Product Market”** means a market comprising of all those products or services—

- i. which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use; or
- ii. the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. [Section 2(t)]

**“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)]

**“Settlement”** means the settlement referred to in section 48A. [Section 2(ua)]

**“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)]

**“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)]

**“Trade”** means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services. [Section 2(x)]

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

**Words and Expressions used but not defined in this Act and defined in the Companies Act, 2013 shall have the same meanings respectively assigned to them in that Act. [Section 2(z)]**

## **PROHIBITION OF CERTAIN AGREEMENTS**

Section 3 deals with anti-competitive agreements. Section 3(1) provides 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 within India.

As per Section 3(2) any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

Section 3(3) states that any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

- a) directly or indirectly determines purchase or sale prices;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;
- c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition.

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement.

*Explanation.* —For the purposes of this sub-section, **“bid rigging”** means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing



competition for bids or adversely affecting or manipulating the process for bidding.

### **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,
- agreements on common norms to calculate prices or terms of bids
- agreements to squeeze out outside bidders
- agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis.

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 other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- a) tie-in arrangement;
- b) exclusive dealing agreement;
- c) exclusive distribution agreement;
- d) refusal to deal;
- e) resale price maintenance,

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

Provided that nothing contained in this sub-section shall apply to an agreement entered into between an enterprise and an end consumer.

*Explanation.* —For the purposes of this sub-section, —

- a) **"Tie-In Arrangement"** includes any agreement requiring a purchaser of goods or services, as a condition of such purchase, to purchase some other distinct goods or services;
- b) **"Exclusive Dealing Agreement"** includes any agreement restricting in any manner the purchaser or the seller, as the case may be, in the course of his trade from acquiring or selling or otherwise dealing in any goods or services other than those of the seller or the purchaser or any other person, as the case may be;
- c) **"Exclusive Distribution Agreement"** includes any agreement to limit, restrict or withhold the output or supply of any goods or services or allocate any area or market for the disposal or sale of the goods or services;
- d) **"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 or services; are sold or from whom goods or services are bought;
- e) **"Resale Price Maintenance"** includes, in case of any agreement to sell goods or provide services, any direct or indirect restriction that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

***It may be noted that Section 3 shall not restrict—***

- i. the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
  - a. the Copyright Act, 1957;
  - 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;
  - f. the Semi-conductor Integrated Circuits Layout-Design Act, 2000;
  - g. any other law for the time being in force relating to the protection of other intellectual property rights.
- ii. the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

### ***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;

### **PROHIBITION OF ABUSE OF DOMINANT POSITION**

According to Section 4(1) of the Act, no enterprise or group shall abuse its dominant position.

Section 4(2) states that there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group, —

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

*Explanation.* —For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such condition or price which may be adopted to meet the competition; or

- b. limits or restricts—
  - i. production of goods or provision of services or market therefor; or
  - ii. technical or scientific development relating to goods or services to the prejudice of consumers; or
- c. indulges in practice or practices resulting in denial of market access in any manner; or
- d. 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; or
- e. uses its dominant position in one relevant market to enter into, or protect, other relevant market.

*Explanation.* — For the purposes of this section, the expression—

“Dominant Position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

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

“Predatory Price” means 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 the goods or provision of services, with a view to reduce competition or eliminate the competitors.

“Group” means two or more enterprises where one enterprise is directly or indirectly, in a position to—

- i. exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
- ii. appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
- iii. control the management or affairs of the other enterprise.

### ***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:

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

## CASE LAW

In the case of ***Mr. Umar Javeed and Others Vs. Google LLC and Another in Case No. 39 of 2018***, the Competition Commission of India (CCI) vide its Order dated 20<sup>th</sup> October, 2022 inter alia observed that the Commission has carefully perused the provisions of Section 4 of the Act and on a holistic consideration thereof, it is observed that “dominant position” under the Act has been defined as meaning a position of strength, enjoyed by an enterprise, in the relevant market which enables it to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, once an entity is found to be dominant in the relevant market, the Act recognizes its ability to adversely affect competition in the market unilaterally through its conducts. As such, the dominant enterprise is clothed with a special responsibility not to indulge in the conducts which are enumerated in Section 4(2) of the Act. Resultantly, once a dominant undertaking is found to have indulged in any of the acts provided in Section 4(2) of the Act, the contravention of the Act stands established. This is further evident from the phraseology used in Section 4(2) of the Act which, inter alia, provides that there shall be an abuse of dominant position if an enterprise directly or indirectly “imposes” unfair or discriminatory condition/ price in purchase or sale of goods or services. The moment there is any imposition of any unfair or discriminatory condition by a dominant player, the statutory prohibitions shall trigger. The same is true for other instances of abuse as enshrined in Section 4(2) of the Act as well and the same also have to be read in this manner, which is consistent with the avowed objectives of the Act..... .

## COMBINATION

Section 5 of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

- a. any acquisition where—
  - i. the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have —
    - A. either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

- A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
  - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or
- b.** acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—
  - i. the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, —
    - A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have, —
    - A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
- c.** any merger or amalgamation in which—
  - i. the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, —
    - A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have, —
    - A. either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.
- d.** value of any transaction, in connection with acquisition of any control, shares, voting rights or

assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore:

Provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India as may be specified by regulations.

- e. notwithstanding anything contained in clause (a) or clause (b) or clause (c), where either the value of assets or turnover of the enterprise being acquired, taken control of, merged or amalgamated in India is not more than such value as may be prescribed, such acquisition, control, merger or amalgamation, shall not constitute a combination under section 5.

*Explanation.* —For the purposes of section 5 —

- a. **"Control"** means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
  - i. one or more enterprises, either jointly or singly, over another enterprise or group; or
  - ii. one or more groups, either jointly or singly, over another group or enterprise;
- b. **"Group"** means two or more enterprises where one enterprise is directly or indirectly, in a position to—
  - i. exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
  - ii. appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
  - iii. control the management or affairs of the other enterprise;
- c. **"Turnover"** means the turnover certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6 and such turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or business from customers outside India, as certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6;
- d. **"Value of Transaction"** includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation;
- e. **the Value of Assets** shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed combination falls and if such financial statement has not yet become due to be filed with the Registrar under the Companies Act, 2013 then as per the statutory auditor's report made on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights under the laws provided in sub-section (5) of section 3;
- f. where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets or turnover or value of transaction as may be applicable, of the said portion or division or business or attributable to

it, shall be the relevant assets or turnover or relevant value of transaction for the purpose of applicability of the thresholds under section 5.

### 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.

## THRESHOLDS FOR COMBINATION

In exercise of the powers conferred by sub-section (3) of Section 20 of the Competition Act, 2002, the Central Government vide its Notification dated March 07, 2024 and in consultation with the Competition Commission of India, enhanced, on the basis of the wholesale price index and exchange rate of rupee, the value of assets and the value of turnover, by One hundred and fifty percent for the purposes of section 5 of the Competition Act. The value of assets and turnover after revision is as under:

| THRESHOLDS FOR FILING NOTICE |                           |                                                          |    |                                                              |
|------------------------------|---------------------------|----------------------------------------------------------|----|--------------------------------------------------------------|
| Enterprise level             |                           | Assets                                                   | Or | Turnover                                                     |
|                              | India                     | > 2500 INR Crore                                         |    | > 7500 INR Crore                                             |
|                              | In India or Outside India | > USD 1.25 bn with at least<br>> 1250 INR Crore in India |    | > USD 3.75 bn with at least<br><br>> 3750 INR Crore in India |
| OR                           |                           |                                                          |    |                                                              |
|                              |                           | Assets                                                   |    | Turnover                                                     |



|                        |                                                                                                                                                                                                                   |                                                           |    |                                                            |
|------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|----|------------------------------------------------------------|
| Group Level            | India                                                                                                                                                                                                             | > 10000 INR Crore                                         | Or | > 30000 INR Crore                                          |
|                        | In India or Outside India                                                                                                                                                                                         | > USD 5 bn with at least<br><br>> 1250 INR Crore in India |    | > USD 15 bn with at least<br><br>> 3750 INR Crore in India |
| OR                     |                                                                                                                                                                                                                   |                                                           |    |                                                            |
| Deal Value Transaction | More than INR 2000 Crore.<br><br>Provided that the target, in case of Acquisition, and Merging or Amalgamating entities, in case of merger or amalgamation, have substantial business operations in India (SBOI). |                                                           |    |                                                            |

**De-Minimis Thresholds:** In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 it has also been decided with regards to de-minimis thresholds that the value of assets and turnover be enhanced from INR 350 crore (rupees three hundred fifty crore) to INR 450 crore (rupees four hundred fifty crore) for assets and from INR 1000 crore (rupees one thousand crore) to INR 1250 crore (rupees one thousand two hundred fifty crore) for turnover.

| <b>THRESHOLDS FOR AVALING OF DE-MINIMIS EXEMPTION</b> |                 |                |           |                 |
|-------------------------------------------------------|-----------------|----------------|-----------|-----------------|
|                                                       |                 | <b>Assets</b>  | <b>Or</b> | <b>Turnover</b> |
| <b>Target Enterprise</b>                              | <b>In India</b> | < Rs.450 Crore |           | < Rs.1250 Crore |

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government vide Notification S.O. 1131(E) dated March 07, 2024 and in public interest exempted the enterprises being parties to --

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and

(c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees Four hundred and fifty crore in India or turnover of not more than rupees One thousand two hundred and fifty crore in India, from the provisions of section 5 of the said Act for a period of two years from the date of publication of this notification in the Official Gazette.

Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indications, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

## REGULATION OF COMBINATIONS

Section 6(1) provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Section 6(2) states that subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a 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, after any of the following, but before consummation of the combination of—

- a. approval of the proposal relating to merger or amalgamation, referred to in clause (c) and clause (d) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
- b. execution of any agreement or other document for acquisition referred to in clause (a) and clause (d) of section 5 or acquiring of control referred to in clause (b) of that section.

*'Explanation.* —For the purposes of this sub-section, "**Other Document**" means any document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets or if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights or where a public announcement has been made in accordance with the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and

Takeovers) Regulations, 2011 made under the Securities and Exchange Board of India Act, 1992 for acquisition of shares, voting rights or control such public document.

According to Section 6(2A), no combination shall come into effect until one hundred and fifty days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.

Section 6(3) provides that the Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 29A, 30 and 31.

Section 6(4) states that notwithstanding anything contained in sub-sections (2A) and (3) and section 43A, if a combination fulfils such criteria as may be prescribed and is not otherwise exempted under this Act from the requirement to give notice to the Commission under sub-section (2), then notice for such combination may be given to the Commission in such form and on payment of such fee as may be specified by regulations, disclosing the details of the proposed combination and thereupon a separate notice under sub-section (2) shall not be required to be given for such combination.

As per Section 6(5) upon filing of a notice under sub-section (4) and acknowledgement thereof by the Commission, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 and no other approval shall be required under sub-section (2) or sub-section (2A).

Section 6(6) provides that if within the period referred to in sub-section (1) of section 20, the Commission finds that the combination notified under sub-section (4) does not fulfil the requirements specified under that sub-section or the information or declarations provided are materially incorrect or incomplete, the approval under sub-section (5) shall be void ab initio and the Commission may pass such order as it may deem fit:

Provided that no such order shall be passed unless the parties to the combination have been given an opportunity of being heard.

Section 6(7) states that notwithstanding anything contained in this section and section 43A, upon fulfilment of such criteria as may be prescribed, certain categories of combinations shall be exempted from the requirement to comply with sub-sections (2), (2A) and (4).

Section 6(8) provides that notwithstanding anything contained in sub-sections (4), (5), (6) and (7)—

- i. the rules and regulations made under this Act on the matters referred to in these sub-sections as they stood immediately before the commencement of the Competition (Amendment) Act, 2023 and in force at such commencement, shall continue to be in force, till such time as the rules or regulations, as the case may be, made under this Act; and
- ii. any order passed or any fee imposed or combination consummated or resolution passed or direction given or instrument executed or issued or thing done under or in pursuance of any rules and regulations made under this Act shall, if in force at the commencement of the Competition (Amendment) Act, 2023, continue to be in force, and shall have effect as if such order passed or such fee imposed or such combination consummated or such resolution

passed or such direction given or such instrument executed or issued or done under or in pursuance of this Act.

According to Section 6(9) the provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign portfolio investor, bank or Category I alternative investment fund, pursuant to any covenant of a loan agreement or investment agreement.

*Explanation.* —For the purposes of section 6, the expression—

- (a) "**Category I alternative investment fund**" has the same meaning as assigned to it under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992;
- (b) "**foreign portfolio investor**" has the same meaning as assigned to it under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019 made under the Securities and Exchange Board of India Act, 1992.

### Open Offers, etc

Section 6A of the Act provides that nothing contained in section 6(2A) and section 43A shall prevent the implementation of an open offer or an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange from coming into effect, if—

- (a) the notice of the acquisition is filed with the Commission within such time and in such manner as may be specified by regulations; and
- (b) the acquirer does not exercise any ownership or beneficial rights or interest in such shares or convertible securities including voting rights and receipt of dividends or any other distributions, except as may be specified by regulations, till the Commission approves such acquisition in accordance with the provisions of sub-section (2A) of section 6 of the Act.

*Explanation.* —For the purposes of this section, "**open offer**" means an open offer made in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 made under the Securities and Exchange Board of India Act, 1992.

## COMPETITION COMMISSION OF INDIA

### Establishment of Commission

Section 7 of the Act empowers the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition

Commission of India”.

The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

The head office of the Commission shall be at such place as the Central Government may decide from time to time. The Commission may establish offices at other places in India.

### Composition of Commission

According to Section 8 the Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

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 fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, technology, 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 shall be whole-time Members.

### Selection Committee for Chairperson and Members of Commission

Section 9 provides 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 term of the Selection Committee and the manner of selection of panel of names shall be such

as may be prescribed.

### **Term of office of Chairperson and other Members**

Section 9 of the Act states 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:

Provided that 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, Removal and Suspension of Chairperson and other Members**

Section 10(1) provides that the Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

It may be noted that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

As per Section 10(2) notwithstanding anything contained in sub-section (1), the Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson 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 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 has become physically or mentally incapable of acting as a Member.

(2) Notwithstanding anything contained in sub-section (2), no Member shall be removed from his office on the ground specified in clause (d) or clause (e) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, 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 Member, ought on such ground or grounds to be removed.

### **Restriction on Employment of Chairperson and other Members**

According to Section 12(1) of the Act, Chairperson and other Members shall, for a period of two years from the date on which they cease to hold office, not accept any employment in or advise as a consultant, retainer or in any other capacity whatsoever, or be connected with the management or administration of--

- a) any enterprise which is or has been a party to a proceeding before the Commission under this Act; or
- b) any person who appears or has appeared before the Commission under section 35.

Section 12(2) provides that notwithstanding anything contained in section 35, the Chairperson or any other Member after retirement or otherwise ceasing to be in service for any reason shall not represent for any person or enterprise before the Commission:

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013.

### **Appointment of Director General**

Section 16 empowers the Commission with the prior approval of the Central Government appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.

The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.

Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.

The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed.

The Director General and Additional, Joint, Deputy and Assistant Directors General or such

officers or other employees, shall be appointed from amongst 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.

### **Appointment of Secretary, Experts, Professionals and Officers and other Employees of Commission**

Section 17 empowers the Commission to appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

The salaries and allowances payable to, and other terms and conditions of service of, the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.

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 this Act.

## **DUTIES, POWERS AND FUNCTIONS OF COMMISSION**

### **Duties and Functions of Commission**

Section 18 of the Act deals with duties and functions of the Commission. It states that subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

Provided further that, the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with any statutory authority or department of Government.

### **Inquiry into Certain Agreements and Dominant Position of Enterprise**

Section 19(1) provides that the Commission may inquire into any alleged contravention of the provisions contained in section 39(1) or section 4(1) either on its own motion or on—

- a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or



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

It may be noted that the Commission shall not entertain an information or a reference unless it is filed within three years from the date on which the cause of action has arisen.

Provided further that an information or a reference may be entertained after the period specified in the first proviso if the Commission is satisfied that there had been sufficient cause for not filing the information or the reference within such period after recording its reasons for condoning such delay.

As per Section 19(2), without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

**The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have 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;
- d) benefits or harm 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 Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, 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.

For determining whether a market constitutes a “relevant market” for the purposes of this Act, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”.

**The Commission shall, while determining the “relevant geographic market”, 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;
- i) characteristics of goods or nature of services;
- j) costs associated with switching supply or demand to other areas.

**The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely: —**

- a) physical characteristics or end-use of goods <sup>1</sup>[or the nature of services];
- b) price of goods or service;
- c) consumer preferences;
- d) exclusion of in-house production;
- e) existence of specialised producers;
- f) classification of industrial products;
- g) costs associated with switching demand or supply to other goods or services;
- h) categories of customers.

#### **CASE LAW**

In *Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors.*— (2017) 5 SCC 17, the Hon'ble Supreme Court referring to Section 3(4) of the Act, 2002 observed that while inquiring into any alleged contravention, whether by the Commission or by the Director General, and determining whether any agreement has an appreciable adverse effect on competition under Section 3, factors which are to be taken into consideration are mentioned in Section 19, which are 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; or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services; relevant product market; relevant geographic market.

Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

Therefore, the purpose of defining the “relevant market” is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned. The relevant market within which to analyse market power or assess a given competition concern has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. The relevant product and geographic market for a particular product may vary depending on the nature of the buyers and suppliers concerned by the conduct under examination and their position in the supply chain. For example, if the questionable conduct is concerned at the wholesale level, the relevant market has to be defined from the perspective of the wholesale buyers. On the other hand, if the concern is to examine the conduct at the retail level, the relevant market needs to be defined from the perspective of buyers of retail products.

