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## Protection Against Predatory Practices – A Critical Analysis of Antitrust Laws in India

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*The need for antitrust laws has been controversial among businesspersons since time immemorial. In fact, many renowned authors and businesspersons have referred to the existence of such laws to be problematic owing to it charging individuals for simply being successful.<sup>1</sup> However, it is important to understand that in the hands of the success of one such individual who has established a monopoly lies the losses of not just hundreds of innocent consumers but also several other companies who could have made a living for themselves. Antitrust laws were created by governments to protect customers from predatory businesses while also protecting businesses by ensuring fair competition.<sup>2</sup> While most nations have sufficient laws in place to explicitly prohibit such practices, inadequacies are bound to creep in. Such inadequacies were seen to be evident when certain companies like Reliance Industries, the Vedanta Group, or Bajaj Auto have been seen to be at their peak in having a dominant position in the market.<sup>3</sup> This dominant presence results in the establishment of a monopoly which defeats the entire purpose of having antitrust laws in the first place.<sup>4</sup> In light of the above developments in the field of antitrust law, this paper aims to analyse the*

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<sup>1</sup> Anu Bradford, 'Antitrust Law in Global Markets' [2012] Research Handbook on The Economics of Antitrust <[https://scholarship.law.columbia.edu/faculty\\_scholarship/1976/](https://scholarship.law.columbia.edu/faculty_scholarship/1976/)> accessed July 30 2021

<sup>2</sup> James Chen, 'Understanding Antitrust Laws' (*Investopedia*, 2021) <<https://www.investopedia.com/ask/answers/09/antitrust-law.asp>> accessed July 30 2021

<sup>3</sup> Prosenjit Datta, 'Market dominance and Antitrust laws in US and India' (*The Indian Express*, 2020) <<https://www.newindianexpress.com/opinions/2020/sep/24/market-dominance-and-antitrust-laws-in-us-andindia-2201129.html>> accessed July 30 2021

<sup>4</sup> *Ibid*

*antitrust laws of India. Further, this paper aims to make observations and suggestions to understand what changes are required for adequate enforcement of antitrust laws in India.*

**Keywords:** *antitrust laws, enforcement, fair competition, investigation.*

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## INTRODUCTION

Antitrust laws exist to help regulate the open market. They are often referred to as competition laws as they help deter anti-competitive elements. They ensure the existence of fair competition in an open-market economy while also preventing any predatory practice that is detrimental to market and consumer interests.<sup>5</sup> Antitrust laws around the world have become more complex and regulatory, thereby restricting companies at large. Compliances stemming from various domestic antitrust laws often force companies to undertake considerable risks in the form of transactional costs, delays and uncertainties.<sup>6</sup> However, it is important to consider that these laws play a substantial role in mitigating negative externalities.<sup>7</sup>

**Antitrust laws generally deal with the following types of violations:**

- Monopolisation
- Price Discrimination
- Price Maker
- Predatory Pricing
- Cartels
- Bid Rigging

Countries around the globe have different motivations underlying their need to adopt antitrust laws. Some may adopt such rules to foster domestic competition, while others may

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<sup>5</sup> 'Antitrust Law: Definition, Types & Outline' (*Study.com*, 2014) <<https://study.com/academy/lesson/antitrust-law-definition-types-outline.html>> accessed July 30 2021

<sup>6</sup> Frederic M Scherer, *Competition Policies for an Integrated World Economy* (Brookings Institution 1994)

<sup>7</sup> Henrik Horn and James Levinsohn, 'Merger Policies and Trade Liberalisation' (2001) 111 *The Economic Journal* <<https://www.jstor.org/stable/2667864>> accessed August 01 2021

simply wish to further domestic welfare.<sup>8</sup> On many occasions, countries adopt certain antitrust statutes to cater to dynamic changes taking place in their economy.<sup>9</sup> For instance, Latin American nations began to prioritize privatization after realizing the underlying harms of import substitution, price control, and excessive reliance on state-owned enterprises.<sup>10</sup> Such radical changes in economic philosophy give rise to the need for a regulatory framework for the same. This is where there is a substantive role played by antitrust laws.

## BRIEF HISTORY

India had seen the birth of antitrust laws in the year 1969 with the Monopolies and Restrictive Trade Practices Act (MRTP Act).<sup>11</sup> The primary intention underlying this legislation was to put a regulatory framework in place to uphold public interest and prevent monopolies from taking undue advantage of the market. Further, with the liberalization of the economy in 1991, the need for an antitrust regime was dire. In furtherance of the same, the Competition Act of 2002 was enacted by the parliament to better regulate businesses in India. This Act was to prevent all practices which are capable of adversely affecting competition in India, thereby having a larger implication on the economy and public.

