Dissertation

On

"Anti-Competitive Agreements—Underlying Concepts & Principles under the Competition Act, 2002"

In the partial fulfilment of internship programme at Competition Commission of India

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DISCLAIMER

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**ABBRIEVATIONS**

<table>
<thead>
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<th>Abbreviation</th>
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<tr>
<td>AAEC-</td>
<td>Appreciable adverse effect on competition</td>
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<td>All ER-</td>
<td>All England Reports</td>
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<td>CCI-</td>
<td>Competition Commission of India</td>
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<td>EC-</td>
<td>European Commission</td>
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<td>ECJ-</td>
<td>European Court of Justice</td>
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<td>EU</td>
<td>European Union</td>
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<td>GATS -</td>
<td>General Agreement on Trade in Services</td>
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<td>GOI -</td>
<td>Government of India</td>
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<td>IICA-</td>
<td>Indian Institute of Corporate Affairs</td>
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<tr>
<td>IPR-</td>
<td>Intellectual property rights</td>
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<tr>
<td>LPG -</td>
<td>Liberalization privatization and globalization</td>
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<tr>
<td>MPRTC</td>
<td>Monopolistic Restrictive Trade Practices Commission</td>
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<td>MRTP Act-</td>
<td>Monopolies and Restrictive Trade Practices Act</td>
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<tr>
<td>OECD -</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>OFT -</td>
<td>Office of Fair Trading</td>
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<td>UK -</td>
<td>United Kingdom</td>
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<td>UNCTAD-</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>USA -</td>
<td>United States of America</td>
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I. INTRODUCTION

“A dynamic and competitive environment, underpinned by sound competition law and policy, is an essential characteristic of a successful market economy”

Most countries in the world have enacted competition laws to protect their free market economies and to ensure an economic system in which the allocation of resources is determined solely by supply and demand. The rationale of free market economy is that the competitive offers of different suppliers allow the buyers to make the best purchase.

Hon’ble Supreme Court observed, “over all intention of competition law is to limit the role of market power that might result from substantial concentration in a particular industry. The major concern with monopoly and similar kinds of concentration is not that being big is necessarily undesirable. However, because of the control exerted by a monopoly over price, there are economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other. The model of perfect competition is the ‘economic model’ that usually comes to an economist’s mind when thinking about the competitive markets.”

Modern competition law can be viewed as a basic system of rules which are designed as far as possible to allow market to function properly. It is designed to prohibit the abuses of market power, whether by an individual firm or a group of firms acting collectively or otherwise to allow markets to operate unhindered. The fundamental rationale of competition law lies in the proposition that competition yields social benefits, which are lost through monopoly and that legal control can reduce, or eliminate the damage done. The welfare of a society, which establishes an effective form of regulation, will, thereby improve.

As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main aim of

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1. Khemani R. S., A framework for the design and implementation of competition law and policy, World Bank publications (1999), Pg V Preface
2. Competition Commission of India vs. Steel Authority of India Ltd. and Anr. (2010) 10 SCC 744 Para 1-7
competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

Objectives:-

The project work has been designed to fulfill following objectives, which could contribute and facilitate to enhance the understanding of anti-competitive agreements under competition law regime in India:-

1. To understand and the analyze concept of anti-competitive agreements and need for the law to prevent the same.
2. To make a comparative study of laws in US, EU and India on anti-competitive agreement.
3. To study and analyze the interpretation of various terms used under the Act, and to study recent judicial trends for prevention of anti-competitive agreements.

Scope of Study:-

This research work is a detailed study of provisions of Competition Act, 2002 so as to find out their adequacy or inadequacy in preventing anti-competitive agreements and to make suggestions in this regard.

Research Methodology:-

The doctrinal method of research has been used, which involve collection of data from both primary and secondary sources; primary sources like statutes, reports of the commissions and committees related thereto and Secondary sources like books written by various eminent authors and articles found in the journals and websites, e-journals. Use of internet also became very relevant to find out the most updated, relevant and apt information which helped me in exploring the subject from various dimensions. Inductive Methodology i.e. getting general results from specific points by analysis of literature studied has been also used.
II. ECONOMICS AND COMPETITION LAW:-

“It has become commonplace to use the language of economics in defining antitrust. Courts and scholars articulate economic goals for antitrust policy and use economic methodologies, both theoretical and empirical, in resolution of antitrust issues.”