### **Inquiry into Combination by Commission**

Section 20(1) states that the Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section 5 or acquisition of any control, shares, voting right or assets of an enterprise, merger or amalgamation referred to in clause (d) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:

Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect.

Section 20(2) provides that the Commission shall, on receipt of a notice under section 6(2) inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.

According to Section 20(3) of the Act, notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, enhance or reduce by notification, or keep at the same level, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, or such factors that in its opinion are relevant in this matter, the value of assets or the value of turnover or value of transaction], for the purposes of that section.

As per Section 20(4), for the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, 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 concentration 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.

## **Reference by Statutory Authority**

Section 21 provides that where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

It may be noted that any statutory authority, may, *suo motu*, make a reference to the Commission on any issue that involves any provision of this Act or is related to promoting the objectives of this Act, as the case may be.

On receipt of a reference, the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.

## **Reference by Commission**

Section 21A states that where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of an Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

It may be noted that the Commission, may, *suo motu*, make a reference to a statutory authority on any issue that involves provisions of an Act whose implementation is entrusted to that statutory authority.

On receipt of a reference, the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

## **Procedure for Inquiry into Certain Agreements and Dominant Position of Enterprise**

Section 26 deals with procedure for Inquiry into Certain Agreements and Dominant Position of Enterprise. It states that:

- 1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

It may be noted that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

- 2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- 2A) The Commission may not inquire into agreement referred to in section 3 or conduct of an enterprise or group under section 4, if the same or substantially the same facts and issues raised in the information received under section 19 or reference from the Central Government or a State Government or a statutory authority has already been decided by the Commission in its previous order.
- 3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.
- 3A) If, after consideration of the report of the Director General referred to in sub-section (3), the Commission is of the opinion that further investigation is required, it may direct the Director General to investigate further into the matter.
- 3B) The Director General shall, on receipt of direction under sub-section (3A), investigate the matter and submit a supplementary report on his findings within such period as may be specified by the Commission.
- 4) The Commission may forward a copy of the report referred to in sub-section (3) and (3B) to the parties concerned.

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in sub-section (3) and (3B) to the Central Government or the State Government or the statutory authority, as the case may be.

- 5) If the report of the Director General referred to in sub-section (3) and (3B) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
- 6) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- 7) If, after consideration of the objections or suggestions referred to in sub-section (5), if any, the Commission is of the opinion that further investigation is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
- 8) If the report of the Director General referred to in sub-section (3) and (3B) recommends that there is contravention of any of the provisions of this Act, and the Commission is of

the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

- 9) Upon completion of the investigation or inquiry under sub-section (7) or sub-section (8), as the case may be, the Commission may pass an order closing the matter or pass an order under section 27, and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

Provided that before passing such order, the Commission shall issue a show-cause notice indicating the contraventions alleged to have been committed and such other details as may be specified by regulations and give a reasonable opportunity of being heard to the parties concerned.

### **CASE LAW**

In ***Competition Commission of India v. Steel Authority of India (Civil Appeal No. 7779 of 2010, judgment dated September 09, 2010)***, looked into the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the prima facie case. With regard to notice and/or hearing at the stage of forming prima facie decision by the Commission under Section 26(1) of the Act, Supreme Court of India held that neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter. However, the Commission, being a statutory body exercising, inter alia, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive. Supreme Court also observed that the Commission is expected to form such prima facie view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17 (2) of the Regulations to invite not only the information provider but even 'such other person' which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be 'preliminary conference', for whose conduct of business the Commission is entitled to evolve its own procedure.

In the aforesaid context, Supreme Court noted kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. Supreme court observed that at the face of it, this is an inquisitorial and regulatory power. The jurisdiction of the Commission, to act under this provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At

that stage, it does not condemn any person and therefore, application of *audi alteram partem* is not called for. Formation of a prima facie opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Accordingly, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), Supreme Court observed that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act.

Supreme Court in the case of ***Competition Commission of India v. Steel Authority of India*** also looked into the issue whether it is obligatory for the Commission to record reasons for formation of a prima facie opinion in terms of Section 26(1) of the Act. Supreme Court held that in consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

In the aforesaid context, Supreme Court of India noted that the proposition of law whether an administrative or quasi-judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more *res integra* and has been settled by a recent judgment of this Court in the case of Assistant Commissioner, C.T.D.W.C. v. M/s Shukla & Brothers [JT 2010 (4) SC 35]. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.

By practice adopted in all courts and by virtue of judge made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Supreme Court noted that recording reasons in support of decisions or orders is consistent with the settled canons of law and would apply to Section 26, under its different sub-sections, which requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Supreme Court also noted that even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act,



without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

### **Orders by Commission after Inquiry into Agreements or Abuse of Dominant Position**

Section 27 of the Act provides that where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:

- a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
- b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover or income, as the case may be, for the last three preceding financial years, upon each of such person or enterprise which is a party to such agreement or has abused its dominant position.

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.

*Explanation 1.* —For the purposes of this clause, the expression "turnover" or "income", as the case may be, shall be determined in such manner as may be specified by regulations.

*Explanation 2.* —For the purposes of this clause, "turnover" means global turnover derived from all the products and services by a person or an enterprise.'

- c) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- d) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
- e) pass such other order or issue such directions as it may deem fit:

It may be noted that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the *Explanation* to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

## **CASE LAW**

In *Excel Crop Care Limited Vs Competition Commission of India & Another (Civil Appeal No. 2480 of 2014)*, judgment dated May 08, 2017), Hon'ble Supreme Court of India observed that a plain reading of Section 27 (b) elucidates that the commission is empowered to impose penalty and to the extent as it deems fit but not exceeding ten percent of the turnover. Section 27 (b) emphasize that penalty is to be levied on 'person or enterprise' who have contravened Section 3 or Section 4 of the Act. Supreme Court emphasized on the usage of the phrase 'as it may deem fit' as occurring under Section 27 of the Act. At the outset this phrase is indicative of the discretionary power provided for the fining authority under the Act. As the law abhors absolute power and arbitrary discretion, this discretion provided under Section 27 needs to be regulated and guided so that there is uniformity and stability with respect to imposition of penalty. This discretion should be governed by rule of law and not by arbitrary, vague or fanciful considerations. Supreme Court noted that any penal law imposing punishment is made for general good of the society. As a part of equitable consideration, we should strive to only punish those who deserve it and to the extent of their guilt. Further it is well established by this Court that the principle of proportionality requires the fine imposed must not exceed what is appropriate and necessary for attaining the object pursued.

In the aforesaid context, Hon'ble Supreme Court observed that in consonance of established jurisprudence, the principle of proportionality needs to be imbibed into any penalty imposed under Section 27 of the Act. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Therefore the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover. Supreme Court laid out a two-step calculation that has to be followed while imposing the penalty under Section 27 of the Act. Under Step 1 relating to determination of relevant turnover, Hon'ble Supreme Court observed that at this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter. Under Step 2 relating to determination of appropriate percentage of penalty based on aggravating and mitigating circumstances, Hon'ble Supreme Court observed that after such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer, the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc.

These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty. Accordingly, Supreme Court observed that at the cost of repetition it should be noted that starting point of determination of appropriate penalty should be to determine relevant turnover and thereafter the tribunal should calculate appropriate percentage of penalty based on facts and circumstances of the case taking into consideration various factors while determining the quantum. But such penalty should not be more than the overall cap of 10% of the entity's relevant turnover. Such interpretation of Section 27 (b) of the Act, wherein the discretion of the commission is guided by principles established by law would sub-serve the intention of the enactment.

Section 28(1) of the Act provides that 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 does not abuse its dominant position.

Section 28(2) states that in particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) 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.

Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.

### **Procedure for Investigation of Combinations**

Section 29 of the Act deals with procedure of investigation of Combinations. It provides that:

- 1) Where the Commission is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within fifteen days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.
- (1A) After receipt of the response of the parties to the combination under sub-section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.
- (1B) The Commission shall, within thirty days of receipt of notice under sub-section (2) of section 6, form its prima facie opinion referred to in sub-section (1).
- 2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven days from the date of receipt of the response of the parties to the combination, or the receipt of the report from Director General called under sub section (1A), whichever is later, direct the parties to the said combination to publish details of the combination within seven days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

- 3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within ten days from the date on which the details of the combination were published under sub-section (2).
- 4) The Commission may, within seven days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.
- 5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within ten days from the expiry of the period specified in sub-section (4).
- 6) After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 29A or section 31, as the case may be.
- 7) Notwithstanding anything contained in this section, the Commission may accept appropriate modifications offered by the parties to the combination or suo motu propose modifications, as the case may be, before forming a prima facie opinion under sub-section (1).

### **Issue of Statement of Objections by Commission and Proposal of Modifications**

Section 29A (1) of the Act provides that upon completion of the process under section 29, where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall issue a statement of objections to the parties identifying such appreciable adverse effect on competition and direct the parties to explain within twenty-five days of receipt of the statement of objections, why such combination should be allowed to take effect.

As per Section 29A (2) where the parties to the combination consider that such appreciable adverse effect on competition can be eliminated by suitable modification to such combination, they may submit an offer of appropriate modification to the combination along with their explanation to the statement of objections issued under sub-section (1) in such manner as may be specified by regulations.