**The primary focus of the Competition Act is the following:<sup>12</sup>**

- Anti-competitive agreements
- Abuse of power (Monopolization)
- Mergers, acquisitions, and amalgamations

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<sup>8</sup> Eleanor M Fox, 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways' (2000) 75 NYU L Rev <<https://www.nyulawreview.org/issues/volume-75-number-6/antitrust-and-regulatory-federalism-races-up-down-and-sideways/>> accessed August 01 2021

<sup>9</sup> Keith Hylton and Fei Deng, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and their Effects' (2007) 74 Antitrust LJ 1

<sup>10</sup> Clive S Gray and Anthony A Davis, 'Competition Policy in Developing Countries Pursuing Structural Adjustment' (1993) 38 Antitrust Bull 1

<sup>11</sup> Suni pun, 'History and Development of Competition Law in India' (*iPleaders*, 2017) <<https://blog.iplayers.in/competition-law-india/>> accessed August 01 2021

<sup>12</sup> Competition Commission of India, 'Introduction to Competition Law' (*cci.gov.in*, 2021)

<[https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/CCI%20Basic%20Introduction\\_0.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf)> accessed August 01 2021

The Competition Act came into force in 2009 after the Competition (Amendment) Act, 2007, with regard to anti-competitive agreements and abuse of power.<sup>13</sup> However, merger-related provisions were not imbibed in the Act and brought into force until the year 2011.<sup>14</sup>

## COMPETITION COMMISSION OF INDIA

With the enactment of the Competition Act, 2002 came a new authority to replace the Monopolies and Restrictive Trade Practices Commission. This authority is referred to as the Competition Commission of India (CCI). *Chapter 3* and *4* of the Act govern the functioning of the CCI.<sup>15</sup> The composition of the CCI is a chairperson along with two to six members appointed by the Government of India. However, as of 2021, the composition of the CCI is five members, including the chairman. The current chairman of the CCI is Ashok Kumar Gupta, while the Secretary is P. K. Singh.<sup>16</sup>

In furtherance of enforcing the Competition Act, 2002, the CCI must first initiate an inquiry on the basis of existing information either they possess or have received from the government/statutory authority. Individuals may also file a complaint if they believe violations pertaining to the Competition Act are taking place. The Office of the Director-General has the power to investigate, carry out 'dawn raids' and submit a report of all findings on the basis of which the CCI will make recommendations.<sup>17</sup> Subsequently, the CCI may pass orders as it deems fit after hearing the parties. If the parties are dissatisfied with the order they have received, they may appeal to the Competition Appellate Tribunal (COMPAT). The subsequent level of appeal after COMPAT is the Supreme Court of India.

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<sup>13</sup> Himanshu Handa, 'Evolution of Competition Law in India' (2019) 5 International Journal of Socio-Legal Research

<sup>14</sup> *Ibid*

<sup>15</sup> Leela Kumar, 'MRTP Commission and Competition Commission of India' (2014) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2429261](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2429261)> accessed August 06 2021

<sup>16</sup> Kumar Mukesh and Singla Naresh Lata, 'Competition Commission of India in Era of Liberalization and Globalization (2017) 7 ZENITH International Journal of Multidisciplinary Research

<sup>17</sup> Cyril Shroff and Nisha Kaur Uberoi, 'Competition Commission of India: Institutional Design and Decision Making' (2014) 10 Competition Policy International Journal 1

<<https://www.competitionpolicyinternational.com/competition-commission-of-india-institutional-design-and-decision-making/>> accessed August 08 2021

## ANTI-COMPETITIVE AGREEMENTS

Regulation of anti-competitive agreements refers to an active prohibition on entering into an agreement of such character. The legal provision pertaining to the same can be found in *Section 3* of the Competition Act, 2002.<sup>18</sup> The Competition Act regulates anti-competitive agreements of two types:

### *Horizontal Agreements*

Such anti-competitive agreements are entered into by competitors. The Competition Act provides an exhaustive list of the agreements that fall within the bracket of horizontal agreements.<sup>19</sup> Such Agreements are often referred to as cartel arrangements which are further divided into four sub-types:<sup>20</sup>

- Price-fixing Arrangements
- Agreements to limit or control production, supply, or markets
- Market-sharing Agreements
- Bid-rigging Agreements

It is pertinent to note that the law in India does not presume that horizontal agreements cause Appreciable Adverse Effect on Competition (AAEC) if the same is entered into by the formation of joint ventures, especially if the same results in the inefficacy of production, supply, distribution, storage, acquisition or control of commodities and/or services.<sup>21</sup>

### *Vertical Agreements*

Such anti-competitive agreements are entered into by enterprises or persons at different stages or levels of the production chain. The Competition Act provides an inclusive list of the

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<sup>18</sup> Rajat Sethi and Simran Dhir. 'Anti-Competitive Agreements Under the Competition Act, 2002' (2012) 24 National Law School of India Review 1

<sup>19</sup> Shobith Sachan, 'Horizontal Agreement' (2014) SSRN  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2390193](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390193)> accessed August 08 2021

<sup>20</sup> Sumita Patwari, 'Competition Law - A Trans-National Perspective' (2014) SSRN  
<<https://ssrn.com/abstract=2381195>> accessed August 06 2021

<sup>21</sup> *Ibid*

different acts that are prohibited in vertical agreements. This includes tie-in, resale price maintenance, refusal to deal, exclusive supply agreements, and exclusive distribution agreements.<sup>22</sup>

Further, it is pertinent to note that there where there is no presumption pertaining to Appreciable Adverse Effect on Competition (AAEC), the vertical agreement is not prohibited. The 'rule of reason' test is used in assessing whether a particular agreement constitutes a vertical agreement that poses an Appreciable Adverse Effect on Competition (AAEC). The assessment of such an agreement may also involve the CCI looking into the factors given in *Section 19(3)* of the Competition Act.<sup>23</sup> These factors include:<sup>24</sup>

- Creation of barriers or obstructing entry into the market;
- Driving out existing competitors;
- Accrual of benefits to customers;
- Production and distribution changes and improvements;
- Promotion of technical, scientific, and economic development.