Hence, before going into a detailed study of any provision under competition law it becomes very important to go through a brief understanding of some basic economic terminologies used under competition law regime. The very essence of competition law in any system of the world is dealing with the conduct that impairs the process of competition. In a market, suppliers have the freedom to compete amongst themselves and the consumers have knowledge of the suppliers, the relative price and quality, and decide to buy or not depending on their preferences and purchasing power. Market forces are said to be determine the price of a product or a service. However, the actual market is entirely different from this description. Understanding of economic concepts and markets is absolute must for successful implementation of competition law.

Furthermore the Hon’ble Supreme Court in TELCO v. Registrar of Restrictive Trade Agreements observed that the question of competition cannot be considered in vacuum or in a doctrinaire spirit. The concept of competition is to be understood in a commercial sense.

According to Garner, “competition is the struggle for commercial advantage; effort or action of two or more commercial interests to obtain same business from the third parties. And a perfect competition is a completely efficient market situation characterised by numerous buyers and sellers, a homogenous product, perfect information for all parties, and complete freedom to move in and out of the market. Perfect competition rarely exists but antitrust scholars often use the theory as a standard for measuring market performance.”

“Competition” has been further defined as the process by which economic agents, acting independently in a market, limit each other’s ability to control the conditions prevailing in that market. Intention of competition law is to limit the role of market power that might result from substantial concentration in a particular industry. Because of the control exerted by a monopoly over price, there are economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition

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2 (1977)2 SCC 55.
law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other. The Supreme Court observed that “competition law is concerned with the regulation of competition in a particular market within the territory of a country.”

In most simple language, competition in the market means sellers striving independently for buyers’ patronage to maximize profit or other business. A buyer prefers to buy a product at a price that maximizes his benefits whereas the sellers prefer to sell the product at a price that maximizes his profit.

**Competition policy** is defined as “those government measures that directly affect the behavior of enterprises and the structure of industry” the objective of competition policy is to promote efficiency and maximize welfare. In this context the appropriate definition of welfare is the sum of consumers’ surplus and procedures’ surplus and also includes any taxes collected by the government. It is well known that in the presence of competition, welfare maximization is synonymous with allocative efficiency.  

As provided in the preamble of the Act focuses on **markets in India.** The Act does not provide the definition of the market. Market has been defined as a place of commercial activity in which goods and services are bought and sold. It can also be said an actual or nominal place where forces of demand and supply operate, and where buyers and sellers interact (directly or through intermediaries) to trade goods, services, or contracts or instruments, for money or barter. Markets include mechanisms or means for determining price of the traded item, communicating the price information, facilitating deals and transactions, and effecting distribution. The market for a particular item is made up of existing and potential customers who need it and have the ability and willingness to pay for it. A free or an open market is that in which any buyer or seller may trade and in which prices and product availability are determined by free competition.

The function of commission is to regulate market activities and to ensure that market works properly without any hindrance for this it is required that no market failure occurs. When markets do not provide us with the best outcome in terms of efficiency and fairness, then we say that there

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7 Haridas export v. Al India float glass manufacturers association AIR 2002 SC 2728.
8 Roy Abir, Jayant Kumar, Competition Law in India. Eastern Law House, 2008 , pg. 389
10 http://www.businessdictionary.com/definition/market.html
exists market failure. Market failure can be defined as Situation where resources cannot be efficiently allocated due to the breakdown of price mechanism caused by factors such as establishment of monopolies. In more simple words it can be defined as an economic term that encompasses a situation where, in any given market, the quantity of a product demanded by consumers does not equate to the quantity supplied by suppliers. This is a direct result of a lack of certain economically ideal factors, which prevents equilibrium. Generally imperfect competition, externalities and information asymmetries are the main causes of market failure.

**Imperfect competition** can be defined as when an agent in a market can gain market power, allowing them to block other mutually beneficial gains from trade from occurring. This can lead to inefficiency due to imperfect competition, which can take many different forms, such as monopolies, cartels, or monopolistic competition if the agent does not implement perfect price discrimination.

Externalities implies that the actions of an agent can have “side effects” known as externalities, which are innate to the methods of production, or other conditions important to the market for example a trade may impose substantial costs on individuals not participating in the trade. Alternately, individuals not participating in the trade would realize significant benefits from it but the parties directly involved in the trade would not.