Section 29A(3) states that if the Commission does not accept the modification submitted by the parties under sub-section (2) it shall, within seven days from the date of receipt of the proposed modifications under that sub-section, communicate to the parties as to why the modification is not sufficient to eliminate the appreciable adverse effect on competition and call upon the parties to furnish, within twelve days of the receipt of the said communication, revised modification, if any, to eliminate the appreciable adverse effects on competition.

Provided that the Commission shall evaluate such proposal for modification within twelve days from receipt of such proposal:

Provided further that the Commission may *suo motu* propose appropriate modifications to the combination which may be considered by the parties to the combination.

## **Procedure in case of Notice under Section 6(2)**

Section 30 provides that where any person or enterprise has given a notice under section 6(2) the Commission shall examine such notice and form its prima facie opinion as provided in section 29(1) and proceed as per provisions contained in that section.

## **Orders of Commission on Combinations**

Section 31 deals with order of the commission on combination. It states that:

- 1) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination in respect of which a notice has been given under sub-section (2) of section 6.  
It may be noted that if the Commission does not form a prima facie opinion as provided under sub-section (1B) of section 29, the combination shall be deemed to have been approved and no separate order shall be required to be passed.
- 2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
- 3) Where the Commission is of the opinion that any appreciable adverse effect on competition that the combination has, or is likely to have, can be eliminated by modification proposed by the parties or the Commission, as the case may be, under sub-section (7) of section 29 or sub-section (2) or sub-section (3) of section 29A, it may approve the combination subject to such modifications as it thinks fit.
- 4) Where a combination is approved by the Commission under sub-section (3), the parties to the combination shall carry out such modification within such period as may be specified by the Commission.
- 5) Where—
  - i. the Commission has directed under sub-section (2) that the combination shall not take effect; or
  - ii. the parties to the combination, fail to carry out the modification within such period as may be specified by the Commission under sub-section (4); or
  - iii. the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition which cannot be eliminated by suitable modification to such combination,then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that such combination shall not be given effect to, or be declared void, or frame a scheme to be implemented by the parties to address the appreciable adverse effect on competition, as the case may be.
- 6) If no order is passed or direction issued by the Commission in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), as the case may be, within a period of one hundred and fifty days from the date of notice given to the Commission under sub-section (2) of section 6, the combination shall be deemed to

have been approved by the Commission.

### Acts Taking Place outside India but Having an Effect on Competition in India

According to Section 32 of the Act, the Commission shall, notwithstanding that, —



have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29, 29A and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

#### CASE LAW

In the case of ***Mr. Umar Javeed and Others Vs. Google LLC and Another in Case No. 39 of 2018***, the Competition Commission of India (CCI) vide its Order dated 20th October, 2022 inter alia observed that Commission also observes that Section 32 of the Act which deals with “Acts taking place outside India but having an effect on competition in India”, clearly inter alia provides that the Commission shall notwithstanding that any enterprise abusing the dominant position is outside India, have the power to inquire into abuse of dominant position by such player if such dominant position has or is likely to have an appreciable adverse effect on competition in India. That being the statutory scheme in respect of anti-competitive acts taking place outside India, there cannot be any higher threshold for examining the abusive conduct which has taken place within the municipal limits of India.

## Power to Issue Interim Orders

Section 33 provides that where during an inquiry, the Commission is satisfied that an act in contravention of section 3(1) or section 4(1) or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

### **CASE LAW**

In ***Competition Commission of India v. Steel Authority of India (Civil Appeal No. 7779 of 2010)***, judgment dated September 09, 2010, Supreme Court observed that during an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order inter alia should : (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) It is necessary to issue order of restraint and (c) from the record before the Commission, it is apparent that there is every likelihood of the party to the lis, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect.

## Appearance before Commission

Section 35(1) states that a party or the Director General may either appear in person or authorise one or more chartered accountants or ***Company Secretaries*** or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Explanation. —For the purposes of this section, —

- a) “Chartered Accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;
- b) ***“Company Secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;***
- c) “Cost Accountant” means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

- d) “Legal Practitioner” means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

As per Section 35(2) without prejudice to sub-section (1), a party may call upon experts from the fields of economics, commerce, international trade or from any other discipline to provide an expert opinion in connection with any matter related to a case.

### **Power of Commission to Regulate its Own Procedure**

Section 36 provides that in the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely: —

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

requiring the discovery and production of documents;

receiving evidence on affidavit;

issuing commissions for the examination of witnesses or documents;

requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such record or document from any office.

The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry by it.

The Commission may direct any person—





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



to furnish to the Director General or the Secretary or any other officer authorised 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 this Act.

## Rectification of Orders

With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of the Act. Subject to the other provisions of this Act, the Commission may make—

an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.



an amendment under sub-section (1) of its own motion;

*Explanation.* —For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

## Execution of orders of Commission Imposing Monetary Penalty

1. 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.
2. In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961, 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.
3. 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.

## **DUTIES OF DIRECTOR GENERAL**

Section 41 of the Act empowers the Director General to investigate contraventions. It provides that:

- (1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.
- (2) The Director General shall have all the powers as are conferred upon the Commission under sub-section (2) of section 36.
- (3) Without prejudice to sub-section (2), it shall be the duty of all officers, other employees and agents of a party which are under investigation—
  - a. to preserve and to produce all information, books, papers, other documents and records of, or relating to, the party which are in their custody or power to the Director General or any person authorised by it in this behalf; and
  - b. to give all assistance in connection with the investigation to the Director General.
- (4) The Director General may require any person other than a party referred to in sub-section (3) to furnish such information or produce such books, papers, other documents or records before it or any person authorised by it in this behalf if furnishing of such information or the production of such books, papers, other documents or records is relevant or necessary for the purposes of its investigation.
- (5) The Director General may keep in his custody any information, books, papers, other documents or records produced under sub-section (3) or sub-section (4) for a period of one hundred and eighty days and thereafter shall return the same to the person by whom or on whose behalf the information, books, papers, other documents or records were produced:  
Provided that the information, books, papers, other documents or records may be called for by the Director General if they are needed again for a further period of one hundred and eighty days by an order in writing:  
Provided further that the certified copies of the information, books, papers, other documents or records, as may be applicable, produced before the Director General may be provided to the party or person on whose behalf the information, books, papers, other documents or records are produced at their own cost.
- (6) The Director General may examine on oath—
  - a. any of the officers and other employees and agents of the party being investigated; and
  - b. with the previous approval of the Commission, any other person, in relation to the affairs of the party being investigated and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.

- (7) The examination under sub-section (6) shall be recorded in writing and shall be read over to or by, and signed by, the person examined and may thereafter be used in evidence against it.
- (8) Where in the course of investigation, the Director General has reasonable grounds to believe that information, books, papers, other documents or records of, or relating to, any party or person, may be destroyed, mutilated, altered, falsified or secreted, the Director General may make an application to the Chief Metropolitan Magistrate, Delhi for an order for seizure of such information, books, papers, other documents or records.
- (9) The Director General may make requisition of the services of any police officer or any officer of the Central Government to assist him for all or any of the purposes specified in sub-section (10) and it shall be the duty of every such officer to comply with such requisition.
- (10) The Chief Metropolitan Magistrate, Delhi may, after considering the application and hearing from the Director General, by order, authorise the Director General—
- a. to enter, with such assistance, as may be required, the place or places where such information, books, papers, other documents or records are kept;
  - b. to search that place or places in the manner specified in the order; and
  - c. to seize information, books, papers, other documents or records as it considers necessary for the purpose of the investigation:

Provided that certified copies of the seized information, books, papers, other documents or records, as the case may be, may be provided to the party or person from whose place or places such documents have been seized at its cost.

- (11) The Director General shall keep in his custody such information, books, papers, other documents or records seized under this section for such period not later than the conclusion of the investigation as it considers necessary and thereafter shall return the same to the party or person from whose custody or power they were seized and inform the Chief Metropolitan Magistrate, of such return:

Provided that the Director General may, before returning such information, books, papers, other documents or records take copies of, or extracts thereof or place identification marks on them or any part thereof.

- (12) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973, relating to search or seizure made under that Code.

*Explanation.* —For the purposes of this section, —

- a) "**Agent**", in relation to any person, means any one acting or purporting to act for or on behalf of such person, and includes the bankers, and persons employed as auditors and legal advisors, by such person;
- b) "**Officers**", in relation to any company or body corporate, includes any trustee for the debenture holders of such company or body corporate;
- c) any reference to officers and other employees or agents shall be construed as a reference

to past as well as present officers and other employees or agents, as the case may be.

### **CASE LAW**

Hon'ble Supreme Court in **CCI v. SAIL (2010) 10 SCC 744** observed that the DG appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. DG, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself to whom the investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the DG and to pass appropriate orders after hearing the parties concerned.

Hon'ble Supreme Court in SAIL judgment clearly observed that the 'inquiry' shall be deemed to have commenced when direction to the DG is issued to conduct investigation in terms of Regulation 18(2) of the General Regulations. In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the DG. Further it was observed that the DG is expected to conduct an investigation only in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the DG.