Essentially, it has been observed that the constitution of the below five elements is required to establish a violation of the Competition Act:<sup>25</sup>

- The agreement must be among enterprises or persons;
- The parties are at different stages or levels of the production chain (i.e. production, distribution, supply, storage, sale, and the like);
- The parties belong to different markets;

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<sup>22</sup> Vikas Kathuria, 'Vertical Restraints under India Competition Law: Whither Law and Economics' (2021) *Journal of Antitrust Enforcement* <<https://doi.org/10.1093/jaenfo/jnab002>> accessed August 06 2021

<sup>23</sup> Yaman Verma, 'Vertical Agreements in Indian Competition Law – Shardul Amarchand Mangaldas & Co' (*Amsshardul.com*, 2021) <<https://www.amsshardul.com/insight/vertical-agreements-in-indian-competition-law/>> accessed August 06 2021

<sup>24</sup> Tilottama Raychaudhuri, 'Vertical Agreements in Competition Law: Striking the Right Balance between Regulation and Competition' (2010) *The West Bengal National University of Juridical Sciences* <<https://nujs.edu/workingpapers/vertical-agreements-in-competition-law-striking-the-right-balance-between-regulation-and-competit.pdf>> accessed August 08 2021

<sup>25</sup> Rahul Rai and Gaurav Bansal, 'Cases and Precedents: Vertical Restraints' (2020) *Global Competition Review* <<https://www.azbpartners.com/bank/cases-and-precedents-vertical-restraints/>> accessed August 08 2021

- The constituents of the agreement contain the violable elements mentioned in *Section 3(4)* of the Competition Act;
- The constituents of the agreement are capable of causing an Appreciable Adverse Effect on Competition (AAEC).

The CCI has often pointed out that the parties to the agreement must have substantial power for there to be an adverse impact on the market. The most recent penalty imposed by CCI was pertaining to exclusive agreements made pertaining to the supply of automobile spare parts.<sup>26</sup> Similarly, the CCI has also clarified that it need not be necessary for an agreement to be strictly classified as horizontal or vertical as long as it causes an Appreciable Adverse Effect on Competition (AAEC); the same is punishable.<sup>27</sup>

### **ABUSE OF DOMINANT POWER**

Enterprises are not permitted to enjoy any form of a 'dominant position' in India. The Competition Act explicitly prohibits abuse of such power under *Section 4*. The Act defines an enterprise exercising a 'dominant position' to include enterprises that impose unfair or discriminatory:

1. *Conditions in the purchase of goods or services; or*<sup>28</sup>
2. *Price in the purchase or sale (including predatory pricing) of goods or services.*<sup>29</sup>

It can be understood from the above definition that there are no particular criteria but an inclusive list for determining whether an enterprise is enjoying a dominant position in the relevant market. The CCI may also consider factors like the size, importance, resources, and

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<sup>26</sup> *Shri Shamsher Kataria v Honda Siel Cars India Ltd and Ors* Case No 03/2011 (2014)

<sup>27</sup> Samir Gandhi and others, 'Antitrust and Competition Laws in India' (*Global Compliance News*, 2021)

<<https://www.globalcompliancenes.com/antitrust-and-competition/antitrust-and-competition-in-india/>>

accessed August 06 2021

<sup>28</sup> Competition Act 2002, s 4

<sup>29</sup> *Ibid*

market share of the enterprise when determining whether it enjoys a dominant position capable of abuse of power.<sup>30</sup>

Section 4 provides a list of the kind of behaviour necessarily constitutes as abuse of this power held by the enterprise in a dominant position:<sup>31</sup>

- Imposition of unjust or discriminatory conditions when engaging in the sale or purchase of goods or services (including predatory pricing).
- Placing limitations or restrictions on production.
- Placing limitation or restrictions on technical or scientific development which can prejudice consumers.
- Make parties accept obligations that they otherwise have no connection with.
- Use power to enter another market or protect other enterprises.

It is pertinent to note that discriminatory pricing is permissible under conditions wherein such techniques are used to meet the competency standards in the market.<sup>32</sup> Further, the Act has laid down no definition or parameters for what constitutes unfair or discriminatory pricing. Therefore, the CCI has played a significant role in investigating the meaning and application of the same.