Some markets can fail due to the nature of certain goods, or the nature of their exchange. For instance, goods can display the attributes of public goods or common-pool resources, while markets may have significant transaction costs, agency problems, or informational asymmetry. Information asymmetries can also cause market failure where one party has material information that the other does not, or both parties lack material information that may or may not affect the trade.

There are three areas of enforcement that provide focus for most competition laws in the world today are mainly agreements among enterprises, abuse of dominance, and mergers or, more generally, combinations among enterprises.

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12 http://www.businessdictionary.com/definition/market-failure.html
13 http://www.investopedia.com/terms/m/marketfailure.asp#axzz1jiXZQnlo
III. COMPETITION LAW IN INDIA

1. Development:-

In the Indian context, the implementation of competition law and policy has always been considered an essential component of governance. Even the Arthashastra, the first known treatise on government written by Chanakya in the 3rd century BC, in which political governance has been equated with economic governance, had emphasized fair trade as one of the mainstay of good governance. Chanakya has warned against the propensity of traders to fix prices by forming cartels and recommended heavy fines for traders who could collude and fleece consumers by conspiring together. According to the Indian Constitution, freedom to trade or practice any occupation is a fundamental right.15 As per Constitution, only the Parliament or the State has the power to impose restrictions on this right. Constitution also provides for curbing concentration of economic power, so that the common good is not adversely affected.

Competition Law for India find its base in Articles 3816 and 3917 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Article 38 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life, while Article 39 provides that the State shall, in particular, direct its policy towards securing.

15 Article 19 Constitution of India-Freedom of trade
16 Article38-State to secure a social order for the promotion of welfare of the people.—(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.
17 Article 39- Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing—
(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
1. That the ownership and control of material resources of the community are so distributed as best to subserve the common good; and

2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the country. Recognizing the important linkages between trade and economic growth, the Government of India, in the early 90s took step to integrate the Indian economy with the global economy. In the wake of liberalization and reforms introduced by GOI since 1991 with a view to meet the challenges offered by globalization it was required to access the need to evolve India’s competition regime. After India became a party to the WTO agreement, a perceptible change was noticed in India’s foreign trade policy which had been earlier highly restrictive. Thus, finally enhancing its thrust on globalization and opened up its economy removing controls and resorting to liberalization. Finding the ambit of MRTP Act inadequate for fostering competition in the market and eliminating anti-competitive practices in the national and international trade, the Government of India decided to appoint a committee to propose a modern competition law. Subsequently in October 1999 a high level committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law and to suggest a legislative framework, which may entail a new law or appropriate amendments to the MRTP Act consonant with international developments was constituted which submitted its report in May 2000.

With the increasing integration of the Indian economy and markets with the international economy the government of India has also acquired a wider perspective on regulation of market from merely curbing monopoly to promoting competition. Acting on the high level committee report with some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed it in December 2002 hence, the **Competition Act, 2002** (herein after referred as ‘the Act’) was enacted which repealed the existing MRTP Act 1969 and received assent of President on 13th January, 2003, subsequent to which various provisions have been brought into force from time to time. The object of the Act as has been clearly laid down in the preamble is to provide for the establishment of a Commission keeping in view of the economic

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18 India is a WTO member since 1 January 1995.
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. Hence the basic objective is to provide a law relating to competition among enterprises that will ensure that the process of competition left free without stronger trading enterprises manipulating the market to their advantage and following from that, to the disadvantage of consumers.

2. Competition Act 2002 - An Overview:

The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, and adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed Regulations called the Competition Commission of India (General) Regulations, 2009 (for short, the ‘Regulations’). The Act and the Regulations framed there under clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country’s economy cannot be ruled out.

Primarily, there are three main elements which are intended to be controlled by implementation of the provisions of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition.