As per the scheme of the Competition Act, 2002 the DG is a fact finding body, whose duty is to collect evidence, analyse such information and present its opinion on the basis of such evidence to the Commission. However, the conclusion/findings of the DG are mere recommendatory and are not final. The Investigation Report as prepared by the DG is never binding upon the Commission and it is always for the Commission to decide whether the alleged conduct is in contravention of the provisions of the Act or not.

## **PENALTIES**

### **Contravention of Orders of Commission**

According to Section 42 of the Act, the Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 6, 27, 28, 31, 32, 33, 42A, 43, 43A, 44 and 45 of the Act, he shall be liable to a penalty which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

If any person does not comply with the orders or directions issued, or fails to pay the penalty imposed, he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit.

It may be noted that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers

authorised 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 6, 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**

As per Section 43 of the Act, if any person fails to comply, without reasonable cause, with a direction given by—

- a. the Commission under sub-sections (2) and (4) of section 36; or
  - b. the Director General while exercising powers referred to in sub-section (2) of section 41,
- such person shall be liable to a penalty 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**

According to Section 43A if any person or enterprise fails to give notice to the Commission under sub-section (2) or sub-section (4) of section 6 or contravenes sub-section (2A) of section 6 or submit information pursuant to an inquiry under sub-section (1) of section 20, the Commission may impose on such person or enterprise, a penalty which may extend to one per cent., of the total turnover or assets or the value of transaction referred to in clause (d) of section 5, whichever is higher, of such a combination:

It may be noted that in case any person or enterprise has given a notice under sub-section (4) of section 6 and such notice is found to be void ab initio under sub-section (6) of section 6, then a notice under sub-section (2) of section 6 may be given by the acquirer or parties to the combination, as may be applicable, within a period of thirty days of the order of the Commission under sub-section (6) of that section and no action under this section shall be taken by the Commission till the expiry of such period of thirty days.

## Power to Impose Lesser Penalty

Section 46(1) provides that the Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, than leviable under this Act or the rules or the regulations made under the Act.

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure:

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, —

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
  - (b) had given false evidence; or
  - (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the contravention with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.
- (2) The Commission may allow a producer, seller, distributor, trader or service provider included in the cartel, to withdraw its application for lesser penalty under this section, in such manner and within such time as may be specified by regulations.
- (3) The Director General and the Commission shall be entitled to use for the purposes of this Act, any evidence submitted by a producer, seller, distributor, trader or service provider in its application for lesser penalty, except its admission.

(4) Where during the course of the investigation, a producer, seller, distributor, trader or service provider who has disclosed a cartel under sub-section (1), makes a full, true and vital disclosure under sub-section (1) with respect to another cartel in which it is alleged to have violated section 3, which enables the Commission to form a prima facie opinion under sub-section (1) of section 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, in respect of the cartel already being investigated, without prejudice to the producer, seller, distributor, trader or service provider obtaining lesser penalty under sub-section (1) regarding the newly disclosed cartel.

## **CONTRAVENTION BY COMPANIES**

Section 48(1) states that where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be in contravention of this Act and unless otherwise provided in this Act, the Commission may impose such penalty on such persons, as it may deem fit which shall not be more than ten per cent. of the average of the income for the last three preceding financial years.

Provided that in case any agreement referred to in section 3(3) has been entered into by a cartel, the Commission may unless otherwise provided in this Act, impose upon such persons referred to in sub-section (1), a penalty of up to ten per cent. of the income for each year of the continuance of such agreement.

Section 48(2) provides that nothing contained in sub-section (1) shall render any such person liable to any penalty if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

As per Section 48(3) notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers shall also be deemed to be in contravention of the provisions of this Act and unless otherwise provided in this Act, the Commission may impose such penalty on such persons, as it may deem fit which shall not be more than ten per cent. of the average of the income for the last three preceding financial years:

Provided that in case any agreement referred to in section 3(3) has been entered into by a cartel, the Commission may, unless otherwise provided under this Act, impose upon such person a penalty as it may deem fit which shall not exceed ten per cent. of the income for each year of the continuance of such agreement.

Explanation. —For the purposes of this section, —

- a. "company" means a body corporate and includes a firm or other association of individuals;
- b. "director", in relation to a firm, means a partner in the firm;
- c. "income", in relation to a person, shall be determined in such manner as may be specified by regulations.

## **Settlement**

According to Section 48A of the Act, any enterprise, against whom any inquiry has been initiated under section 26(1) for contravention of section 3(4) or section 4, may, for settlement of the proceeding initiated for the alleged contraventions, submit an application in writing to the Commission in such form and upon payment of such fee as may be specified by regulations.

An application may be submitted at any time after the receipt of the report of the Director General under section 26(4) but prior to such time before the passing of an order under section 27 or section 28 as may be specified by regulations.

The Commission may, after taking into consideration the nature, gravity and impact of the contraventions, agree to the proposal for settlement, on payment of such amount by the applicant or on such other terms and manner of implementation of settlement and monitoring as may be specified by regulations.

While considering the proposal for settlement, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any.

If the Commission is of the opinion that the settlement offered above is not appropriate in the circumstances or if the Commission and the party concerned do not reach an agreement on the terms of the settlement within such time as may be specified by regulations, it shall, by order, reject the settlement application and proceed with its inquiry under section 26.

The procedure for conducting the settlement proceedings under this section shall be such as may be specified by regulations.

No appeal shall lie under section 53B against any order passed by the Commission under this section.

All settlement amounts, realised under this Act shall be credited to the Consolidated Fund of India.



## **Commitment**

As per Section 48B of the Act, any enterprise, against whom any inquiry has been initiated under section 26(1) for contravention of section 3(4) or section 4, as the case may be, may submit an application in writing to the Commission, in such form and on payment of such fee as may be specified by regulations, offering commitments in respect of the alleged contraventions stated in the Commission's order under section 26(1).

An offer for commitments may be submitted at any time after an order under section 26(1) has been passed by the Commission but within such time prior to the receipt by the party of the report of the Director General under section 26(4) as may be specified by regulations.

The Commission may, after taking into consideration the nature, gravity and impact of the alleged contraventions and effectiveness of the proposed commitments, accept the commitments offered on such terms and the manner of implementation and monitoring as may be specified by regulations.

While considering the proposal for commitment, the Commission shall provide an opportunity to the party concerned, the Director General, or any other party to submit their objections and suggestions, if any.

If the Commission is of the opinion that the commitment offered above is not appropriate in the circumstances or if the Commission and the party concerned do not reach an agreement on the terms of the commitment, it shall pass an order rejecting the commitment application and proceed with its inquiry under section 26 of the Act.

The procedure for commitments offered under this section shall be such as may be specified by regulations.

No appeal shall lie under section 53B against any order passed by the Commission under this section.

## **Revocation of the Settlement or Commitment Order and Penalty**

Section 48C provides that if an applicant fails to comply with the order passed under section 48A or section 48B or it comes to the notice of the Commission that the applicant has not made full and true disclosure or there has been a material change in the facts, the order passed under section 48A or section 48B, as the case may be, shall stand revoked and withdrawn and such enterprise shall be liable to pay legal costs incurred by the Commission which may extend to rupees one crore and the Commission may restore or initiate the inquiry in respect of which the order under section 48A or section 48B was passed.

## **COMPETITION ADVOCACY**

Section 49 deals with Competition Advocacy. It provides that the Central Government may, in formulating a policy on competition (including review of laws related to competition) or on any other matter, and a State Government 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 effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

The opinion given by the Commission shall not be binding upon the Central Government or the State Government, as the case may be, in formulating such policy.

The Commission shall take suitable measures for the promotion of competition advocacy or culture, creating awareness and imparting training about competition issues.

## **APPELLATE TRIBUNAL**

According to Section 53A of the Act, the National Company Law Appellate Tribunal constituted under section 410 of the Companies Act, 2013 shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall—

hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-section (6) of section 6, sub-sections (2), (2A), (6) and (9) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act; and

adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section (2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

## **Appeal to Appellate Tribunal**

Section 53B provides that the Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

Every appeal shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed.

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the Commission, shall be entertained by the Appellate Tribunal unless the appellant has deposited twenty-five per cent. of that amount in the manner as directed by the Appellate Tribunal.

On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.

### **CASE LAWS**

In *Samir Agrawal vs. Competition Commission of India & Ors (Civil Appeal No. 3100 of 2020)* judgement dated December 15, 2020, Supreme Court held that a reading of the provisions of the Act and the 2009 Regulations would show that “any person” may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of “person” in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of “consumer” in section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.

The expressions used in sections 53B and 53T of the Act are “any person”, thereby signifying that all persons who bring to the CCI information of practices that are contrary to the provisions of the Act, could be said to be aggrieved by an adverse order of the CCI in case it refuses to act upon the information supplied. By way of contrast, section 53N(3) speaks of making payment to an applicant as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II of the Act, having been committed by an enterprise. By this sub-section, clearly, therefore, “any person” who makes an application for compensation, under sub-section (1) of section 53N of the Act, would refer only to persons who have suffered loss or damage, thereby, qualifying the expression “any person” as being a person who has suffered loss or damage.

