APPLICABILITY OF COMPETITION LAW PRINCIPLES ON PUBLIC SECTOR UNDERTAKINGS: AN ANALYSIS OF CCI ORDERS AND OTHER JURISDICTIONS

INTERNSHIP REPORT
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I. INTRODUCTION

The present paper aims to analyze and assess the Competition enforcement regime with regard to Public Sector Undertakings. The PSUs in India are engaged in two kinds of Activities- Sovereign functions of the State and Non sovereign functions. The Competition Act, 2002 restricts its application to the non Sovereign functions of the PSUs. Sovereign activities can be considered as public service obligations or other responsibilities that a public undertaking is required to undertake beyond its commercial activities.

Competitive neutrality Notion requires that the Public and private sector should operate upon a level playing field when performing commercial functions in the Market and state ownership should not brig any competitive advantage to any market participant. Thus, the notion of competitive neutrality is also limited to Non-Sovereign functions of PSUs.

In areas where Government performs non sovereign Functions it may have to compete with the Private entities. The role of competitive neutrality in such areas is to ensure a level playing field so that the government and the private enterprise can compete effectively. In similar line the Indian Competition Act, 2002 has been enacted to provide, keeping in view of the economic development of the country, 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. The Act includes government departments in the definition of enterprise in order to ensure competitive Neutrality principle.

There have been various instances when the commission has proactively looked into the Anti competitive conduct of the government enterprises. The paper aims to analyze the CCI’s approach in various orders where government entity was involved.
Furthermore, the paper discusses the notion of single Economic entity in various jurisdictions and how far this doctrine can be extended to apply to Government Entities. Thus, the present paper attempts to cover the following areas:

1. **Whether the Notion of Competitive neutrality is enshrined under the Competition Act, 2002 and how it been maintained through CCI orders?**

2. **Whether the notion of Single Economic Entity can be applied to State owned enterprise?**
II. COMPETITIVE NEUTRALITY APPLICABILITY PROSPECTS TO THE INDIAN PARADIGM

This section firstly would deal with the conceptual understanding of the principle of competitive Neutrality and go on to discuss the application of the doctrine in various jurisdictions. Thereafter, the section will dwell upon how this notion is enshrined under the Indian Competition law Regime. It further analyses that how the said principle has been adopted and upheld by the Competition Commission of India by analyzing a few orders of the Commission where the Commission has proactively looked into the conduct of Government owned enterprises. Lastly, the section attempts to provide certain suggestive changes that can be made to the Commission’s approach towards the application of the above principle.

2.1 Conception of Competitive neutrality

PSUs are “government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services”.¹ Given the privileged Position and the necessary role that many PSUs play in achieving goals of general public interest, which cannot be accomplished by private enterprises, it is important to subject them to appropriate corporate governance frameworks in order to maximize their effectiveness and reduce potential market distortions resulting from their privileged position.² So Competition rules should apply to both private and state-owned enterprises, subject to very limited exceptions.

**OECD** defines the notion as, “Competitive neutrality is a regulatory framework (i) within which public and private enterprises face the same set of rules and (ii) where no contact with the state brings competitive advantage to any market participant.”³

**UNCTAD** understands Competitive neutrality as, the recognition that significant government business activities which are in competition with the private sector should not have a competitive advantage or disadvantage simply by virtue of government ownership and control.⁴ This allows

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resources to flow to efficient producers and maximizes consumer welfare. It also forces
government businesses to be more transparent and addresses private competitor concerns about
equity and the level playing field for competition.\(^5\)

While competitive neutrality is desirable in general, there are instances where its strict
application may hamper the achievement of important societal goals, such as in crisis situations
or when dealing with market failures. Thus, certain amount of Government intervention is
required to stabilize the economic system and to avoid the unacceptable social consequences
which would occur if market forces were left to operate freely.\(^6\) The competition law regime that
has been introduced in many of the world’s jurisdictions typically regulate business, and not state,
behaviors.\(^7\) There are a very few competition law regimes that attempt to regulate government
intervention in the market and that have rules and principles allowing courts and competition
authorities to establish whether such intervention is necessary, helpful or harmful to consumer
welfare. Methods of ensuring that government bodies do not obtain an advantage over private
enterprises include privatization, effective governance, improving independence, accountability
and disclosure.\(^8\) The most far-reaching and successful organization in controlling and regulating
the economic behavior of states and their governments is in the European Union.\(^9\)

### 2.2 Competitive Neutrality under EU Legal Regime

**Meaning of ‘undertaking’ under Article 101(previously section 81 of the EC treaty):**

Article 101 applies to agreements and concerted practices between two or more independent
‘undertakings’ and to the decisions by ‘association of undertakings’. The definition accorded to
‘undertaking’ directly determines the scope of applicability of Article 101. The Treaty does not
define the term Undertaking. There has been a wide interpretation given to the term by European
Courts and Commission. The widely accepted interpretation is, “the concept of an undertaking
embraces every entity engaged in an economic activity regardless of the legal status of the

\(^5\) Ibid.
\(^7\) Ibid.
\(^9\) Ibid.
entity and the way in which it is financed.”10 The term ‘economic activity’ further determines the scope of ‘undertaking’. Economic activity is given a wide definition as consisting of any activity involving offering goods and services on a given market.11 Even the fact that an entity lacks a profit motive does not exclude it from the scope of the EC competition rules, provided it is engaged in some sort of economic activity.12

**Government bodies covered under ‘Undertaking’**

It is irrelevant whether the undertaking is privately or publically owned, thus public authorities engaged in an economic activity have been held to fall within the scope of Article 101(1).13 State owned corporations14, quasi governmental Bodies15 that perform an economic activity and bodies entrusted by the state with a particular task16 have all been considered as ‘undertakings’.