Another avenue of CCI interference and enforcement in abuse of power or this dominant position pertains to what the 'relevant market' of that particular enterprise constitutes. Without understanding the relevant market of the enterprise, it becomes difficult to ascertain whether or not they hold a dominant position that they are abusing. The CCI leans towards giving the narrowest definition to 'relevant market'. In the *DLF case*, the CCI attempted to define the relevant market for the real-estate company.<sup>33</sup> The CCI made a distinction stating

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<sup>30</sup> Zisha Rizvi, 'Decrypting the Concept of Abuse of Dominant Market Position: Trends in India and EU' (2020) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3578864](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3578864)> accessed August 06 2021

<sup>31</sup> Vijay Kumar Singh, 'Competition Law: Dominant Position and Its Abuse: Identification of Abusive Use of Dominant Position' (2017) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2973781](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2973781)> accessed August 06 2021

<sup>32</sup> Preeti Maderna 'Corporate Laws: Abuse of Dominance' (2017) 3 Amity International Journal of Juridical Sciences

<sup>33</sup> *Belaire Owner's Association v DLF Ltd and Ors* Case No 19 of 2010 (2011)

that high-end and low-end residential apartments constitute two separate markets.<sup>34</sup> Further, the CCI has also held that the CCI does not have to carry out a market analysis as the statute provides a *prima facie* prohibition of abuse of dominant position. However, the CCI has consistently analysed market effects prior to giving their order on cases pertaining to violation of *Section 4* of the Competition Act, 2002.<sup>35</sup>

## COMBINATIONS

Antitrust law in India did not cater to protection against enterprise combinations in the form of acquisitions, amalgamations, and mergers until June 1, 2011. *Section 5* and *6* of the Competition Act and Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 include the legal provisions underlying the merger control regime in India.<sup>36</sup> They lay down the procedure for engaging in combinations. The same was amended on April 4, 2013.

## TRANSACTIONS EXEMPTED FROM FILING

There exists a certain classification of transactions that do not require prior notification to be filed. The details of the same can be found in Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. Such transactions are popularly known to not cause any Appreciable Adverse Effect on Competition (AAEC).<sup>37</sup> These transactions include the following:<sup>38</sup>

- When shares or voting rights are acquired as an investment or as a transaction in the ordinary course of business, however, the value of the shares or voting rights in the

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<sup>34</sup> *Ibid*

<sup>35</sup> R L Koul and Priya Prasad, 'An Analysis of the Abuse of Dominant Position by the E-Commerce Retailers in India' (2017) *Amity International Journal of Juridical Sciences* 1

<sup>36</sup> Shivam Goel, 'Regulation of Combinations under the Competition Law in India' (2014) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2485557](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485557)> accessed July 31 2021

<sup>37</sup> Harshita Srivastava and others, 'Permissible Combinations – Legal Perspective' (2010) *Competition Law Reports* <[http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Articles/Permissible%20Combinations%20Legal%20Perspective.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Permissible%20Combinations%20Legal%20Perspective.pdf)> accessed July 21 2021

<sup>38</sup> Tanaya Sanyal and Sohini Chatterjee, 'Combination Control: Strengthening the Regulatory Framework of Competition Law in India?' (2012) 5 *NUJS L Rev* 1

hands of the acquirer must be less than 25% of the total shares or voting rights of the company. The acquisition must also be in accordance with the governing instrument of the company.

- When the particular acquisition of shares or voting rights does not result in depriving the company of more than 5% of the shares or voting rights in the financial year, this is applicable when the acquirer is already in possession of more than 25% but less than 50% of the existing shares or voting rights. However, if this acquisition results in sole or joint control, the same is subject to CCI approval.
- When the acquisition is being made by a party that already possesses 50% of shares or voting rights, however, if this acquisition results in sole or joint control, the same is subject to CCI approval.
- When the acquisition is made as an investment or in the ordinary course of business or is not affiliated with the business operations of the party if such acquisition does not result in a substantial takeover of a particular location, the same does not require a pre-notification.
- When a previously filed notification with CCI is being renewed or amended.
- When current assets like raw materials or spares are being acquired in the ordinary course of business.
- When shares or voting rights are acquired owing to existing bonus issues, stock split, rights issue, buy back, or consolidation. However, if this acquisition results in sole or joint control, the same is subject to CCI approval.
- When the acquisition is being made by a securities underwriter or stockbroker.
- When the acquisition is not made by an enterprise controlled by enterprises that do not belong to the same group.
- When the merger or amalgamation is by a party that already has more than 50% of the shares or voting rights of the other enterprise/enterprises, however, if this acquisition results in sole or joint control, the same is subject to CCI approval.

The most recent amendment to the Regulations was made on March 28, 2014.<sup>39</sup> The primary change made pertained to how the CCI will now take cognizance of combinations that take place entirely outside India, even if their effect on Indian markets is insignificant.<sup>40</sup>

## FILING REQUISITES

Transactions that satisfy the following requisites must mandatorily file their merger with the CCI:<sup>41</sup>

- Cumulative assets in India amount to more than INR 60 billion;
- Turnover in India exceeds INR 180 billion;
- Possession of non-Indian assets values greater than USD 3 billion (however, the same must be inclusive of asset value worth a minimum of INR 7.5 billion in India);
- Turnover from outside India exceeds USD 9 billion (however, the same must be inclusive of a turnover value worth a minimum of INR 22.5 billion in India);
- If the parties to the transactions possess assets in India worth more than INR 15 billion;
- If the parties to the transactions have an existing turnover in India worth more than INR 45 billion;
- If the parties to the transactions possess assets internationally worth more than USD 750 million (however, the same must be inclusive of asset value worth a minimum of INR 7.5 billion in India); or
- If the parties to the transactions have a turnover from outside India exceeding USD 2.25 billion (however, the same must be inclusive of a turnover value worth a minimum of INR 22.5 billion in India).