Thus, the preliminary objections against the Informant/Appellant filing Information before the CCI and filing an appeal before the NCLAT are rejected.

When the CCI performs inquisitorial, as opposed to adjudicatory functions, the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purpose of the Act.

### **Right to Legal Representation**

According to Section 53-S of the Act, a person preferring an appeal to the Appellate Tribunal may either appear in person or authorise one or more chartered accountants or **company secretaries** or costaccountants 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 authorise 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 authorised may present the case with respect to any appeal before the Appellate Tribunal.

The Commission may authorise 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 authorised may present the case with respect to any appeal before the Appellate Tribunal.

## APPEAL TO SUPREME COURT

Section 53T provides that 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:

It may be noted that 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.

## COMPOUNDING OF CERTAIN OFFENCES

Section 59A states that notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act, not being an offence punishable with imprisonment only or imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by the Appellate Tribunal or a court before which such proceeding is pending.

### 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 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.

### TEST YOURSELF

*(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation)*

1. Define and discuss the Bid Rigging and Cartel.
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.

### LIST OF FURTHER READINGS

- Bare Act - Competition Act, 2002 and amendments made therein.
- Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

### OTHER REFERENCES

- <https://www.cci.gov.in/>
- <https://www.cci.gov.in/legal-framework/act>

## LESSON 12

# LAW RELATING TO CONSUMER PROTECTION

According to Consumer Protection (Jurisdiction of the District Commission, the State Commission and the National Commission) Rules, 2021 *Vide Notification dated 30th December, 2021* prescribed the following Pecuniary Jurisdiction:

- ▶ District Commission: *Does not exceed fifty lakh rupees*
- ▶ State Commission: *Exceeds fifty lakhs but does not exceed two crore rupees.*
- ▶ National Commission: *Exceed two crore rupees*

### Case Laws

1. In the case of *Rutu Mihir Panchal & Ors{Petitioner(s)} Vs. Union of India & Ors.(Respondent(s))* *Writ Petition (Civil) No. 282 of 2021 with Civil Appeal No. of 2025 arising out of SLP (C) No. 1738 of 2022 judgement dated April 29, 2025*, Supreme Court held that Section 34, 47 and 58 of the Consumer Protection Act, 2019 are Constitutional and are neither violative of Article 14 of the Constitution of India nor Manifestly Arbitrary.

Hon'ble Apex Court inter alia observed that the purpose and object behind referring to the constitution and functioning of the Central Consumer Protection Council and the Central Consumer Protection Authority is only to ensure that the regulatory regime for consumer protection is clearly identified, coordinated – if not centralised and declared to be duty bearers for effective functioning of the consumer protection regime. In a recent decision in *Lifecare Innovations Pvt. Ltd. v. Union of India, 2025 INSC 269*, Supreme Court held that that the significance of creation and establishment of these statutory and administrative bodies is not difficult to conceive. If these institutions and bodies work effectively and efficiently, it is but natural that the purpose and object of the legislation will be achieved in a substantial measure. It is, therefore, necessary to ensure that

in the functioning of these bodies, there is efficiency in administration, expertise through composition, integrity through human resources, transparency and accountability, and responsiveness through regular review, audits and assessments (Para 21).

In conclusion Supreme Court held that the Central Consumer Protection Council and the Central Consumer Protection Authority being statutory authorities having clear purpose and objects and vested with powers and functions must act effectively and in complete coordination to achieve the preambular object of the statute to protect the interest of consumers. As they are impressed with statutory duty, their functioning will be subject to judicial review. Vibrant functioning of the Council and the Authority will subserve the purpose and object of the Parliament enacting the 2019 legislation.

For the reasons stated above; (a) Supreme Court dismissed the constitutional challenge to section 34, 47 and 58 of the 2019 Act and declare that the said provisions are constitutional and are neither violative of Article 14 nor manifestly arbitrary; (b) Central Consumer Protection Council and the Central Consumer Protection Authority shall in exercise of their statutory duties under sections 3, 5, 10, 18 to 22 take such measures as may be necessary for survey, review and advise the government about such measures as may be necessary for effective and efficient redressal and working of the statute. With the above directions, the Writ Petition and Civil Appeal are disposed of.

**2.** In the case of *Rakesh Khanna (Petitioner) vs. Naveen Kumar Aggarwal & Ors(Respondents)*, *W.P.(C) 13098/2024 & CM APPL. 54737/2024, CM APPL. 54738/2024, CM APPL. 56340/2024, CM APPL. 56339/2024, Judgement dated September 25, 2024* , Hon'ble High Court inter alia observed that Section 72 of the CP Act makes it abundantly clear that the objective of the provision is to enforce the orders of Consumer Commissions, by holding a company and its officers accountable for defying the directions of the Commissions. These Commissions are empowered with judicial authority akin to that of a Judicial Magistrate of the first class for the purpose of executing their directions. Hence, the issuance of arrest warrants against the directors of the Judgment Debtor Company for compelling compliance, is well within the ambit of the statutory framework of the CP Act. The Petitioner's argument that he should not be held liable because he was not a director at the time the original cause of action arose as alleged in the Complaint, is both legally flawed and untenable. The issue at hand is not the assessment of personal liability for the initial acts of deficiency in service, but the responsibility for ensuring compliance with the SCDRC's final order. As a director of the Company at the time of the enforcement proceedings, the Petitioner had a legal obligation to ensure that the Company complies with the SCDRC's directives. Therefore, the issuance of arrest warrants in this context is not an indictment of the Petitioner's personal liability, but rather a procedural mechanism to ensure that the Petitioner, as a director of the Judgment Debtor Company, meets with his obligations.

Section 71 of the CP Act provides for the enforcement of an order by a Consumer Commission in the same manner as a decree passed by a civil court, incorporating the provisions of Order XXI of the CPC. In the present case, the issuance of arrest warrants is not rooted in the enforcement mechanism outlined in Section 71 of the Act, but rather in the powers conferred by Section 72, which explicitly empowers the Consumer Commissions to act as a Judicial Magistrate of the first

class for the purpose of trying an offence under Section 72(1) of the CP Act. Section 72(2), envisaging a non-obstante clause, grants the State Commission the jurisdiction to penalize non-compliance of its directions, which includes the power to issue arrest warrants for enforcing compliance. This reinforces that the SCDRC is vested with both the jurisdiction and authority to enforce its orders, including issuing arrest warrants, if necessary. The Petitioner's reliance on specific provisions of the CPC, to suggest that the warrants were issued under an incorrect provision, is therefore misplaced. Consequently, the objection raised by the Petitioner regarding the misuse of CPC provisions is without merit and cannot be sustained.

**3.** In the case of *Omkar Realtors and Developers Pvt. Ltd {Appellant(S)} Vs. Kushalraj Land Developers Pvt. Ltd. & Anr. {Respondent(s)} Civil Appeal No.858 OF 2023 judgement dated August 23, 2024* Supreme Court of India The Hon'ble Supreme Court relied on decisions of in *M/s Daimler Chrysler India Pvt. Ltd. vs. M/s Controls & Switchgear Company Ltd. & Anr., Civil Appeal No. 353 of 2008 decided on 09.07.2024* and *Lilavati Kirtilal Mehta Medical Trust vs. Unique Shanti Developers and Others (2020) 2 SCC 265* and *National Insurance Company Ltd. vs. Harsolia Motors and Ors (2023) 8 SCC 362* where in Apex Court ruled that in sum and substance to determine whether the goods purchased by a person (which would include a legal entity like a company) were for commercial purpose or not within the meaning of the Act would depend upon the facts and circumstances of each case. However, ordinarily "commercial purpose" is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities. The purchase of the goods should have a close and direct nexus with a profit generating activity. If it is found that the dominant purpose behind purchasing the goods was for the personal use and consumption of the purchaser and/or the beneficiary, or was otherwise not linked with other commercial activities, the question whether such a purchase was for the purpose of "generating livelihood by means of self-employment" need not be looked into. In short, the dominant intention or the dominant purpose of the transaction is to be looked into to find out if it had any nexus with some kind of profit generation as part of the commercial activities.