Thus, the government entities under the EU that are not working with a profit motive would be covered under the term undertaking carrying on economic activity. However, state owned corporations will not fall within the scope of Article 81(1) when they perform activities in exercise of official Authority.17 ‘Official authority’ means a task in the public interest which forms part of essential functions of the state and where the activity is connected by its nature to exercise of powers of those of a public authority.18

**Certain entities excluded from ‘undertaking’**

The European Courts have ruled that certain companies did not engage in economic activities per se, but exercised essential functions of the state and therefore did not qualify as ‘undertakings’. For instance, in Cali e Figli19 case, a private company engaged in anti pollution surveillance was not considered to be an undertaking as it performed a task in the public interest, forming part of one of the essential functions of the state in protecting maritime environment, the same principle

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16 International Express Courier services in Spain, OJ 1990 L233/19
18 Ibid.
was applied to Poucet\textsuperscript{20} which was a French local social security office administering sickness and maternity insurance schemes. Similarly in \textit{FENIN}\textsuperscript{21} the European courts held that the commission had been correct to find that 26 Spanish public authorities that managed the national health service were not ‘undertaking’.

EC competition law applies just as well to state-owned companies as to private companies. Article 106 of the Treaty on the Functioning of the European Union 2008 reminds the Member States that the competition rules apply also to state-owned companies and that national laws depriving the competition rules of their effectiveness would be in violation of the Treaty.\textsuperscript{22}

Article 106(1) in combination with Article 101 and 102 obliges the Member States to refrain from imposing anticompetitive behaviour on their public or privileged undertakings. The \textit{Deutsche Post}\textsuperscript{23} case is a landmark case for applying anti-trust law to public monopolies. This case is the first time that the Commission applied the test for predatory pricing to a traditional public service such as postal service. As has been elaborated earlier the term ‘Undertaking’ under Article 101 includes Government Bodies. Furthermore, Article 106(1), which is addressed to the Member States, lays down the following broad principle:

"\textit{In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 101 to 110}".

Article 106(2) provides for a narrow exception to the rule that competition law is applied to all types of undertakings.

"\textit{Undertakings entrusted with the operation of services of general economic interest of having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community}".

\textsuperscript{22} Article 106, Treaty on the Functioning of the European Union 2008.  
\textsuperscript{23} Commission Decision 2008/354/EC
The term "services of general economic interest" is not defined in the Treaty. It covers obviously the conventional utilities such as provision of postal services, telecommunication services, gas, electricity, provision of services in the transport sector which are not viable on its own etc. In essence, in the EC competition Regime the Notion of Competitive Neutrality is duly maintained and followed by the courts. Articles 106(1) and (2) attempt to find this balance between the sometimes conflicting interests of national policy and EC competition law.

2.3 Competitive Neutrality as maintained in the US

The commercial activities in which various levels of government in the United States are federal government enterprises called “federal government corporations,” so-called “quasi government” entities such as government-sponsored enterprises and federally funded research and development centers. In the U.S., the role of such enterprises is usually specialized and the extent of competition between the government and private sector is at most indirect, and often negligible or non-existent. As a general matter, agencies and instrumentalities of the U.S. government are not subject to liability under the federal antitrust laws, even when engaging in commercial activity. In 2004, for example, the U.S. Supreme Court held that the federal antitrust laws did not apply to the U.S. Postal Service (USPS). The Court’s opinion in Flamingo noted that the USPS by statute was “an independent establishment of the executive branch of the Government of the United States.” The Court observed that its decision was consistent with “the nationwide, public responsibility” of the USPS, which differs from private enterprise in not seeking profits, in its universal service and recent national security responsibilities, and in its possession of Government powers. Under the state action doctrine applied in the US as developed by the Supreme Court in Parker v. Brown, the federal antitrust laws do not apply to “anticompetitive restraints imposed by the States ‘as an act of government.’”

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doctrine immunizes acts of the highest levels of the state government itself, acting as sovereign; this includes actions of a state legislature and probably of the governor.\footnote{City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 370 (1991).}

Thus, it is clear that the notion of competitive Neutrality is not prevalent and maintained in the US.

\subsection*{2.4 Applicability of Competitive Neutrality to India}

The Government majority held companies are commonly referred to as Public Sector Undertakings (PSUs) in India. India adopted a strategy of mixed economy (public and private enterprises) after Independence since Market failure a major concern the model of economy assigned a major role to PSUs.\footnote{Ibid.} However, with flux of time on account of lower productivity and efficiency of Public sector resulted in economic liberalization policies in 1991 which shifted the divide between private and public in favor of a greater role for the private sector through removal of entry barriers through the mechanism of licensing.\footnote{OECD Report 2009, State Owned Enterprises and the Principle of Competitive Neutrality, DAF/COMP(2009)37, available at http://www.oecd.org/newsroom/43125523.pdf} In India, PSUs still constitute an important segment of the economy, accounting for about 26\% of the gross domestic capital formation.\footnote{Dr. Geeta Gouri, “The Application of Antitrust Law to State Run Enterprises (SOEs) in India”, available at http://cci.gov.in/images/media/presentations/CLandSOE_20100401142732.pdf.}

\textbf{Whether the notion of competitive Neutrality is enshrined under the Competition Act, 2002?}

The government can enter the competition in the market through direct participation i.e. by engaging in an activity that makes the government department a direct supplier, producer, buyer through public procurement, manufacturer of a particular commodity. Government can also enter through an indirect participation into the market by granting subsides, Tax incentives to certain industries, enacting policies and regulations for market regulation. Thus, such interventions of the government can sometimes lead to anticompetitive consequences in the market. Thus, to deal with such scenario the Competition Act includes Government within the definition of enterprise under section 2(h).

