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ABOUT US

"Journal of Unique Laws and Students" (JULS) which shall provide law students, young lawyers and legal professionals to deliberate and express their critical thinking on impressionistic realms of Law. The JULS aims to provide cost free, open access academic deliberations among law students and young lawyers. The ISSUE III of Volume I focuses on three themes i.e. (i) Arbitration Law (ii) Competition Law, and (iii) Criminal Law.

The journal strives to contribute to the community with quality papers on a vast number of legal issues and topics written by authors from various groups that have been reassessed and revised by our editorial team to reach the highest possible standard.

UNIQUE LAW is a law related Ed-tech premier start up in India that excels in imparting legal education. It is a registered entity under the name Ansh LexPraxis Legal Education LLP. The said LLP is recognized as a start-up India Initiative by Government of India's Ministry of Commerce and Industry and DIPP63504.

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PREFACE

On looking at today's scenario, there are numerous issues to know about. Our journal`s Issue III of Volume I has work on three crucial themes namely ***Criminal Law***, ***Arbitrational Law*** and ***Competition Law***. We would like to express our deep appreciation of the co-operation of the contributors, who so willingly devoted their time and energies.

We have tried to cover these wide topics with the relevant research and landmark judgments. We have used standard of words for the explanation, evenly attempted to clear the concepts and presented captivating writing to the readers. The works also contains some suggestions in respective fields.

The views expressed in the articles are purely and solely of the authors and the entire team of the Journal has no association with the same. Although all attempts have been made to ensure the correctness of the information published in the articles, the Editorial team shall not be held responsible for any errors that might have been caused due to oversight or otherwise. It is up to the rest of us to help make the journal a success story in the next several years.

FOREWORD

As a member of the Advisory Board of Journal of Unique Laws and Students (JULS) which seeks to support student dynamism in action, I take pride in writing this very brief Preface to **Issue III of Volume I** of the Journal. Through this sturdy student-led initiative, the Journal provides young lawyers and law students of the opportunity to deliberate on legal issues of contemporary interest and to express their well-researched conclusions in the form of double-peer reviewed articles.

In this issue of the JULS I am happy to see a wide array of articles on *Alternate Dispute Resolution (ADR), Arbitrability, Competition Law, Juvenile Delinquency, Gender Crime, Cybercrime, Criminalisation of Politics, Sedition and Witness Protection*. Laws and legal systems are dynamic in nature and laws evolve or are enacted to suit the changing needs of society. Young lawyers and law students can contribute to this dynamic process and even recommend law reform or analyse existing laws including case law. Young lawyers can also contribute to society as civil society activists engaged in efforts to improve the quality of law and its administration. The inculcation of critical thinking, which is one of the main objectives of the JULS, can no-doubt stand in good stead to young lawyers in moulding their future careers.

While I am happy that the very first issue of the inaugural volume of JULS was a tremendous success and its wide array of articles on diverse topics were well received by the legal fraternity, I take this opportunity to thank the contributors of articles as well as the vigilant and hardworking Editorial Board and my colleagues in the Advisory Board for the high standards achieved. In this Foreword, I take the opportunity to thank the publisher for coming out with another issue of JULS almost in time despite the trying conditions in which lawyers work and law students are placed, and I am glad that JULS through its on-line presence, is able to contribute immensely to this process of dissipation of legal knowledge and skills.

Justice Saleem Marsoof PC

Judge of the Supreme Court of Fiji

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EDITOR'S NOTE

Unique Law was established in the month of April 2020 and cheerfully brings **Volume 1 Issue III** of **Journal of Unique Laws and Students (JULS)**. This journal has become a successful climb in reaching to our goal of gaining visibility in the academic front and becoming a great platform in education community.

The journal aims to present merit papers on the numerous legal issues and these topics are authored by various groups of individuals that have been reappraise and emended by our team of editors to attend the highest possible excellence. These research papers, case analysis and shortnotes are the result and we feel privileged to have been able to act as editors.

We thank to all our authors for their obedient submission to the third issue of the Journal by Unique Law and also for their productive cooperation with the editorial team to garnish their work with perfection. We would also like to express our gratitude to our diligent editorial board, whose restless support and commitment made this Journal's Issue III a success.