In the case at hand, the complainant specifically mentions that the flat was being purchased for the purpose of residence of one of its Directors and his family and that the company is a family-owned company. The mere fact that the respondent-company is a real estate company, it does not mean that the flat was purchased by it for commercial purpose or for resale so as to earn profits. It is the appellant who is contending that the respondent is not a consumer and as such the complaint is not maintainable, therefore, the burden lies heavily upon it to lead evidence to prove that the respondent in purchasing the flat in question is indulging in real estate business. There is no evidence on record to show that the flat so purchased by the respondent was in any way connected with the real estate business rather than for personal use of its Director and his family

**4.** In the case of *Alpha G184 Owners Association (Appellant) Vs. Magnum International Trading Company Pvt. Ltd (Respondent) Civil Appeal No. 4718 of 2022 with Civil Appeal Nos. 329-332 of 2023 judgement dated May 15th, 2023*, Hon'ble Supreme Court of India inter alia observed that the Consumer Protection Act, 1986; 68 of 1986 (hereinafter referred to as "the 1986 Act") and the Consumer Protection Act, 2019; 35 of 2019 (hereinafter referred to as "the 2019 Act") have got a laudable objective. The 2019 Act facilitates the consumers to approach the forums by providing a very flexible procedure. It is meant to encourage consumerism in the country. Any technical approach in construing the provisions against the consumer would go against the very objective



behind the enactment. Hon'ble Supreme Court of India placed reliance on the decision of Supreme Court in *National Insurance Co. Ltd. v. Harsolia Motors*, 2023 SCC OnLine SC 409,

*"21. The Act, 1986 is a social benefit-oriented legislation and, therefore, the Court has to adopt a constructive liberal approach while construing the provisions of the Act. To begin with the Preamble of the Act, 1986 which can afford useful assistance to ascertain the legislative intention, it was enacted to provide for the protection of the interests of consumers. Use of the word "protection" furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled law that a Preamble cannot control otherwise plain meaning of a provision.*

*22. In fact, the law meets long felt necessity of protecting the common man from such wrong for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interests of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively and inefficiently for reasons which are not necessary to be stated.*

*23. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. A scrutiny of various definitions such as "consumer", "service", "trader", "unfair trade practice" indicates that legislature has attempted to widen the ambit and reach of the Act. Each of these definitions are in two parts, one explanatory and the other inclusive. The explanatory or the main part itself uses expressions of amplitude indicating clearly its wide sweep within its ambit to widen such things which otherwise would have been beyond its natural import. 24. The provisions of the Act, 1986 thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit-oriented legislation. The primary duty of the Court/Commission while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objective of the enactment."*

**5.** In the case of *Secretary Ministry of Consumer Affairs {Appellant(s)} Versus Dr. Mahindra Bhaskar Limaye & Ors. {Respondent(S)}* Civil Appeal No. 831 of 2023 (@ SLP(C) NO. 19492 OF 2021) with Civil Appeal No. 832 of 2023 with Civil Appeal No. 833 of 2023 Judgement dated March 03, 2023, Hon'ble Supreme Court of India inter alia observed that the Consumer Protection Act, 1986 has been repealed and the Consumer Protection Act, 2019 has come into force w.e.f. 24.07.2020 with a sole intention to provide adequate safeguards to the consumers and the pecuniary jurisdiction of the District Fora and State Commissions are enhanced substantially. However, there is no substantial change in the scheme with respect to the adjudication of the consumer disputes. No justification at all is shown to do away with the written examination while framing the Rules, 2020 under the Consumer Protection Act, 2019. Therefore, as rightly observed by the High Court, the Rule 6(9) of the Rules, 2020 is unconstitutional, arbitrary and violative of Article 14 of the Constitution of India, more particularly, when the same is wholly impermissible to override/overrule the earlier decisions of this Court and that too without any justification. We are in complete agreement with the view taken by the High Court.

It is required to be noted that under provision 4(1) of Rules, 2020, a person who is eligible to be appointed as a district judge (having minimum experience of 7 years) is qualified to be appointed as President of the District Commission but in order to be appointed as a Member, Rule 4(2)(c) mandates a minimum experience of 15 years which is rightly held to be violative of Article 14 of the Constitution.

Similarly providing 20 years' experience under Rule 3(2)(b) also rightly held to be arbitrary and violative of Article 14 of the Constitution. It is required to be noted that under Rule 3(2)(b), a presiding officer of a Court having experience of 10 years is eligible for becoming President of the State Commission. Even under Rule 3(1) a judge of the High Court, present or former, shall be qualified for appointment of the President. As per Article 233 of the Constitution, a lawyer needs to have only 7 years of practice as an advocate in High Court. Under the circumstances to provide 20 years' experience under Rule 3(2)(b) is rightly held to be unconstitutional, arbitrary and violative of the Article 14 of the Constitution of India. We are in complete agreement with the view taken by the High Court. At this stage, it is required to be noted that in the case of *Madras Bar Association Vs. Union of India & Anr. – MBA III - (2017) 7 SCC 369 decided on 27.11.2020*, Supreme Court directed to consider 10 years' experience, after detail reasoning.

**6.** In the case of *Brigade Enterprises Limited v. Anil Kumar Virmani & Ors./ Civil Appeal No.1779 of 2021 judgement dated December 17, 2021*, Hon'ble Supreme Court inter alia observed that Section 35(1)(c) enables one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, to file a complaint, on behalf of or for the benefit of all consumers so interested. It is needless to point out that the sine qua non for invoking Section 35(1)(c) is that all consumers on whose behalf or for whose benefit the provision is invoked, should have the same interest. Interestingly, Section 35(1) (c) uses the disjunction "or" in between two sets of words, namely, (i) "on behalf of"; and (ii) "for the benefit of". Therefore, a complaint filed under Section 35(1)(c) could either be "on behalf of" or "for the benefit of" all consumers having the same interest.

Section 38(11) of the Consumer Protection Act, 2019 makes the provisions of Order I Rule 8 of the First Schedule to the Code of Civil Procedure, 1908 applicable to cases where the complainant is a consumer referred to in Section 2(5)(v), which defines a 'complainant' to mean one or more consumers, where there are numerous consumers having the same interest.

Order I Rule 8, CPC, unlike Section 35(1)(c) operates both ways and contains provisions for a two way traffic. It not only permits plaintiffs to sue in a representative capacity but also permits people to be sued and to be defended in an action, in a representative capacity.

In simple terms, the salient features of the stipulations contained in Order I Rule 8 CPC can be summed up as follows:

(i) where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue on behalf of or for the benefit of all persons so interested;

(ii) where there are numerous persons having the same interest in one suit, one or more of such persons may be sued or one or more such persons may defend such suit, on behalf of or for the benefit of all persons so interested;

(iii) the Court itself may, without the plaintiffs or defendants seeking any permission under Order I Rule 8(1)(a), direct that one or more such persons may sue or be sued or may defend the suit on behalf of and for the benefit of all persons interested;

(iv) notice of the institution of the suit to all persons so interested either by personal service or by public advertisement should be ordered by the Court in both categories of cases, namely, where permission is given by the Court on the application of the individuals or direction is issued by the Court itself;

(v) any person on whose behalf or for whose benefit the suit is instituted or defended may seek to be made a party to the suit;

(vi) abandonment of the whole or part of the claim, withdrawal of the suit or the recording of any agreement, compromise or satisfaction shall not be allowed by the Court unless notice to all persons interested in the matter is issued either by personal service or by public advertisement.

(vii) the Court may at any time substitute the person suing or defending in a representative capacity, with any other person, if the former was not prosecuting the suit or defence with due diligence.

(viii) the decree passed in the suit covered by this Rule will be binding on all persons.

A careful reading of the provisions of Section 35(1) would show that there is no scope for the contention that wherever there are more consumers than one, they must only take recourse to Order I Rule 8 CPC, even if the complaint is not on behalf of or for the benefit of, all the consumers interested in the matter. There may be cases where only “a few consumers” and not “numerous consumers” have the same interest. There is nothing in the Act to prohibit these few consumers from joining together and filing a joint complaint. A joint complaint stands in contrast to a complaint filed in a representative capacity. For attracting the provisions of Section 35(1)(c), the complaint filed by one or more consumers should be on behalf of or for the benefit of numerous consumers having same interest. It does not mean that where there are only very few consumers having the same interest, they cannot even join together and file a single complaint, but should take recourse only to independent and separate complaints. (Para 34)

Therefore, the proper way of interpreting Section 35(1) read with section 2(5), would be to say that a complaint may be filed: (i) by a single consumer; (ii) by a recognised consumer Association; (iii) by one or more consumers jointly, seeking the redressal of their own grievances without representing other consumers who may or may not have the same interest; (iv) by one or more consumers on behalf of or for the benefit of numerous consumers; and (v) the Central Government, Central Authority or State Authority. (Para 38)

It must be remembered that the provisions of the Consumer Protection Act are in addition to and not in derogation of the provisions of any other law for the time being in force, by virtue of Section 100. Even Section 38 which prescribes the procedure to be followed by the Commission for enquiring into the complaint, does not expressly exclude the application of the provisions of CPC. Though Subsections (9), (11) and (12) of Section 38 make specific reference only to a few provisions of the Code of Civil Procedure, the principle behind Order I Rule 1 enabling more than one person to join in a suit as plaintiff is not expressly excluded. (Para 39)

Therefore, Supreme Court is of the considered view that while the National Commission was wrong in this case, in the peculiar facts and circumstances in permitting an application under Section 35(1)(c) read with Order I Rule 8 CPC, it does not mean that the complaint filed by the respondents itself is liable to be thrown out. The complaint filed by the respondents may have to be treated as a joint complaint and not a complaint in a representative capacity on behalf of 1134 purchasers. The purchasers of other flats, such as the intervenors herein may join as parties to the consumer complaint, if they so desire. As a matter of fact, it is stated by the intervenors that pursuant to the impugned order, advertisements were issued and the intervenors have already filed impleadment application before the National Commission. They are entitled to be impleaded. (Para 40)

**7.** Supreme Court in the case of *Manohar Infrastructure and Constructions Private Limited vs Sanjeev Kumar Sharma & ors*, judgement dated December 07, 2021 held that the condition of pre-deposit for entertaining appeal under Section 51 of the Consumer Protection Act, 2019 is mandatory. Section 51 of the Consumer Protection Act, 2019 provides that no appeal by a person, who is required to pay any amount in terms of order of the State Commission shall be entertained by the NCDRC unless the appellant has deposited 50 percent of that amount.