The \textbf{Section 2(h)} of the Act proved the definition of ‘enterprise’,

\begin{quote}
\textit{“a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of}\end{quote}

acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space”.

Thus, we see that the Act does not make any distinction with regard to its application to private players or the Government owned entities. This definition makes it clear that no competition exemption is available to Government entities performing non-sovereign commercial functions. However, the definition explicitly excludes any function of the government that is relatable to sovereign functions that includes activity relating to energy, currency, defense and space. The Competition Act has enacted a law to ensure that a level playing field is created to all market players irrespective of their size, resources, market position, economic strength etc. The intention33 of the statute is very clear that there should not be any discrimination between a private player and a government player and all players should be treated equally so that they can operate independently and freely in a given market. This definition clause including government shows that Competitive Neutrality is enshrined under the Act.

This interpretation is supported by a the High Court of Delhi in Union of India v. Competition Commission of India34 where the Government of India filed a case against Competition Commission through Railway Board of India. The Court recognized ‘Railway’ as an enterprise covered within the ambit of Competition Act, 2002. The Court highlighted the clear distinction between sovereign and non-sovereign functions holding.

“…that the Primary, inalienable and non-delegable functions of the Government are to be considered as sovereign functions of the Government under Section 2(h) of the Competition Act, 2002. Any Welfare, commercial and economic functions are not sovereign functions and state while discharging such functions is as much amenable to the jurisdiction of CCI as any other private entity discharging such functions. Running of Railways is a business activity that comes within the purview of Section 2(h) of the Competition Act, 2002 and hence it is an enterprise.”

33 Preamble of the Act states, “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.”

34 W. P. (C) No. 5770 of 2011
The term ‘inalienable functions’ has been interpreted to mean functions such as administration of justice, maintenance of order and repression of crime, maintaining foreign affairs, power to acquire and retain territory, the primary and inalienable functions of a constitutional Government like legislative power, the administration of laws, the exercise of the judicial power.

Furthermore, Section 54 of the Act empowers the Central Government to exempt the application of any provision of the Act to an enterprise performing a sovereign function on behalf of the Central or State Government, through a notification.

Application of Competitive Neutrality limited through the Act

From the above position it is clear that the Competition enforcement in India also includes Government entity within its ambit. However, it is submitted that the Applicability of this doctrine is limited through the Act itself.

The Act does not give a blanket power to take enforcement action against government entities. The Commission has to be very careful while taking any action against Government entities. Government entities operate with a non-commercial, non-profit purpose in order to maintain Public service obligations. For instance, maintaining postal, transport telecommunication services in outlying areas, providing essential utilities at affordable rates etc. The main reasons for government intervention in any jurisdiction are to correct for market failure, to achieve a more equitable distribution of income and wealth and to improve the performance of the economy. Keeping these purposes in mind the Preamble of the act aims to protect the interest

36 State of Bombay and Ors. v. The Hospital Mazdoor Sabha and Ors. (1960)ILLJ251SC
37 Coomber v. Justices of Berks, (1883-84) 9 App. Cas. 61,74.
38 Section 54 provides, “The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—
(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;
(b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government: Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.”
40 Ibid.
of the consumers and to promote and sustain benefit to competition in the market. **Section 19(3) clause (d) and (f)** provide that while determining Anti competitive agreement the commission will have due regard to factors that includes accrual of benefit to consumers and promotions of economic development by means of production and distribution of goods and services. Such agreements would not be considered to have appreciable adverse effect to competition in India. Further, **section 19(4)(k)** provides that an while determining the dominant position the commission has to see if the Act serves ant social obligation or social costs in the society. Such an act against would not be anti-competitive.

Thus, the Act itself does not give commission paramount blanket powers to scrutinize the government conduct. Act itself restricts the applicability of the doctrine only to peculiar circumstances where the above tests are not fulfilled. The application is restricted but it does not nullify the concept of neutrality.

Thus, it is concluded that Competitive Neutrality is enshrined under the Competition Act. However, there are also adequate flexibilities provided within the Act that maintains the Neutrality in a proscribed and controlled manner.

**2.5 Commission’s Orders: Upholding Competitive Neutrality**

There have been various occasions where the Commission has had the opportunity to intervene into the conduct of the government enterprises. The Commission has played a proactive role and looked into such conduct effectively. Some of the major orders of the Commission in this regard are discussed below.

In the *PDA Trade Fairs v. India Trade Promotion Organization*\(^ {41} \) PDA Trade Fairs, a business organization engaged in the business of organizing international trade fairs filed information against ITPO alleging contravention of section 4 of the Act by ITPO. ITPO is a nodal agency of Government of India engaged in organizing fairs and exhibitions in India thereby having management and control over bookings in Pragati Maidan. CCI concluded that Pragati Maidan holds a unique position in Delhi because of its close proximity with all modes of transport, national and international, its capacity, huge footfall which it attracts during exhibitions making it an unsubstitutable and unique place for exhibitions. Thus prima facie, the

\(^{41}\) Case No. 48/2012.
opposite party was in a dominant position as far as the market of providing venue for trade fairs/exhibitions within the geographic area of Delhi was concerned according to section 2(r) read with section 19. The allegations were that the allotment letter provided a forfeiture of the whole amount in case of cancellation of booking, such a condition was held to be valid by the CCI on the reasoning that if a booking is cancelled a few months before the exhibition, the authority/enterprise who is providing the site is bound to suffer loss as there is no probability of the site being booked afresh. The second allegation was that ITPO revised its rental by increasing it to the tune of 15.7% which was highly unreasonable considering the previous year revision trend which was around 10%. This allegation was gain rejected as CCI cannot embark upon an enquiry as to what shall be the fair price or rent and merely because the percentage of increase in rent was not same as was during the previous years, one cannot say that the increase was unfair or there was abuse of dominance since the change was uniformly applied to all exhibitors. Thus, CCI found no prima facie case and closed the case under Section 26(2) of the Act.