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COMPETITION LAW: PRECURSORS, PRACTICE AND PROBLEMS

Author: Sathya G Krishnan*

ABSTRACT

Law brings structure and order in the society. Rightly so, it is imperative to have a strong competition law regime in place to guide the activities of the marketplace, the backbone of the economy. India has had a very eventful journey in finding out, formulating and fixing a proper competition legislation in place. The Competition Act regulates the domestic market activities of India by supporting activities that promote healthy competition. As India completes almost two decades after the enactment of the Competition Act of 2002, the author tries to elucidate on the journey of Indian Competition law by discussing its precursor, the MRTP Act, the present legislation, and also enumerates the challenges that are faced by the competition and anti-trust laws in the country.

Keywords: *Competition Law, Competition Act, MRTP Act, Anti-competitive practices, Monopoly, Cartels, Competition Advocacy.*

INTRODUCTION

Healthy competition is a prerequisite for the growth of an economy. It makes an enterprise strive towards making better progress which in turn benefits the economy. Fairness is always expected and appreciated between competing firms. There are situations where the competition between enterprises go out of hand and it becomes necessary to put certain limits to the amount of power that an enterprise has. The importance of competition law arises here. "Competition law is a law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies".[1] It seeks to prevent practices that have an adverse effect on competition. In India, the anti-competitive practices are restricted under the Competition Act, 2002. Before this Act was enacted, there existed the Monopolies and Restrictive Trade

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[1] Rita Yi Man Li; Yi Lut Li, *The Role of Competition Law: An Asian Perspective*, Vol 9, ASIAN SOCIAL SCIENCE, pp. 47-53, 2014

Practices Act, 1969 (hereinafter mentioned as MRTP Act) which put a stop to all activities that restricted freedom of trade to firms and led to concentration of economic powers to a few large firms in the market. After it was found that the MRTP Act was incapable of handling certain situations that arose with the development of technology and industry, the Competition Act was enacted to replace the MRTP Act.

This paper traces the evolution of the development of competition law in India along with highlighting the problems that are on the horizon in the competition law scenario. It is divided into the following sections- Evolution of competition law in India, the Competition Act, Competition Law practice and Challenges to Competition law.

EVOLUTION OF COMPETITION LAW IN INDIA

Prior to independence, there existed no rules or regulations regarding the conduct of activities of markets except for policies and resolutions made by the government to ensure equitable distribution of resources[2]. With the increase in market players and the advancement of trade and industry came abuse of market power. To curb such a misuse of power, the MRTP Act was enacted. The Act was passed by the Indian Parliament on 18 December, 1969 but came into force from June 1, 1970.

The MRTP Act finds its constitutional validity in Articles 38 and 39 which falls under the Directive Principles of State Policy.[3] Articles 38 and 39 of the Constitution of India mandate that the State shall strive towards promotion of welfare of the people through securing and protecting as effectively as possible and establishing a social order in which social, economic and political justice is accessible to all person. It envisages that ownership and control of material resources of the community are equitably distributed to secure common good, and to operate the economic system in such a way that there is no concentration of wealth in the hands of a few.[4]

This Act was the first of its kind in enabling provisions that puts a limit on the power of firms in the market. The MRTP Act was passed as a check on the concentration of economic power

[2] Amit Kapoor, Competition Regulation-history, *Insights and Issues for the Way Forward*, 2009 Manupatra (2009)
[3] Shreyaa Chaturvedi, *Monopolies and Restrictive Trade Practices Act, 1970*, iPleaders, (August 30, 2018) https://blog.ipleaders.in/mrtp/#_ftn29
[4] 13th ed., V.N. Shukla, Constitution of India, pg 376-378, EBC, 2017

in the hands of a few rich in the market. It enabled authorities to prevent monopolistic and restrictive trade practices. The main objectives of the Act included[5]-

- Prevention of concentration of economic power to the detriment of common people;
- Control of monopolies in the market;
- Prohibition of monopolistic trade practices in the market;
- Prohibition of restrictive trade practices in the market and,
- Prohibition of unfair trade practices.

This Act extended to whole of India except for Jammu and Kashmir[6] and was not applicable to certain establishments unless expressly directed by the Central Government. These establishments included[7]-

- Undertakings owned or controlled by the Government, Government Company, statutory corporation, or co-operative societies,
- Trade unions, and other related workmen or employee unions,
- Undertakings engaged in industry, whose control is with any person working for the central government,
- Financial institutions.