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<sup>39</sup> Sparsh Agarwal, 'Comprehending Combination Under Competition Law' (*iPleaders*, 2020) <<https://blog.ipleaders.in/comprehending-combination-competition-law/>> accessed August 6 2021

<sup>40</sup> Nishant Pande and Urja Dhapre, 'The Curious Case of Composite Combinations under the Indian Competition Law Regime' (*Kluwer Competition Law Blog*, 2019) <<http://competitionlawblog.kluwercompetitionlaw.com/2019/12/05/the-curious-case-of-composite-combinations-under-the-indian-competition-law-regime/>> accessed August 6 2021

<sup>41</sup> Viswanath Pingali and others, 'Competition Law in India: Perspectives' (2016) Sage Journals <<https://doi.org/10.1177/0256090916647222>> accessed August 6 2021

- It is pertinent to note that any transaction which qualifies under the *de minimis* test need not require official filing with the CCI. The *de minimis* test requires that the target:<sup>42</sup>
- Possess assets in India worth less than INR 2.5 billion; or
- Accrue a turnover in India worth less than INR 7.5 billion.

With regard to mergers or amalgamations, the pre-notification must be made within 30 days after the Board of Directors has approved the same. However, with regard to acquisitions, the pre-notification is to be made within 30 days after execution of the binding instrument that affirms the desire for acquisition. It is pertinent to note that there may exist an instance where the parties may not have drawn up a binding instrument but may have communicated their intention to engage in the combination to the Government (Central Government, State Government, or statutory authority). This date of this communication will mark the commencement of the 30-day time period given to provide the pre-notification.<sup>43</sup>

In the instance that the takeover is hostile in nature, the notification to the CCI must be made within a period of 30 days after the execution of a document that verifies the acquirer's intention to take over. If the parties do a transaction failed to notify the CCI of their combination, the CCI still holds power to initiate any investigations with regards to the operations taking place within this combination. The CCI is empowered under the Act for one year after the combination has officially taken effect.<sup>44</sup>

The responsibility of providing a notification to the CCI lies in the hands of the acquirer in case there is an acquisition taking place. However, in the instance of mergers or amalgamation, there is a joint responsibility conferred on all parties. The notification provided by parties must be in consonance with the forms provided in the Regulations. Form I is shorter than Form II. The fee correlating with Form I is INR 1.5 million, and for Form II INR 5 million. The latter

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<sup>42</sup> Shreeya Prabhakar Tambe, 'Procedure for Investigation of Combination by the Competition Commission of India under the Scheme of the Act' (2021) 4 International Journal of Law Management and Humanities

<sup>43</sup> Aditya Bhattacharjea, 'India's New Competition Law: A Comparative Assessment (2008) 4 Journal of Competition Law & Economics 1

<sup>44</sup> *Ibid*

requires the provision of extensive details and documents pertaining to not just the transaction but also the parties and relevant markets.

The CCI generally recommends the parties to fill up Form two in the following instances:<sup>45</sup>

- Horizontal combinations that give rise to a combined market share of 15% or more in the relevant market.
- Vertical combinations give rise to a combined or individual market share of 25% or more in the relevant market.

It is pertinent to note that the CCI is not restricted by the information requisites within the forms. They may ask for any information that they require to understand the transaction better prior to giving it their approval. The CCI also asked the parties to file Form II if they feel that Form I is insufficient.<sup>46</sup> Banks, public financial institutions, foreign institutional investors, and venture capital funds are provided certain benefits in light of not having to uphold the same filing requirements if the acquisition pertains to the enforcement of a loan agreement or other financial agreements. Notification to the CCI in Form II is required within seven days after the transaction is completed.<sup>47</sup>

## REVIEW BY CCI

Interference from the CCI is fairly uncommon unless they have observed that the combination is likely to cause an Appreciable Adverse Effect on Competition (AAEC). To get a better understanding of whether this particular transaction is capable of having an adverse effect on the relevant market, the Competition Act has a tested and researched within it. The 'effects test' aims to directly analyse the economic effects of the particular combination along with several other factors that are explicitly mentioned within the Competition Act. These

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<sup>45</sup> Bobby Maharaj and Mahendra Reddy, 'To Clear or Not: Examination of Mergers and Acquisition Cases from Small Economies' (2012) 5 International Journal of Economics and Finance 1

<sup>46</sup> Sivani KMS, 'Critical Analysis of the Effects of Regulations under Competition Law on Mergers and Acquisitions: A Comparison of the India, EU, US and UK Laws' (2019) 2 Journal of Corporate Governance and International Business Law <<http://lawjournals.celnet.in/index.php/jcgibl/article/view/389>> accessed August 06 2021