In this case the commission has proactively taken cognizance against a government enterprise however no valid contravention of section 4 was found by the commission.

In *M/s Mineral Enterprises Limited v. Ministry of Railways* the information was filed by M/s Mineral Enterprises Limited, a company involved in mining, trading and exports of iron ore. For transportation of iron ore extracted from the mines it uses the services of rail transport, owned and controlled by Railway Ministry. As empowered under Section 31 of the Railway Act, 1989 the Railway Board issued Rate circulars adjusting Freight rates and also reclassified the iron ore based upon its end use, thereby imposing different freights on iron ore based on its end use. The iron ore meant for domestic consumption for manufacture of iron and steel was charged at a lower rate and iron ore transported for other domestic purpose or for export purpose attracted a higher freight. This classification was alleged to be unfair and discriminatory and was challenged as violative of section 4 of the Act. The commission held that since the legislature has authorized the Central Government to classify and revise rates/freight with respect to carriage of passenger and goods the Railway board was exercising its statutory functions and therefore there was no Prima Facie case made out.

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42 Case No. 47/2012
However, with regard to this case it is submitted that since railway has been regarded as an enterprise\textsuperscript{43} under section 2(h) of the Act it should be amenable to the Commission’s jurisdiction. Furthermore, the issue here primarily is whether the Commission can interfere into policy formulations authorized through a statutory provision? It is submitted that CCI is an economic regulatory body unlike a court and is empowered to look into the economic aspects of a decision. The Commission does not have any restriction in examining a policy decision or a fixation of rates if it is unfair and discriminatory as CCI has been mandated by the Parliament under Section 18\textsuperscript{44} of the Competition Act to prevent any conduct and practices which are anti-competitive. Thus, in such cases the commission can have a proactive role of doing a competitive impact assessment of policy formulation made i.e. the ‘rate circulars’ in the present case and if it is found to have any anti-competitive effect on the economy then required amendments to the policy may be ordered by the Commission. At present the Competition Act, 2002 does not empower the commission to take such proactive steps thus it is suggested that an amendment to this effect is made into the Act to make such assessment enforceable through the commission. The section 49 of the act should be amended suitably to accommodate within its ambit such proactive role of the commission. The amendment can empower the Commission to assess the policy on case to case basis relying on certain parameters that are laid down under competition checklist\textsuperscript{45} in the OECD Toolkit. The Draft National Competition Policy 2011\textsuperscript{46} has also proposed Impact Assessment to see if any anti-competitive effect is exerted by a provision in the existing or proposed laws, regulations and policies, enforced by Government.

\textsuperscript{43} Union of India v. Competition Commission of India , W. P. (C) No. 5770 of 2011
\textsuperscript{44} Section 18 provides, “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”

OECD TOOLKIT

(A) Limits the number or range of suppliers
This is likely to be the case if a clause:
i. Grants exclusive rights for a supplier to provide goods or services
ii. Establishes a license, permit or authorization process as a requirement of operation. Creates natural barriers affecting prospective entrants or significantly raises cost of entry or exit by a supplier.
iii. Limits to the number of firms permitted to enter the market
iv. Limits the ability of some types of suppliers to provide a good or service
v. Has barriers, based on either regulations or custom, that prevent women from commencing business in the relevant market(s) and/or expanding an existing business, or that make it difficult for them to do so.
vi. Creates a geographical barrier to the ability of companies to supply goods services or labour, or invest capital

(B) Limits the ability of suppliers to compete
This is likely to be the case if a clause:
i. Limits sellers’ ability to set the prices for goods or services
ii. Limits freedom of suppliers to advertise or market their goods or services
iii. Benefits or grants preferential treatment to the state-owned enterprise/s that operate in the market/s being assessed
iv. Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that some well-informed customers would choose
v. Allows under-development of transport or other infrastructure in some territories to give incumbent firms monopoly status
vi. Limits competition, transparency and fairness in government procurement
vii. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

(C) Reduces the incentive of suppliers to compete
This is likely to be the case if a clause:
i. Creates a self-regulatory or co-regulatory regime
ii. Requires or encourages information on supplier outputs, prices, sales or costs to be published
iii. Exempts the activity of a particular industry or group of suppliers from the operation of the general competition law

(D) Regulatory and policy barriers
This is likely to be the case if a clause:
i. Creates ‘policy uncertainty’ through onerous, costly or time-consuming regulation or frequent changes in regulations
ii. Allows unequal application of laws or regulations

(E) Limits the choices and information available to customers
This is likely to be the case if a clause:
i. Limits the ability of consumers to decide from whom they purchase
ii. Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
iii. Fundamentally changes information required by buyers to shop effectively
In *Travel Agents Association of India v. Balmer & Lawrie Co.*\(^{47}\) the government issued a memorandum that required the Government officials to avail the services of exclusively two Travel Agents namely, Balmer & Lawrie Co. and Ashok Travels for their official visits. This Act of the government was challenged as being violative of Section 3 by the Travel Agents Association of India. To this the commission held that since the memorandum provided that a Central Government Official is free to procure air ticket directly from any airline or through Internet for official domestic visits. It is only when an official wants to utilize the services of travel agents it has been limited to the two Agents who are in turn required to ensure that the procurement of the ticket should be on the best bargain across all airlines. There is no horizontal or vertical agreement as the memorandum does not amount to be an Agreement since the Government of India, being a consumer, is not producing anything, so it cannot be said that there is a vertical agreement between the Government of India and the Travel Agents. Furthermore, it is the choice of the Government of India, like a normal consumer, to avail the service of a particular travel agency. Moreover, since there is a direct accrual of benefit to the Government of India, the consumer, cannot be said to be a dominant enterprise in the relevant market. Thus, neither section 3 nor section 4 are attracted in this case.