The MRTP Act made it compulsory for all enterprises that had assets of total value Rs. 20 crores or more to obtain approval from the Central government before they underwent any form of corporate restructuring or any proposed takeover. The MRTP Act brought under its ambit monopolistic, restrictive and unfair trade practices. Chapter IV of the Act covered monopolistic trade practices that were used by big enterprises to exploit their market position. The Act sought to curb all those activities that were ant-consumer which hampered or eliminated healthy competition in the market. Some big corporate houses restrict the flow of profits or capital back into the markets by restricting production or by controlling delivery channels. These acts when found to be committed by any enterprise was punished under the MRTP Act. Unfair trade practices arise when a firm indulges in providing misleading or false information about goods or services. All these practices were disallowed by the Act.

[5] Communication from India, Working Group on the Interaction between Trade and Competition Policy, WT/WGTCP/W/79 24 July 1998
[6] Monopolies and Restrictive Trade Practices Act, S.1, 1969
[7] Monopolies and Restrictive Trade Practices Act, S.3, 1969

The MRTP Act provided for the establishment of Commission of the MRTP, a regulatory body that dealt with the offences mentioned under the MRTP Act. It heard and decided cases that were in violation of the healthy competitive practices and committed offences mentioned in the Act.

In ***Tata Engineering and Locomotive Co. Ltd v. Registrar of Restrictive Trade Practices Agreement*** [8] **(TELCO case),** the territorial restriction imposed by TELCO to its dealers with regard to sales of Tata's vehicles was claimed as a restrictive trade practice. This called for the application of the Rule of Reason in this case and it was also the first time this rule was to be applied in an Indian case. The apex court decided that the said restriction could not be claimed a restrictive trade practice as its aim was to ensure equality in distributing goods in the country.

In ***Truck Operators Union v. Mr SC Gupta & Mr Sardar***[9] **(Sirmur Truck Operator's case),**the union in question fixed high freight rates for all non-member truck operators while members had only to pay lower rates. The court held that such a practice was restrictive as per the Act. The court issued cease and desist orders as it was unable to issue fines or penalty with its given jurisdiction.

The MRTP Act efficiently handled the issues that arose in the Indian markets until 1984. The Act was first amended in 1984 and Section 36A was added to the Act in tune with the recommendation of the Sachar committee. This amendment was set in place to protect consumers from deceptive and false advertisements.[10]The Act was amended for the second time in 1991 with the objective of extending the applicability of the Act to public sector undertakings and government companies as well. This amendment made it easy for private sector companies to venture into corporate restructuring without seeking the prior approval of the government. This move was welcomed as it facilitated easy transition towards adopting the New Economic Policy of 1991. The Amendment to the Act in 1991 was a strong step towards abolishing the License Raj in our country.[11]

With the opening up of the economy and influx of many new foreign companies to the Indian market, the MRTP Act was proving incapable to cater to the changing economic scenario in the country. The lacunae in the MRTP Act made it easy for market players to manipulate the

[8] 1977 AIR 973, 1977 SCR (2) 685
[9] 1995 3 CTJ 332 (MRTPC) 74
[10] Narayana Rao Rampilla, *Developing Judicial Perspective to India's Monopolies and Restrictive Trade Practices Act of 1969*, A, 34 Antitrust Bull. 655 (1989)
[11] Sarbapriya Ray; Ishita Aditya Ray, Emergence and Applicability of Competition Act, 2002 in *India's New Competitive Regime: An Overview*, 1 J.L. Pol'y & Globalization 15 (2011)

market and indulge in unfair competition rampantly. The amendments to the Act were not enough to tackle these issues. Various impediments finally led to the repeal of the MRTP Act.