<sup>47</sup> K A Goyal and Vijay Joshi, 'Mergers in Banking Industry of India: Some Emerging Issues' (2014) 1 Asian Journal of Business and Management Sciences 1

parameters include the level of competition existing in the market, the extent of effective competition, countervailing buying power, and the extent of barriers to entry posed by the newly introduced combination. After analysing all of these factors, the CCI may either approve, disapprove or partially approve the combination as long as the parties are willing to make certain modifications prescribed by the CCI. The amendment of 2014 saw substantive changes taking place in the approach of the CCI with regard to scrutiny. There has also been a reduction in time that the CCI may take in approving a transaction. There are two stages of reviewing the notification.

*Firstly*, they are given a mandate of needing to provide an opinion within 30 days after the notification has been provided from the respective parties. This opinion primarily plays the role of highlighting the likelihood of the transaction causing an Appreciable Adverse Effect on Competition (AAEC). The transaction will be *prima facie* approved if it does not cause an Appreciable Adverse Effect on Competition (AAEC), and the same will be published on the website.<sup>48</sup>

*Secondly*, if the CCI has discovered some possible Appreciable Adverse Effect on Competition (AAEC), further investigation will take place. The CCI will be provided with a duration of a maximum of 210 days from the filing of the notification to decide on whether the transaction will be approved or not. This phase of review may require the parties to publish details pertaining to the combination they're engaging into the public. This is to ensure that the public is informed of the damage that may or may not be caused to them.

It is pertinent to note that although the regulations state that the determination will be made within 180 days, the CCI is not bound by the same. However, if the determination is not provided within 210 days, the transaction is presumed to have been approved. Some popular cases where the CCI has partially approved the notification made by the parties with certain modifications include the *Pharmaceuticals case* and the *Oil Manufacturing Companies case*. The

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<sup>48</sup> Srinivasan Parthasarathy, *Competition Law in India* (4<sup>th</sup> Edn, Kluwer Law International 2017)

former required modifications pertaining to the non-compete clause.<sup>49</sup> The latter pertained to modifications in connection with the joint-venture taking place between Mumbai airport and the oil manufacturing companies.<sup>50</sup> The CCI required the removal of restrictive use clauses to ensure that there is access to all aviation turbine fuel suppliers at the airport.<sup>51</sup>

While most cases get passed after the first stage of review, certain cases do catch the eye of the CCI. One such case pertained to the pharmaceutical sector. The transaction was ultimately approved by the CCI as long as the parties divestment the two key product lines and other six major products.<sup>52</sup> This was one of the first cases where the CCI had given substantive structural remedies and enlighten the world about the implementation of the Competition Act.

## CONSEQUENCES OF NON-COMPLIANCE

Antitrust laws in India have a history of laying down heavy penalties in the instance of proportionate violations to the statute. In this light, both the MRTP Act and the Competition Act have imposed reasonable penalties in the instance that violations take place with regard to anti-competitive agreements, abuse of dominant power, or combinations (mergers and the like). It is important to note that the quantum of penalty is generally the most difficult question that the CCI struggles with when passing an order.

### *Anti-Competitive Agreements and Abuse of Dominant Position*

The Competition Act imposes fines up to 10% of the average turnover from the preceding three years in the instance that enterprises have engaged in violations pertaining to anti-competitive agreements or abuse of power. Additionally, the CCI has the power to split up corporations that they believe to be abusing their dominant position.<sup>53</sup>

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<sup>49</sup> *In re M/s Peeveear Medical Agencies, Kerala v All India Organization of Chemists and Druggists and Ors* Case No 30 of 2011 (2013)

<sup>50</sup> *In Re: Suo-moto case against LPG cylinder manufacturers v M/s International Cylinder (P) Ltd* Suo Moto Case No 03 of 2011 (2014)

<sup>51</sup> *Ibid*

<sup>52</sup> Geeta Gouri, 'Economic Evidence in Competition Law Enforcement in India' (2016) Part of International Law and Economics Book Series 1

<sup>53</sup> PK Basu Majumdar, 'Penalising Anti-Competitive Agreements and Abuse of Dominance (2013) 7 NUJS L Rev 225

It is pertinent to note that horizontal agreements (cartel arrangements) often invite a higher penalty equal to or higher than three times the annual profits for the years in which this agreement was active. Another form of penalty for such agreements is 10% of the annual turnover for the years in which this agreement was active.<sup>54</sup> Further, the CCI may mandate these companies to either modify the anti-competitive aspect of the agreement or 'cease and desist from engaging in such activities which directly contravene the Competition Act.