It is submitted that the market share that is allotted to the two travel agents is negligible. Also these two travel agents were not chosen randomly by the government but through a valid tender process. This memorandum is not creating an entry barrier in the whole market as it applies only to the central government employees. Moreover, these employees are free to book tickets online and not be bound by the travel agents. Thus, the Commission can in order to ensure that there is no adverse effect in the Market can undergo a Competitive impact Assessment of the Memorandum. The competition act has to be functional in empowering the Commission with such overarching powers similar to Section 49\(^{48}\) of the Act which provides that the government may while formulating a policy on any matter make reference to the Commission for its opinion on the possible effects of such policy over competition in India.

\(^{47}\) COMPAT order, Appeal No. 21/2010.

\(^{48}\) Section 49(1) provides, “The Central Government may, in formulating a policy on competition (including review of laws related to competition) or 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.”
Thus, from the above analysis we see that the Competition does not grant enough power to the commission to uphold competitive neutrality. Thus, certain amendments to the act can facilitate the commission to undertake competitive impact assessment and uphold the Neutrality principles.
III. APPLICATION OF THE NOTION OF SINGLE ECONOMIC ENTITY CTO THE GOVERNMENT ENTERPRISES

This section dwells upon the notion of Single Economic Entity as prevalent in the US and under the Treaty on the Functioning of the European Union 2008. Thereafter, it attempts to read this concept into the Indian Context and determine whether government enterprises can be covered under the notion of single Economic entity and be granted immunity from the Competition Enforcement.

3.1 The conceptual understanding to Single Economic Entity Doctrine:

The practice of considering two or more legal entities as a single economic entity within European competition law started as early as in the case in 1973 where was stated that,

"...the circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behavior autonomously but in essentials follows directives of the parent company." 49

The doctrine of the single economic entity aims to identify the true nature of an undertaking operating in its market. In most cases one would assume that an economic entity is no bigger than the one legal entity of which it is formed. However, with the complex structures of today's undertakings, often consisting of large company-constellations, it can become increasingly difficult to direct a sanction at the correct legal entity. 50 If two legal entities are part of the same economic unit then they cannot be said to collude with each other. There are mainly two ways in which two or more undertakings can be found to belong to the same economic entity. First, when a parent company owns all or majority of the shares in its subsidiary. 51 Second, when an overall view of the relationship between the two companies suggests that the parent company is able to

51 Stora Kopparbergs Bergslags AB v Commission of the European Communities. Case C-286/98 P, paragraph 29
control the subsidiary.\textsuperscript{52} In considering whether two companies belong to the same economic entity, the following factors will be considered:

1. **Ownership:** Where a company owns all of or large parts of another company, they can often be presumed to belong to the same economic entity.\textsuperscript{53} The two companies are working for the interests of the same individuals, and can therefore, and often do, act on the market as a single larger entity.

2. **Economic independence:** The degree of economic independence between the two companies will be key when evaluating whether the two belong to the same economic entity.\textsuperscript{54} A company which is entirely financially dependent on another would most likely have to follow instructions from that other company when making decisions.

3. **The degree of instructions given:** It will be of interest to note whether or not a parent has given instructions to its subsidiary, independent of whether the subsidiary follows these instructions.\textsuperscript{55} This is mainly because such instructions show to what extent the parent company considers itself entitled to instruct the subsidiary.

4. **Obedience to instructions:** The degree of obedience to instructions given by a parent company regarding market behavior\textsuperscript{56} will also be of importance when evaluating whether two companies belong to the same economic entity as this gives an idea of how the subsidiary considers the connection between itself and the parent company.

To prove that a parent and subsidiary form a single economic entity one must not prove that the parent owns 100% of its subsidiary, rather, one must, prove that the parent can exert a decisive influence over its subsidiary, and that it has done so in the given case.\textsuperscript{57} Thus, the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit.\textsuperscript{58}

\textsuperscript{52} Akzo Nobel v. Commission, Case T-112/05 paragraph 62.
\textsuperscript{54} Beguelin Import v GL Import-Export, [1971] ECR 949 (para 8).
\textsuperscript{56} Joined cases C-201/09 P and C-216/09 P, ArcellorMittal Luxembourg SA v Commission, paragraph 96
\textsuperscript{57} Case T-301/04 Clearstream Banking AG e.a. v Commission, paragraph 198.
\textsuperscript{58} Mausegatt v Haute autorité, Case C-13/60, opinion of Mr Advocate-General Roemer, p. 135-136.
3.2 Single Economic Entity Principle as under the TFEU 2008:

The Treaty on the Functioning of the European Union 2008 was formulated with the purpose of promoting throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance.\(^{59}\)

Section 101\(^{60}\) prohibits agreements and other collusive behavior between ‘undertakings’ that restrict competition and affect trade between the Member States. It not only covers agreements but is broadly formulated to cover all types of collusions between undertakings that restrict Competition. Undertakings are believed to compete with each other and not cooperate to influence market conditions to detriment of competition and ultimately of consumers.\(^{61}\) Therefore, agreements between undertakings operating on the same market are a cause of concern to competition authorities. It also covers within its ambit vertical agreements i.e.