Up until the 1991 amendment, it was very difficult for all businesses to expand their market due to the restrictions imposed by the Act. The mandatory permission to be obtained from the government prior to expansion was a clear show of the excessive power government had over the market. This hindered progress and resulted in uneasy business.[12] As mentioned above in the Sirmur Truck Operator's case[13], the MRTP Commission was ineffective in its operations. Even though it had administrative and judicial functions, the appointment of the members of the commission was done by the government and this resulted in bias and shone a negative light on its independent functioning. Moreover, their powers although seemingly pervasive, was very limited. Many a times, the decisions regarding disputes were made by the government, unaided and without waiting to seek an approval form the commission. There were unwanted delays in processes. This led to the commission becoming irrelevant and inessential.[14]

Another important reason for the repeal of MRTP Act was its superfluous and obsolete nature. The manifold growth in the Indian industrial sector and trade called for far more liberalistic and advanced provisions of law. The MRTP Act failed to deliver in that aspect and it subsequently led to its toppling.[15] The 1984 amendment placed concurrent jurisdiction on the Consumer Protection Act and the MRTP Act to deal with consumer complaints on account of deceiving advertisements by companies. This led to a side-track of the actual aim of the MRTP Commission and it was over burdened with consumer redressal cases.[16]

In ***DG v. Hindustan Lever Ltd (HLL)*[17],** a complaint was initiated on the disproportionate hike in prices of the products of the company. It was argued that this was done that profits would shoot up and their market share would in turn become higher. They claimed that it was a monopolistic trade practice, but the MRTP Commission overruled these contentions and held that mere high prices was not sufficient to prove that the company indulged in monopolistic

[12] Sahil Parikh, Background and Basics of Competition Law, S.H. Bathiya & Associates, Sept. 21, 2012
[13] Truck Operators Union v. Mr SC Gupta & Mr Sardar 1995 3 CTJ 332 (MRTPC) 74
[14] S. Chakravarthy, India's New Competition Act 2002 – *A Work Still in Progress*, 5 Bus. L. Int'l 240 (2004)
[15] Dorothy Shapiro, A Competition Act by India, for India: *The First Three Years of Enforcement under the New Competition Act*, 5 Indian J. Int'l Econ. L. 59 (2012)
[16] UK Essays, MRTP Act: Rise Fall and Need for Change: Eco Legal Analysis, November 2013.
[17] 2002 CTJ 61 (MRTP)

trade practices. Many other unfair judgements like these proved that the government's upper hand in the matters of the commission was detrimental to its proper functioning. [18]

One other disadvantage of the MRTP Act was that it had not explored the area of cartels. In ***DG (IR) v. Modi Alkali and Chemicals Ltd***[19]**,**an anonymous complaint was received stating that certain enterprises had joined together to form a cartel in order to create a clear and discreet scarcity of certain chemicals and to simultaneously raise prices by over 200% in the preceding 4 months. The DG reported that there was no cartel present in the said industry and the case was taken over by the MRTP Commission for further enquiry. The term cartel had not been defined by the Act, but the Commission defined it as "an association of producers who by an agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". In this case, lack of sufficient evidence prohibited the commission from holding anyone liable and it was subsequently dismissed. The study of cartels remained a grey area under the MRTP Act.

This downfall of the MRTP Act led to its repeal and replacement by the Competition Act in 2002. The MRTP Act proved incapable of fulfilling its true objective for which it was initially promulgated. It lacked in certain areas including that it was unclear about the international economic developments relating to competition law. There was a paradigm shift of focus of competition laws from curbing monopolistic practices to promoting healthy competition around the world. The political bias in the commission and its ineffective functioning called for a stronger law that restricted anti-competitive practices.[20]

COMPETITION ACT, 2002

With the gradual decline of the applicability of the MRTP Act, there was an urgent need to lay down new advanced legislations to cater to the growing needs of the market and the economy. Many committees were assigned with the task of making recommendations as to what can be done in this direction. The most prominent among these was the high level committee headed by Mr. S.V.S Raghavan, called the Raghavan Committee. The Raghavan Committee submitted

[18] Ajay Singh; Kiran Singh & Shashi Singh, Competition Policy & Anti-Trust Law in India: A Review, Vol. 3, ROM, 29-36, pg 31, 2013, http://mdrf.org.in/wp-content/uploads/2016/04/Review-of-Management-Vol.-3-No.-1-2-June-2013.pdf#page=29
[19] 2002, CTJ 459 (MRTP)
[20] Shreyaa Chaturvedi, Monopolies and Restrictive Trade Practices Act, 1970, iPleaders, (August 30, 2018) https://blog.ipleaders.in/mrtp/#_ftn29

its report in 1999 where the main points raised were centred on the setting up of the Competition Commission of India (hereinafter CCI) and the need for a uniform Competition law in India.