The Competition Commission of India has played a key role in identifying and reprimanding cartels since its inception. Despite an unsuccessful run-in with their first case relating to associations of film producers, the CCI has grown and imposed stricter penalties upon identification of violations. Further, the CCI has also taken a significant stance against trade associations over the course of their cartel investigations in numerous cases. For instance, the *Cement Cartel case* saw a fine of 50% of profits on all companies.<sup>55</sup> Similar imposition of penalties was also seen in the *Distribution of Pharmaceuticals case*<sup>56</sup> and *LPG Manufacturers Cartel case*.<sup>57</sup>

### ***Combinations***

The CCI operates on the presumption that combinations actively disrupt the Appreciable Adverse Effect on Competition (AAEC) of India. Therefore, combinations in the form of mergers, amalgamations, and acquisitions are subject to CCI approval. In this light, any failure to provide prior notification regarding such combinations gives rise to the incurrance of penalties by the parties. The fine is up to 1% of the combined asset turnover of the involved enterprises. Further, non-compliance to orders given by the Director-General attracts a penalty of INR 100,000 per day up to INR 10 million. Upon failure to pay the fine, the party may be imprisoned for up to three years or fined for a maximum of INR 250 million.

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<sup>54</sup> *Ibid*

<sup>55</sup> *In re Builders Association of India v Cement Manufacturers Association and Ors* Case No 29 of 2010 (2016)

<sup>56</sup> *In re M/s Peeveear Medical Agencies* (n 49)

<sup>57</sup> *In Re: Suo-moto case* (n 50)

The first fine of INR 10 million was imposed on *Kingfisher Airlines Limited* for not providing information up the Director General's request. However, the same was reduced to INR 7.25 million by the Competition Appellate Tribunal (COMPAT).<sup>58</sup> Another instance of imposition of penalties that were substantially high was the *Titan International order*, where a penalty of INR 100 million was imposed for delayed notification.<sup>59</sup> However, the CCI has not (as of 2021) imposed the highest allowable penalty on any party.

## LESSER PENALTY REGULATIONS

The CCI had brought into effect the Competition Commission of India (Lesser Penalty) Regulation on August 13, 2009. This regulation reduced the penalty of cartel participants who disclosed crucial information that can be used by the CCI to punish the cartel. The primary aim of the regulation was to promote the disclosure of vital information aimed at eradicating cartels in the market. It is pertinent to note that the leniency was afforded on the basis of whoever approaches the CCI first and discloses. The waiver of penalty may extend up to 100% depending on the value and utility of the disclosure made. It has been observed that the primary conditions that determine the waiver of penalty are as follows:<sup>60</sup>

- The stage at which the individual has disclosed the information to CCI.
- Existing evidence possessed by CCI.
- Quality of information provided by the individual.
- Facts and circumstances surrounding the case.

## COMPETITION AMENDMENT BILL, 2012

The year 2012 saw the introduction of the Competition Amendment Bill in the Lok Sabha. This bill was aimed at making significant changes to antitrust laws in India. The key additions or modifications made in the Bill were as follows:<sup>61</sup>

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<sup>58</sup> *Kingfisher Airlines v Competition Commission of India* (2010) 4 Comp LJ 557 (BOM)

<sup>59</sup> Competition Act 2002, s 43A

<sup>60</sup> Saakshi Agarwal and Chintan Bhardwaj, 'Goals of Competition Law in India (2021) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3789536](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789536)> accessed August 06 2021

<sup>61</sup> *Ibid*

**Joint Dominance** - This terminology was to be inserted within *Section 4* of the Act. The new law was aimed at ensuring that two or more enterprises may not abuse their combined dominance in any manner.

**Governmental Flexibility** - This provision enabled the government to exercise flexibility in determining asset and turnover benchmarks for the different sectors in the market. This allows the CCI to easily understand if the sector has the notification requirement prior to mergers.

**Dawn-raids** - The new Bill ensured that the Director-General no longer required to receive any prior approval from the Chief Judicial or Metropolitan Magistrate for conducting a search and seizure.

Additionally, several minuscule but substantive changes were proposed for the Competition Act included reducing the waiting period of parties before the imposition of penalties to be less than 180 days as opposed to the previous 210 days prescribed.<sup>62</sup> Further, the definition of turnover was clarified now to exclude taxes on the sale of goods or services.<sup>63</sup>

## COMPETITION AMENDMENT BILL, 2020

It has been consistently observed that the CCI is often overburdened with cases which results in a considerable delay in the administration of justice. In pursuit of the same, the draft Amendment Bill of 2020 was promulgated by the Ministry of Corporate Affairs. The key developments recommended in the Amendment Bill of 2020 were as follows:<sup>64</sup>

**“Settlement and Commitment” Clause** - This clause was proposed to allow internal settlements to take place between aggrieved parties and the parties causing the grievance. This was considered beneficial in light of the Madras High Court judgement in *Tamil Nadu Film*

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<sup>62</sup> Neeraj Tiwari, 'Merger Under the Regime of Competition Law: Comparative Study of Indian Legal Framework with EC and UK' (2012) 23 Bond L Rev 1

<sup>63</sup> 'Opinion | Competition Law Needs to be Effective' (*Mint*, 2019) <<https://www.livemint.com/opinion/online-views/opinion-the-competition-law-needs-to-be-effective-11571675441630.html>> accessed August 06 2021

<sup>64</sup> Nishkant Bibhu, 'Critical Analysis of the Key Proposals Suggested by Competition Law Review Committee under Draft Competition (Amendment) Bill, 2020' (2020) 10 Shodh Sanchar Bulletin 1