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\(^{60}\) Treaty on the Functioning of the European Union 2008, Article 101(1) provides, “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

  - impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

agreements between undertakings operating at different levels of production or distribution chain for the purposes of the agreement. 62

**Agreements involving ‘Single Economic Entity’-excluded from Article 101 (previously Article 81 of EC Treaty)**

There is a requirement of at least two independent parties since a purely unilateral action is excluded from the scope of Article 81. 63 Employees acting on behalf of the entity that employs them for the duration of their employment do not constitute an independent undertaking under Article 81 64 unless he pursues his own economic interest different from employer’s interest 65. The obligations imposed on agents as contracts negotiated on behalf of the principle do not fall within the scope of Article 81(1). 66

Thus, an agreement or concerted practice between two or more independent undertakings is required for application of Article 101. However two or more legally separate entities can be treated as a single undertaking for competition Law purposes if their relationship justifies treating them as a ‘single economic unit’ 67. In case of such an entity agreements between them will usually be regarded as an internal allocation within a corporate group, rather than an agreement between independent undertakings capable of falling within the scope of Article 101.

In 1969 the Commission categorically concluded that a market sharing agreement between a company and its wholly owned Dutch subsidiary was outside the scope of Article 101 as there was no competitive relationship existing between the two companies which was capable of being restricted. 68 The European Courts have also endorsed the view that Article 101 does not apply to a parent subsidiary relationship when the subsidiary, although having a separate legal entity, enjoys no economic independence. 69 In *Centrafarm v. Sterling Drug* 70 the court applied the same

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68 Christiani & Nielsen, OJ 1969 LI165/12.
70 [1974] ECR 1147 (para 45).
reasoning to undertakings forming an economic unit within which the subsidiary has no real freedom to determine its course of action in the market.

**The Viho Test**

One of the landmark judgments on Single Economic Entity is the *Viho Europe v. Commission*\(^{71}\). The test used in this judgment is commonly known as the *Viho* test to determine whether two entities can be referred to as a single economic entity or not. In this case Parker Pen had established a distribution system in which subsidiary companies distributed its products. Based on the fact that Parker held 100% of the shares of its subsidiaries and directed their sales and marketing activities, the court of justice concluded that Parker and its subsidiaries formed a ‘Single Economic Unit’ within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them.\(^{72}\) The ECJ went on to say that in those circumstances the fact that Parker Pen could divide National Markets between its subsidiaries being a unilateral conduct was outside the scope of Article 81.\(^{73}\) Thus as there was no agreement between two separate entities the court did not apply Article 101.

Thus, precisely the *Viho* test in order to determine the single economic entity requires to see whether the parties to the agreement are independent in their decision making or whether one has sufficient control over the other so that the latter does not have ‘real autonomy in determining its course of action in the market’.

**Factors significant to determine ‘control’ over subsidiary**

Property rights\(^{74}\), shareholders agreement\(^{75}\), composition of board of directors and the extent to which parent affects the subsidiaries\(^{76}\) and determines their policy are important factors to determine whether the entity belongs to single economic entity. Instances where the subsidiary is wholly owned or where the parent has majority shareholding there is a presumption that

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\(^{73}\) Ibid, para 54.


\(^{76}\) *Lafarge v. Commission* [2008] ECR II 120 (para 539)
subsidiary is controlled by the parent. However, the European commission in certain cases has also held a minority holding as sufficient affiliation for the two entities to be treated as single economic entity if the minority shareholding allows the parent to decisively influence and determine the strategic behavior of the affiliate.

**Relationships not qualifying as Single Economic Entity**

Despite the existence of certain links between undertakings they could not be regarded as single economic entity. In *IJsselcentrale* the commission determined that the fact that electricity producers cooperate so closely that they can be said to form ‘one indivisible system of economic supply’ in providing electricity to the public does not mean that they form a single economic entity when they are separate legal entities pursuing independent pricing policy. Thus, the relationship between the two entities must be of significant control in order to establish them as single economic entity.

When a subsidiary is no longer under the control of its parents for instance because it is sold an agreement between the two companies can become subject to Article 81(1) scrutiny as the parent subsidiary relation has ended. Although an agreement between connected firms may not infringe Article 101, the manipulation of a subsidiary company by a parent company might lead to competition Law violation. For instance, a parent company through an agreement ordering its subsidiary to impose export ban on its distributors, such a restriction has itself been held to be an Article 81 violation.

**3.3 Antitrust Liability in the US:**

The **Section 1 of the Sherman Act** provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Section 1 infringements require at least bilateral action since a company cannot conspire by itself. Section 2 on the other hand prohibits

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80 *Austin Rover Group*, OJ 1988 L45/34.
82 Section 1, Sherman Act, 1890.
83 Freeman v. San Diego Association of Realtors, 322 F.3d, 1147
individual ‘persons’ or firms to engage in monopolization i.e. the Unilateral conduct of Person. thus in absence of proving an agreement the person can still move under section 2 as it requires only unilateral conduct. Both sections refer to ‘persons’, but remain silent on the scope of personhood.

In the US three kinds of tests i.e. per se, rule of reason and ‘quick look’ rule of reason analysis are used to determine Antitrust Implications of any Act.