Following this report, a proposal for a new competition law was announced by the then Finance Minister of India, Mr Yashwant Sinha, in his budgetary speech in the Parliament. The Competition Act, 2002 was enacted by the Parliament of India and it replaced the Monopolies and Restrictive Trade Practices Act, 1969. The Act came into force in January 2003. The major loopholes present in the MRTP Act was to be covered under the various provisions of the Competition Act, 2002.

The key differences between the MRTP Act and the Competition Act can be highlighted thus[21]-

BASIS OF COMPARISON	**MRTP ACT**	**COMPETITION ACT**
Meaning	First competition law in India governing market rules and practices	Enacted to upkeep competition and fair practices
Nature	Reformatory in nature	Punitive in nature
Dominance	Determined by firm size.	Determined by firm structure.
Main focus	Consumer interest (generally)	Public (generally)
Offenses against principle of natural justice	14 offenses	4 offenses
Penalty	No penalty for offense committed	Offenses, if committed, are penalized
Objective	To control monopolies in the market	To promote competition in the market
Agreement	Requirement to be registered	No specific provision for registration of agreement

[21] Surbhi S, Difference between MRTP Act and Competition Act, Key Differences, March 2017, https://keydifferences.com/difference-between-mrtp-act-and-competition-act.html

Appointment of Chairman	By the Central Government	By the Committee

The Competition Act of 2002 was passed with the aim of ensuring sustainable competition in the market and to also consider the larger interests of the consumers. It also seeks to allow participants to trade with freedom. This Act is in effect now in deciding matters related to Indian Competition law. The Act was amended by the Competition Amendment Act, 2007 and became fully operational from June 1, 2011. The provisions regarding competition advocacy was notified in the Act in 2003, those regulating anti-competitive agreements and abuse of dominance were added in 2009 and those provisions regulating mergers and acquisitions were added to the Act in 2011.

The main objectives of the Act includes[22]-

- To prevent practices that have an adverse effect on competition;
- To promote and sustain healthy competition in markets between firms;
- To protect the interests of consumers in general;
- To ensure freedom of trade among firms;
- To provide framework for the establishment of the Competition Commission of India[23] and,
- To prevent monopolies and promote competition in the markets.

The broad framework of the Competition Act consists of four compartments-

- Anti-competition Agreements (Section 3)
- Abuse of Dominance (Section 4)
- Combination Regulation (Sections 5 & 6)
- Competition Advocacy (Section 49)

Anti- Competition Agreements: Anti-Competition Agreements are agreements that are entered into by two or more companies competing in the same market area to fix prices, reduce stocks etc., to manipulate the market conditions to their favour. Any agreement that has an

[22] Karney, Competition law in India, Legal Service India, https://www.legalserviceindia.com/legal/article-1814-competition-law-in-india.html
[23] Cleartax, https://cleartax.in/s/competition-act-2002, (last visited Aug 17, 2021)

appreciable adverse effect on competition in India is prohibited under the Act. According to S. 3 of the Act,

> *"No enterprise or association of enterprises or individuals or association of individuals may enter into an agreement regarding production, supply, distribution, storage, acquisition or control of goods or provision of services which may adversely affect the competition in the Indian market."*

Anti-competition agreements are also called Appreciable Adverse Effect on Competition agreements (AAEC agreement). These agreements are expressly void as per the provisions of the Act. The Act lays down provisions regarding both horizontal and vertical agreements. Horizontal agreements are those that are entered between parties in the same line of production. Vertical agreements are those which are entered into between non-competing undertakings operating in different levels of the manufacturing and distribution process[24]. Any agreement that results in the following are termed as AAEC agreements[25]-

- Directly affects purchase or sales prices;
- Indirectly affects purchase or sales prices;
- Limits production;
- Limits supply of commodities or services in the market;
- Limits provision of service in the market;
- Limits technical development in the processes used;
- Leads to collusive bidding or
- Leads to rigging of bids.