*Exhibitors Association vs CCI*<sup>65</sup> It was held in the case that this practice is formidable owing to it not being an active hindrance to trade freedom and prevention of anti-competitive practices.<sup>66</sup>

**New Governing Board** - The introduction of a new board to govern antitrust law in India was made to supervise and manage the operations of the CCI. This was to maximise efficacy and keep a check on the primary body appointed for governing antitrust law.<sup>67</sup>

**Protection for IPR Holders** - The nature of rights conferred on IPR holders was to be made more reasonable. Therefore, any conditions made by them pertaining to their intellectual property were to be reasonable and not ambiguously interpreted in their favour. These entities may not abuse their dominant position under the garb of IPR. This issue was identified by the European Union Commission as early as 1988 in *AB Volvo v. Erik Veng Ltd.*, wherein IPR rights were seen to be abused by the enterprise.<sup>68</sup>

**Additional Criteria to Determine Threshold for Combinations** - The government will now be given the power to determine a criterion beyond the scope of *Section 5* with regard to combinations. This additional provision allows the government to hold enterprises accountable even if they do not fall within the rigid threshold given in the statute.<sup>69</sup>

**Green Channel Approval** - This proposition was to ensure a speedier approval process for combinations of certain nature. While the same has been in practice wherein in 2020, 4 out of 15 combinations were approved via the green channel; the same is not given statutory recognition. Recognition of the same may prove to be greatly beneficial to antitrust law in India.<sup>70</sup>

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<sup>65</sup> *Tamil Nadu Film Exhibitors Association v CCI* (2015) 2 Comp LR 420 (Mad)

<sup>66</sup> *Ibid*

<sup>67</sup> Eshvar Girish, 'Competition (Amendment) Bill, 2020' (*Times of India*, 2020) <<https://timesofindia.indiatimes.com/readersblog/eshvar/competition-amendment-bill-2020-26233/>> accessed August 06 2021

<sup>68</sup> *AB Volvo v Erik Veng Ltd* (1988) ECR 1988, 06211

<sup>69</sup> Akansha Agrawal, 'Draft Competition (Amendment) Bill 2020: How life may change for tech firms' (*Business Standard*, 2020) <[https://www.business-standard.com/article/opinion/draft-competition-amendment-bill-2020-how-life-may-change-for-tech-firms-120030100856\\_1.html](https://www.business-standard.com/article/opinion/draft-competition-amendment-bill-2020-how-life-may-change-for-tech-firms-120030100856_1.html)> accessed August 04 2021

<sup>70</sup> *Ibid*

## SUGGESTIONS AND CONCLUSION

The Indian antitrust law has often been criticised for numerous reasons. In pursuit of rectifying the same, the following suggestions are recommended.

*Firstly*, the CCI has been criticised repeatedly for being extremely slow and disposing of cases. Even though 180 days is set as the upper limit, they often exhaust the complete duration before they determine the resolve. Therefore, the first and most important change that must be made within the system of antitrust law is to ensure speedy enforcement of the law.

*Secondly*, there were talks within the Central Government regarding a settlement clause within the Act.<sup>71</sup> This was to allow companies facing penal action to reach a settlement by adopting some sort of corrective measures within their institution. This is preferable not just for the company but also for the CCI as it helps save time in attempting to decide the appropriate penalty on a case to case basis. This ultimately reaps benefits in a twofold manner wherein; first, the CCI saves resources and costs; and second, there is the promotion of business within the nation as individuals are not afraid of repercussions that they may face in the law prior to adopting the risk of starting a business.

*Thirdly*, similar to the first suggestion, India needs a better enforcement mechanism for its competition law. Enforcement within competition law is extremely important as it concerns what is the rights of consumers of the general public but also small and upcoming investors in the market who may become key stakeholders in the development of the nation's economy. As mentioned earlier, with companies like Reliance, India has a long history of having monopolistic practices infringing on the development of antitrust law.<sup>72</sup> This is further worsened with the CCI being overburdened with numerous cases. The best solution to ensure effective enforcement of the law is the possibly have more platforms for resolving competition law-related disputes. These platforms can come in the form of alternate dispute resolution

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<sup>71</sup> Evernett and Simon J, *What is the Relationship between Competition Law and Policy and Economic Development* (Palgrave Macmillian 2016)

<sup>72</sup> V Venkateshwara Rao, 'The rise of monopolies in New India' (*The Deccan Herald*, 2020)

<<https://www.deccanherald.com/opinion/panorama/the-rise-of-monopolies-in-new-india-917337.html>>  
accessed July 31 2021

mechanisms wherein individuals may enter into a form of negotiation or mediation with the company or enterprise that they may feel has violated their interests.

In conclusion, like every legal system across the world, there is always scope for improvement with antitrust law in India. From the above suggestions, it can be understood that the key area of improvement pertains to the enforcement of the law. Therefore, even if changes are required within the statute of self, it is essential that existing legal provisions be implemented to their best possible extent first to ensure the protection of the interests of the general public and market at large in pursuit of the development of the Indian economy.