1. **Per se prohibitions** present an automatic rule of illegality. Activities that trigger a per se prohibition are immediately and without conducting a detailed (economic) analysis considered to be illegal and prohibited. They are ‘so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality’. The U.S. Supreme Court limits the establishment of per se prohibitions and exemptions to exceptional situations like direct price fixing, direct output limitations through cartels and Bid Rigging.

2. **The rule of reason** allows the parties to present a balanced argument in which reasonable limitations on competition can be justified. Attention is paid to the analysis of the ‘facts peculiar to the business, the reasons why it was imposed, the purpose of the analysis is to form a judgment about the competitive significance of the restraint’.

3. The ‘quick look’ Test also known as a truncated rule of reason test presents an analytical compromise between the per se and rule of reason approaches. The quick look test does not amount to a non-rebuttable per se prohibition or exemption, the factual rule of reason analysis remains rather limited. The courts basically apply a rule of reason analysis, but truncate its scope because of particular properties inherent in anticompetitive behavior.

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84 Section 2 of the Sherman Act provides, “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

85 U.S. Supreme Court, National Society of Professional Engineers v. United States (1978), 98 S. Ct. 1366


87 National Society of Professional Engineers v. United States (1978), 98 S. Ct. 1366
The Development of the Single economic unit Jurisprudence in US:

There is no language in the Sherman Act that says that two companies that are affiliated may avoid antitrust liability if they combine their efforts to compete. The doctrine developed through a line of Supreme Court cases that prohibited this sort of conduct. The intra-enterprise conspiracy doctrine was the product of Supreme Court jurisprudence that began with *United States v. Yellow Cab Co.* in 1947 where the court developed the ‘intra enterprise doctrine’ and said that for the purposes of the Sherman Act, what is important is that trade is restrained and the relationship of the conspirators does not matter. The case involved a series of vertical agreements between the Checker Cab Manufacturing Corporation and several Yellow Cab companies operating in various cities. So, despite the fact that each of the Yellow Cab companies were part of the same business organization, the Court held that they were capable of conspiring with each other violation of section 1.

Later, the *Copperfield* case overruled the *Yellow cab* position and held that Section 1 of the Sherman Act is not intended to apply to activity that is “wholly unilateral.” Further, holding that “internal agreements” of companies do not arouse Sherman Act suspicion because (1) a single firm’s officers do not pursue separate economic interests as they have complete unity of interest, common objectives and one corporate consciousness (2) internal coordination may be required for a business to compete properly. The 2010 *American Needle* case finally determined the scope Single economic entity doctrine.

Notion of Single Economic Entity as prevalent in US:

The position in US is the one established by the Apex Court in 2010 through the *American Needle* case. In the said case, 32 separately owned professional football teams in the National Football League (NFL) collectively, through NFL Properties, awarded an exclusive headwear license to Reebok to manufacture and sell headwear for the 32 NFL teams. American Needle alleged that such conduct was a conspiracy to restrict Reebok’s competitors’ ability to obtain licenses for the teams’ intellectual property. In defense of these allegations, it was argued that the

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89 United States v. Yellow Cab Co. (1947), 67 S. Ct. 1565.
90 Copperweld Corporation v. Independence Tube Corporation (1984), 104 S. Ct. 2739
91 American Needle, Inc. v. National Football League (2008), F.3d 736
entities concerned were incapable of having perpetrated the alleged conduct as they constituted a single economic entity, at least with respect to the conduct concerned.92

The US Supreme Court rejected inferior courts’ holdings that the parties had “so integrated their operations that they should be deemed a single entity rather than joint ventures co-operating for a common purpose”.93 Court said that the key inquiry was whether the conduct in question was tantamount to a joining together of separate decision makers. Where separate economic actors that ordinarily pursue separate economic interests come together in a manner that “deprives the marketplace of independent centers of decision making”, the court said that the single economic entity defense would be of no use.94 Critically, the US Supreme Court affirmed that, when determining whether a single economic entity existed, the answer would not necessarily turn on whether parties involved were legally distinct entities.95 Rather, the “central substance of the situation” must be considered. The American Needle distinguishes three conditions that need to be seen in addition to concerted action of a unitary body: control (absence of independent decision making centers), interests (absence of concurring entrepreneurial interests) and competitive links (lack of actual or potential competition).

Thus, the US court evolved the doctrine of substance over form and left the decision of exception to depend on case to case basis instead of opting for a straight jacket formula. This is the present position taken in the American Jurisprudence on Single economic Entity principle.

3.4 Juxtaposing the above Doctrine upon the Indian Competition Law Regime

In India so far no case has come up to the Commission where the principle of Single Economic Entity was applied to decide the issue. The notion can be read into the definition of Enterprise under section 2(h) of the Competition Act which states,

“"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in

95 Ibid.
investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.”

The definition of ‘enterprise’ includes within its ambit even the subsidiary or division or unit through which the enterprise functions. So an enterprise also includes any subsidiary that operates under its control engaged in its activity. So for instance, if corporation A and Corporation B both are subsidiaries of corporation C then all three will be part of one unit. Such entities have been granted exemption in other jurisdictions and the intra organization agreements entered within such units is beyond the reach of competition Law. Therefore any kind of agreement, informal arrangement allocating the area of operation, fixing prices, allocating customers amongst them will not be scrutinized under section 396 of the Act.

Further, the definition also includes any department of the government that performs a non sovereign function which means that any government entity/department working under the control of Government of India as a subsidiary would also fall under section 2(h). However such linkages are although easier to be applied in Private enterprises where the shareholding and control of the parent company can be established upon the subsidiary, but applying the same to the Public sector enterprises creates a slippery situation.