The MRTP Act was silent with regard to treatment of cartels but the Competition Act strictly prohibits the functioning and existence of cartels. The Competition Act discusses cartels and holds them invalid under the Act. In a particular case[26], the Builder's Association of India brought an information to the CCI that the Cement Manufacturer's Association and eleven cement manufacturing companies were found to have joined together to form a cartel for fixing prices and for limiting the production and supply of cement in the market. Here, the CCI

[24] Ajay R Kamath, *Notes on Competition Act*, https://www.srcc.edu/sites/default/files/B.com%20H_sem%20vi_Consumer%20affairs%20and%20Customer%20Care_Ms.%20Kavita%20Kamboj.pdf (last visited Aug 17, 2021)
[25] Cleartax, https://cleartax.in/s/competition-act-2002 , (last visited Aug 17, 2021)
[26] Case No 29/2010, CCI Order Date 20th June, 2012

imposed a penalty of Rs. 6,714 crores on the companies and held that cartels are a form of AAEC agreements.

Abuse of Dominant Position: Abuse of dominant position is prohibited by S. 4 of the Competition Act. According to the section,

> *"(2) 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*
>
> *(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."*[27]

Dominant position is a position of strength and power that is enjoyed by an enterprise in its relevant market in India. As per the provisionsof the Act, when an enterprise enjoys a dominant position, it operates independently of the various competitive forces in the market and thus affects or influences the competition, consumer or the relevant market to its favour.[28] Relevant market in this context can either be a relevant product market or a relevant geographical market.

The ***NSE-MCX case,*** or popularly known as the ***'stock exchange case'***[29] was the first case decided by the CCI in which a penalty of Rs. 55.5 crores was imposed on the National Stock Exchange (NSE) for actively abusing its dominant position in the stock exchange market. The

[27] Competition Act, S. 2, 2002
[28] Cleartax, https://cleartax.in/s/competition-act-2002, (last visited Aug 17, 2021)
[29] Case No. 13/2010, decided on 25.05.2011

NSE had indulged in the practice of predatory pricing by which goods or provisions of services were sold at a price which was below the actual cost to reduce competition in the market. The NSE had also abused its dominant position to protect its interests in other relevant markets.

Anti-competitive agreements and abuse of dominant position are different from each other. In anti-competitive agreements, it is necessary to have two or more parties to the agreement. It can be between any enterprises of firms and there is no compulsion that the dominant firm must also be a party to the agreement. In the case of abuse of dominant position, it can be done by a single party alone and it is necessary that the said party has a dominant position in the relevant market. In cases involving the question of abuse of dominant position, the duty of the CCI is to establish that the enterprise is in a dominant position and that it has done any of the acts mentioned in S. 4 (2) of the Act in the relevant market.[30]

Combination Regulation: Under the Competition Act, the term combination has a broad definition. It encumbers acquiring of one or more enterprises by another through mergers or amalgamation or through control over those enterprises. For a combination to be valid, certain prescribed monetary thresholds have to be met and must also involve-

- any acquisition or takeover of shares;
- acquisition of voting rights;
- control of assets and
- being a party to the merger or amalgamation of the enterprises.

Any person or enterprise shall not venture into any combination that is likely to have an adverse effect on competition and even if entered into, it shall be void. There are certain monetary thresholds that are mentioned in the Act with respect to which combinations can be made. If any person or any enterprise proposes to enter into a combination with another enterprise(s), it has to intimate the same to the Competition Commission of India within 30 days of seeking approval for the said merger or amalgamation from the Board of Directors of the enterprises involved and execution of any agreement pertaining to acquire control. Enterprises whose total value and having turnover less than Rs. 750 crores and enterprises having assets less than Rs.

[30] Vijay Kumar Singh, Competition Law and Policy in India: *The Journey in a Decade*, NUJS L. Rev. 523, MANUPATRA, (Dec. 2011), http://docs.manupatra.in/newsline/articles/Upload/79028C30-E976-4144-B717-D63B881BE589.pdf

250 crores in India are exempted from the application of Section 5 of the Act for a period of five years.[31]

Section 6 of the Act regulates combinations and it clearly states that enterprises shall not enter into combinations that will have an adverse effect on competition. The CCI is empowered to look into such transactions that it finds to be AAEC. Time is of essence in mergers and acquisitions. The Act provides for a 210 days period for finalizing a merger case. In case the time lapses, the merger is deemed to be approved. The Commission is looking towards reducing this period to 180 days so as to rule out apprehensions about delay.[32]

Competition Advocacy: Competition advocacy is an important part of the present Competition Act as it lays down solutions as to how to adapt to the undergoing market changes. It has two dimensions- first being the role of the CCI as a consultant to government and related machinery on the implications of competition machinery and second being the need for increased public understanding and acceptance of competition principles. One of the unique features of the Competition Act is that it formally provides for the promotion of competition advocacy, for creating awareness and for imparting training about competition issues.[33] There is a growing need to make the general public understand the basics of competition law in our country and this was the central aim of the CCI since its inception for up to 7 years of its existence. It undertakes various programmes for public awareness of the CCI and its functions and to also understand the various provisions of law relating to competition policy.