The Court in answering the question laid down the following:

1. Pre-deposit of 50 per cent of amount as ordered by the State Commission under second proviso to Section 51 of the Consumer Protection Act, 2019 is mandatory for entertainment of an appeal by the National Commission;
2. The object of the said pre-deposit condition is to avoid frivolous appeals;
3. The said pre-deposit condition has no nexus with the grant of stay by the NCDRC;

It then held that the NCDRC can grant a conditional stay directing the appellant to deposit the entire amount and/or any amount higher than 50 per cent of the amount determined by the State Commission.

However, while doing so, the NCDRC has to assign some cogent reasons and pass a speaking order either as an ex parte order or after hearing both sides and considering the facts and circumstances of the case.

*"It must reflect an application of mind by the National Commission why the order passed by the State Commission is to be stayed on condition of deposit of the entire amount and/or any amount higher than 50 per cent of the amount awarded by the State Commission,"* the Court ruled.

8. “Recognised Consumer Association” means any voluntary consumer association registered under any law for the time being in force. In the case of ***Sobha Hibiscus Condominium vs. MW Sosh developer’s ltd judgement dated February 2020***, Hon’ble Supreme Court observed that in essence voluntary consumer association will be a body formed by group of person’s coming together, of their own will and without any pressure or influence from anyone and without being mandated by any other provisions of law.

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## LESSON 17

# LAW RELATING TO TRADE MARKS

In the case of *Lifestyle Equities CV & Anr. (Plaintiffs) Vs. Amazon Technologies, Inc. & Ors(Defendants) CS(COMM) 443/2020*, judgement dated February 25, 2025, Hon'ble Delhi High Court has granted a permanent injunction, restraining Amazon from using the infringing mark of Plaintiff and ordered to pay ₹336 crore (\$38.78 million) in damages, along with ₹3.23 crore in litigation costs in favour of the Plaintiff.

High Court inter alia observed that traditionally, violation of rights in a trademark would take place in brick-and-mortar stores where the identity of the infringing party is easily determinable. The growth of the internet and the rise of digital commerce have significantly transformed the promotion and sale of branded products, creating both opportunities and challenges for IP owners. As with all technological advancements, the internet has facilitated both legitimate trade and unauthorized exploitation of IP rights. The emergence of e-commerce intermediaries, who claim to be distinct from traditional retailers on e-commerce platforms, has introduced legal complexities for IP owners in their efforts to enforce their rights and seek redress for trademark infringement. This distinction has complicated IP enforcement, as such entities often claim intermediary status to mitigate liability for the sale of infringing goods. Unlike conventional retail models, where accountability for infringement was clearly attributable, e-commerce platforms operate within a multi-tiered ecosystem, often making it difficult to identify and hold liable those responsible for violations.

E-commerce platforms, while making products and services more easily available and accessible have also posed significant challenges for IP owners seeking to protect their brands and marks being infringed through online platforms. The proliferation of e-commerce is now here to stay and is an irreversible reality, giving rise to a new species of infringement which can be termed as 'e-infringement'. In this species of infringement, unlike traditional forms of trademark violations, there are multiple parties who could be involved in the violation of right: a) The owner of the infringing brand which is being used on the product. b) The retailer or seller who is selling the infringing product. c) The e-commerce platform which is enabling the retailer to sell the product or the aggregator who may be collecting similar products and making them available for sale. d) The party/entity who is warehousing, raising invoices, packaging, delivering and receiving payments for the product. e) The party who supplies the product, i.e. the infringing goods. f) Finally, the brand being used on the infringing products.

Hon'ble High Court opined that in e-infringement, the biggest challenge would first be in fixing responsibility on each of the parties. There are complex questions which arise including issues relating to intermediary liability, entitlement to safe harbour protection,

as also jurisdictional issues. Clearly, the multi-layered nature of ecommerce has made it increasingly difficult to identify, attribute liability, and effectively enforce IP rights, necessitating clear legal frameworks to address the evolving challenges posed by online trademark infringement.

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## LESSON 18

# LAW RELATING TO COPYRIGHT

1. Hon'ble Delhi High Court in the case of *Informa Markets India Private Limited (Petitioner) Vs. M/S 4PInfotech And Anr (Respondents)*, C.O.(COMM.IPD-CR) 695/2022 Judgement dated May 06, 2024, referred the case of *R. G. Anand v. M/s Deluxe Films and Others, (1978) 4 SCC 118*, wherein Hon'ble Supreme Court traversed the law as was available from various international jurisdictions and reached the following conclusion in paragraph 45 and 46, which are extracted as under:

*"45. Thus, the position appears to be that an idea, principle, theme, or subject-matter or historical or legendary facts being common property cannot be the subject-matter of copyright of a particular person. It is always open to any person to choose an idea as a subject-matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo and Juliet, Julius Ceasar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great playwright. In fact, throughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of his dramas constitute a masterpiece of English literature. It has been rightly said that "every drama of Shakespeare is an extended metaphor". Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved. Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in different form, different tone, different tenor so as to infuse a new life into the idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.*

*46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:*

*1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.*



2. *Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.*
3. *One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.*
4. *Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.*
5. *Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.*
6. *As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.*
7. *Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved."*

Delhi High Court said that while this exposition and articulation by the Hon'ble Supreme Court is self-explanatory, it must be reiterated that the conclusion was that there subsists no copyright in an idea, subject matter, theme, plot or historical and legendary fact, and that copyright is confined to the form, manner, arrangement and expression of the idea. If the same idea has been developed in a different manner albeit with some fundamental or substantial similarities in the mode of expression adopted, then the issue of infringement of copyright arises. However, if the same idea has been presented differently, such that the subsequent work transforms into a completely new work, there is no violation of copyright.

2. In the case of *Eastern Book Company and Ors. v. D.B. Modak, (2008) 1 SCC 1*, the Court reiterated that one of the key requirements of copyright law was that of originality, which contributes to and has a direct nexus in maintaining the interest of the author as well as that of the public. In relation to the classic issue of the idea- expression dichotomy, the Court observed as under:

*“25. The present case raises the classic issue concerning the idea-expression dichotomy. The settled legal position as per the law enunciated above is that no copyright can be claimed in an idea. However, the expression of any idea cannot be imitated or copied, and if expression is copied, the same would constitute infringement of the copyright under Section 51 of the Copyright Act, 1957.*

The decision in *Eastern Book Company and Ors. v. D.B. Modak*, (2008) 1 SCC 1, is also landmark on this subject. The issue before the Hon'ble Supreme Court was whether the law reports “*Supreme Court Cases*” which required the preparation of head notes, involved skill, labour, and expertise and therefore, constituted an original literary work and whether the respondents copied the same in their legal search software. In dealing with this, the Hon'ble Supreme Court reiterated the law on the subject in the following paras:

*“57. The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court. We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there is no copyright in the original text of the judgments. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author.*

....

*59. The aforesaid inputs put by the appellants in the judgments would have had a copyright had we accepted the principle that anyone who by his or her own skill and labour creates an original work of whatever character, shall enjoy an exclusive right to copy that work and no one else would be permitted to reap the crop what the copyright owner had sown. No doubt the appellants have collected the material and improved the readability of the judgment by putting inputs in the original text of the judgment by considerable labour and arranged it in their own style, but that does not give the flavour of minimum requirement of creativity. The exercise of the skill and judgment required to produce the work is trivial and is on account of the labour and the capital invested and could be characterised as purely a work which has been brought about by putting some amount of labour by the appellants.*

*60. Although for establishing a copyright, the creativity standard applies is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. It does require a minimal degree of creativity. Arrangement of the facts or data or the case law is already included in the judgment of the Court. Therefore, creativity of SCC would only be addition of certain facts or material already*

*published, case law published in another law report and its own arrangement and presentation of the judgment of the Court in its own style to make it more user-friendly. The selection and arrangement can be viewed as typical and at best result of the labour, skill and investment of capital lacking even minimal creativity. It does not as a whole display sufficient originality so as to amount to an original work of the author. To support copyright, there must be some substantive variation and not merely a trivial variation, not the variation of the type where limited ways/unique of expression are available and an author selects one of them which can be said to be a garden variety. Novelty or invention or innovative idea is not the requirement for protection of copyright but it does require minimal degree of creativity. In our view, the aforesaid inputs put by the appellants in the copy-edited judgments do not touch the standard of creativity required for the copyright."*

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