96 Section 3, competition Act, 2002, provides, “(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void. (3) 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.”
It can be said that the Public sector undertakings (PSUs) are owned by the government and thus, all of them ultimately form a single economic entity and should be exempted from the Competition enforcement. However, such a blanket exemption cannot be granted to the Government entities as it results in exclusion of all such Government owned enterprises from competition Act which is contrary to the objective\(^{97}\) of the Act. Also, such a blanket exemption has not been granted in any other jurisdiction. The courts have laid down rigorous tests that need to be fulfilled along with parent subsidiary relationship before a conclusion about being a single economic entity is made and exemption granted.

Thus, the ambit of the exemption has to be limited only to certain specific cases that qualify the tests laid down in various jurisdictions. The essential qualifying criterion that can be borrowed from the US and the EC decisions to be applied to PSUs in India could be:

a. Lack of Economic independence of the Subsidiary company.

b. To prove that a parent and subsidiary form a single economic entity one must not prove that the parent owns 100\% of its subsidiary, rather, prove that the parent can exert a decisive influence over its subsidiary.

c. Even minority shareholding can allow the parent to decisively influence and determine the strategic behavior of the affiliate

d. Parties to the agreement are not independent in their decision making and one has sufficient control over the other so that the latter does not have ‘real autonomy in determining its course of action in the market’. – Viho Test

e. whether the conduct in question tantamounts to a joining together of separate decision makers and the “central substance of the situation” must be considered from case to case basis.-American Needle Test

Applying these above criterion the Single economic Entity test in India should be limited to very specific Government enterprise cases. An hypothetical situation where the notion can be applied could be that there are four state owned General insurance companies and a circular is issued by the Department of Financial services to share data concerning premium to ensure ‘no

\[^{97}\text{Objective of the Competition Act, 2002, “An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”}\]
competition’ between them. These four insurance companies are centers of independent decision making and they are under the financial control of Government of India. Furthermore, applying the Viho test since they are Public companies they do not have any real Autonomy to determine their course of Action in Market. The most important factor here is that in substance these are Public Companies and cannot compete with each other to the detriment of the other. Thus, they can be considered as a single Economic Entity. On an assumption, if there was a Multinational company and the three insurance companies were subsidiaries of that one multinational Corporation then the concept of single economic entity would have extended to them. Thus there is no reason why this concept not be applied to government entities who have a common consciousness and common interest. The two major problems that are faced while applying this notion to government entities is:

1. It would mean that all PSUs are a part of the same economic entity because they are all essentially owned by the government. However this defect is remedied by restricting the scope of application of the doctrine.
2. In case relief is granted under section 3 it may attract section 4. Thus the no. of cases filed under section 4 would increase since a single economic entity will be considered as one enterprise for assessing dominance. However, since it is public enterprise not engaged in a profit making purpose it can be exempted from the scrutiny of section 3 as well.
IV RECOMMENDATIONS AND CONCLUSION

The notion of Competitive Neutrality requires a level playing field for both the private and the Public Players in the Market and that the public players should not be given any competitive advantage by virtue of their government ownership. This doctrine has been partially enshrined under the Act since preamble, section 19(3)(d), 19(4)(k), 19(3)(f) provide enough safeguard to actions taken by government in public interest. Thus, it is concluded that with regard to its application the doctrine is enshrined in a limited manner within the competition Act. This doctrine has also been upheld by the commission by proactively taking cognizance into the Acts of the Government bodies, however no contravention has been found. It is suggested that there have been instances when the case that has come up before the commission when certain policy formulation or memorandum is passed by the government causing anti-competitive implications. In such cases the Act does not empower the commission to take action upon the adverse economic effects of such government intervention. Thus, it is suggested that the Act should empower the commission to undertake a competition assessment of the policy or memorandum passed by the government entity that entails anti-competitive effect. The assessment should be guided by the criterion identified under the OECD Impact assessment Toolkit. This kind of Impact Assessment has also been proposed under the Draft National Competition Policy, 2011. Although, section 49 of the Act requires the Government to take the opinion of the commission before formulating its policy. However, such an opinion has no binding Value upon the Government Entity. Also the provision says ‘may’ that gives a discretionary power in the hand of the government to approach or not approach the commission. Thus, it is suggested that an enforceable provision be made in the Act that empowers the commission to give recommendations in cases that come up to the commission alleging anti-competitive effect of the Government policy or memorandum passed under its statutory Power. The section 49 could be amended suitably to incorporate such proactive role of the Commission.

It is submitted that the notion of single economic entity requires that the entity which is controlled has no real autonomy to control its market behavior, it lacks financial independence and is under the decisive control of the Parent company. If these circumstances are present the entity is granted a status of single economic unit and its unilateral acts are not subject to competition jurisdiction since they amount to an internal allocation of work within a corporate
group, rather than an agreement between independent undertakings capable of entailing anti
competitive effect. These principles have been abundantly resorted to by the European
commission and courts and also lately in the United States that requires the court to look at
application on case to case basis. Applying this doctrine to the Government enterprises could be
a valid rationale for granting them exemption from competition enforcement at least in some
 exceptional cases where the entities are essentially controlled by some department or branch of
 the government. However, this application has to be sparingly and carefully exercised since it
 may amount to a blanket exemption to all government owned enterprises. Thus, its application
 should be limited only to cases where two or more public sector undertakings belonging to some
 economic unit are competing with each other as discussed in a hypothetical situation of four
general insurance companies. The author doesn’t suggest that this doctrine be used as a blanket
exemption as such an application will take away the basic objective which the competition law
seeks to achieve. Thus no quantitative and straight jacket formula can be formulated to apply the
said doctrine and it is believed that the commission will apply such a doctrine only on case to
case basis.