The Competition Act of 2002 has undergone amendments twice, once in 2007 and again in 2009. After these amendments, the Act became fully functional from June 1, 2011. This Act is not applicable to rights that are protected as intellectual property rights and to agreements that are exclusively designed for experts.[34] Competition (Amendment) Bill of 2020 has been drafted based on the recommendations of the Competition Law Review Committee, keeping in view the need for a robust framework to adapt to the growth of newer and disruptive business

[31] S.O. 482(E) dated 04.03.2011
[32] Competition Act, S. 5, Regulation 28(6), 2002
[33] Competition Act, 2002, S. 49(3)
[34] Ajay R Kamath, Notes on Competition Act, https://www.srcc.edu/sites/default/files/B.com%20H_sem%20vi_Consumer%20affairs%20and%20Customer%20Care_Ms.%20Kavita%20Kamboj.pdf (last visited Aug 18, 2021)

models.[35] The Bill aims towards bringing prominent changes in the various spheres of operation of the Competition Act.

COMPETITION LAW PRACTICE

The Competition Commission of India was established under the Competition Act, 2002. It is a statutory body that governs and enforces the Competition Act and has the power to impose penalty on commission of offences under the Act. The CCIinitially did not depart from the structure of the MRTP Commission, the only difference being that the CCI had various branches. There have been discussions as to whether the CCI is a judicial, quasi-judicial, administrative tribunal or expert body. It is settle now that the CCI is a judicial body which has the same powers as that of a civil court in competition law affairs.[36] The CCI is an affiliated office of the Ministry of Corporate Affairs under the Government of India.

The CCI is composed of a Chairman and a minimum of two Board members and a maximum of six Board members including industry or trade specialists. The members are required to have a minimum of fifteen years of experience in their respective fields and are appointed by the Central Government. Post the 2007 Amendment, separate offices of the Director General (DG) and other such officers was created to assist in the proper functioning of the CCI. The powers and duties of the CCI are enumerated in the Competition Act, 2002. The Competition Act also provided for the Competition Appellate Tribunal (CompAT) with a Chairperson who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court and two members with professional expertise. The Act has been amended since and the Appellate Tribunal has ceased to exist. Its functions are now carried on by the National Company Law Appellate Tribunal (NCLAT).[37] The main functions of the CCI are-

- regulating the market scenario and ensuring healthy competition takes place between competing enterprises;
- regulating and prohibiting anti-competitive agreements;

[35] Devika Sharma, Introduction of Competition (Amendment) Bill, 2020: *A step towards revamping Indian Market*, SCC Online, May 6, 2020, https://www.scconline.com/blog/post/2020/05/06/introduction-of-competition-amendment-bill-2020-a-step-towards-revamping-indian-market/ (last visited Aug 18, 2021)
[36] Competition Act, 2002, S. 36
[37] Susmit Pushkar, Sakshi Agarwal, Aman Singh Baroka, Megna Sundar, *Compat No More: NCLAT Marches* On, mondaq, June 2017, https://www.mondaq.com/india/antitrust-eu-competition-/599508/compat-no-more-nclat-marches-on (last visited Aug 18, 2021)

- regulating and prohibiting any abuse of dominant position by firms or enterpirses;
- regulating combinations;
- promoting competition advocacy and,
- act as an advisor to the government and other stakeholders of the economy.

In ***Brahm Dutt v. UoI***[38], the constitutional validity of the appointments of the various Committee membersunder the new Competition Act was challenged. The Supreme Court while upholding the appointment of experts held that it was a common practice in other jurisdictions as well to do so. Moreover, if the decision of the CCI was unsatisfactory, there was a provision for appeal where the Chairperson was retired Judge. Thus, the appointments were held constitutionally valid.

CHALLENGES TO COMPETITION LAW

Although the Competition Act, 2002 has played a major role in regulating Indian markets by filling in the lacunae of the MRTP Act, there are still some bottlenecks in the path of its precision of action[39]-

- *Pending cases from MRTP*- There was a hiatus when the MRTPC was dissolved and a majority of the pending cases were transferred to the CCI. This was a very difficult time for the Commission as it had to decide all these cases.
- *Retrospective application of the Act*- There have been several debates over the retrospective application of the Competition Act. It was held in a few cases like the ***CCI v. SAIL***[40]etc.that all matters since the inception of the Act will fall under its ambit and no other cases would be eligible to be looked into under the provision of the Competition Act, 2002.
- *Procedural Challenges*- Although the CCI had the power to evolve its own procedure to discharge its functions, there were a lot of problems that were raised with regard to its procedures. The power of the CCI in appointing the DG to investigate the SAIL case[41] was challenged before the CompAT. The CCI's power to determine questions of

[38] (2005) 2 SCC 431; MANU/SC/0054/2005
[39] Vijay Kumar Singh, *Competition Law and Policy in India: The Journey in a Decade*, , NUJS L. Rev. 523, MANUPATRA, (Dec. 2011), http://docs.manupatra.in/newsline/articles/Upload/79028C30-E976-4144-B717-D63B881BE589.pdf (last visited Aug 18, 2021)
[40] (2010) 10 SCC 744
[41] CCI v. SAIL, (2010) 10 SCC 744

jurisdiction was also under constant scrutiny. Despite the power of the CCI to pass interim orders and impose penalties, it was a tedious task to fix suitable penalties in numerous cases with the presupposing condition that the power to pass interim orders were to be used "sparingly and under exceptional circumstances"[42].

- *Confidentiality*- The CCI constantly attempts to keep a balance between confidentiality and disclosure of information of parties for the benefit of others. The CCI is bound to maintain such balance as per Section 57 of the Competition Act.
- *Protecting the Interests of the Consumer indirectly*- The CCI plays a major role along with Consumer Protection Forums to protect the interest of the consumers by prohibiting anti-competitive conduct and abuse of dominance, regulating mergers and forestalling market failures, ultimately protecting the interest of consumers.
- *Private Enforcement Issues*- The primary objective of private enforcement is to make good the loss of the injured party through compensation secured from the infringing party for injuries suffered due to anti-competitive practices. One major challenge to the CCI in this issue is fixing the amount of compensation.
- *Law Enforcement Issues*- Various cases before the CCI have brought several law enforcement issues. There have been debates over the 'per se' and 'rule of reason' tests under the Act. The scope of the term AAEC has also been dealt with in particular. Similarly, there have been several issues in relation to the abuse of dominant position by various business houses in the relevant market.
- *Harmonising Sectoral Overlaps*- There are various other legislations in India that regulate the functioning of various other market and industrial activities, like the Reserve Bank of India (RBI), Telecom and Regulatory Authority of India (TRAI), Insurance Regulatory and Development Authority (IRDA) etc. There is a high possibility for conflict of jurisdictions of these legislations with the Competition legislation.
- *Extraterritorial Application of the Act*- There have been no reported cases that will bring about the necessity of applicability of the Competition Act in other international jurisdictions as of now, but with the increasing number of multinational or transnational companies operating in India, and cross-border mergers taking place, the need for its extra territorial jurisdiction will come to the limelight.

[42] Supra

- *Keeping at parwith the developing Competition law jurisprudence across various jurisdictions.*
- *Incorporation of "competition culture" in the economy*-This is possible through training and equipping lawyers, judges, officers etc. with the essence of competition law and its policies and by creating awareness among market players about the existence and implications of various provisions of competition law.

CONCLUSION

After nearly two decades of its enactment, the Competition Act is still in the developmental stage. But tracing the course of the evolution of competition law in our country, it can be confidently said that India has shown tremendous improvement. There are still various aspects that has to be looked into in the competition regime by the CCI and other affiliated authorities. Competition advocacy and proper implementation of competition law is necessary to realise the true objects of the Act. Indian competition regime still has to undergo several developments to keep at par with the evolving international competition jurisprudence and to realise the motto of the Act, "FAIR COMPETITION".