The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India (herein after referred as commission21) which has been established by Central Government with effect from 14th October 2003 (duly constituted in March

21 section 2(e)- "Commission" means the Competition Commission of India established under of section 7(1)
2009). Hence the commission is required to take care of such situation so that there could not be created market failure thereby causing harm to market. To achieve its objectives, Commission the endeavours to do the following:

1. Make the markets work for the benefit and welfare of consumers.
2. Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
3. Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.
4. Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.
5. Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.22

The Act covers essentially four areas of competition contained in its substantive provisions namely:

- Anti - Competitive Agreements(Section 3)
- Abuse of Dominance(Section 4)
- Combinations Regulation(Section 5 and 6)
- Competition Advocacy(Section 49)

The Act is extra-territorial and assumes jurisdiction over acts outside India that may affect a market within India.23

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23 **Section32.** Acts taking place outside India but having an effect on competition in India- The Commission shall, notwithstanding that,—
(a) an agreement referred to in section 3 has been entered into outside India; or
(b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire [in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an AAEC in the relevant market in India [and pass such orders as it may deem fit in accordance with the provisions of this Act.]
IV. ANTI-COMPETITIVE AGREEMENTS

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”24

This statement of Adam Smith makes it abundantly clear for a need to have a proper regulatory mechanism for prevention of anti-competitive agreement which not only affect the market economy leading to monopolistic approach but also victimizes the consumers and thereby cause harm to the entire economy creating hindrance to the competition in the market.

Anticompetitive agreements can be said to be agreements that negatively or adversely impact the process of competition in the market. According to an OECD/World Bank Glossary,25 anticompetitive practices refer to a wide range of business practices that a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing foods and services at a lower cost or higher quality. Similarly, it can be said that anticompetitive agreements are agreements between firms or enterprises that restrict or prevent or otherwise unfavourably affect competition, and that may help increase the market position or share of the parties and may also be to the disadvantage of the consumer as the products and services may be available at a higher cost than are available in a competitive market and also may be of a lower quality.

Prohibition of anti-Competitive Agreements has been provided under Section 3 Chapter II of the Act dealing with prohibition of certain agreements, abuse of dominant position and regulation of combinations of the Act. The provisions of the Competition Act relating to anti-competitive agreements were notified on 20th May, 2009. The endeavor of the researcher is to make a careful and elaborate study of provisions relating to anti-competitive agreement under the Act.

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1. Competitive Agreements—Underlying Concepts & Principles under the Competition Act, 2002

1. Comparative Study with USA, EU and UK Competition Law Regimes:

Before going in detail analysis of anti-competitive Agreements as under section 3 of the Act a study of laws as existing in other countries on anti-competitive Agreements namely EU, UK, and USA law would be useful because competition law in these countries are much older than India’s. Below is a brief study of the US and EU and UK legal regimes for anti-competitive Agreements. The history of competition law reaches back to the Roman Empire. The business practices of market traders, guilds and governments have always been subject to scrutiny, and sometimes severe sanctions. Since the 20th century, competition law has become global. The two largest and most influential systems of competition regulation are United States antitrust law and European Union competition law. National and regional competition authorities across the world are framed on the model of these two regimes.

1.1 USA Competition law:

Competition law is known as antitrust law in United States. The antitrust laws are the original and in many ways most important component of the United States’ federal economic regulatory scheme. The antitrust laws seek to protect free market and robust competition by setting limits on the collusive and predatory conduct and monopolistic abuses that free markets often breed. Sherman Act is the original and principle antitrust statute of the US and was the earliest in the world, enacted in 1890 called Sherman Antitrust Act, 1890.

Two great ideologies of the market and the state have shaped the evolution of antitrust law in the USA since 1890, namely evolutionary and intentional vision. Evolutionary vision view the market, framed solely by common law rules of property and contract, as a mechanism for facilitating free exchange among countless individuals in the pursuit of their best interests; markets, in this vision, will destroy monopoly without government intervention. While the intentional vision view the market as a mechanism within which powerful interests can coerce consumers, labor, and small businesses; markets in this vision, tend toward monopoly unless government intervenes. However Sherman Act embodied a legislative compromise between these two visions. The influence of versions of these ideologies is apparent throughout the competition history in the world.26

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26 Collins Wayne Dale, ‘ISSUES IN COMPETITION LAW AND POLICY’ Volume I ABA Section of Antitrust Law (2008) pg.1,3
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After that came the Chicago school of thoughts which laid down two propositions which emphasized firstly that Markets are superior to any form of governmental, including judicial intervention and judicial interventions have no coherent analytical basis. These two propositions are said to be central for understanding the background of the limits of antitrust.\(^\text{27}\)

US Court observed, “Antitrust laws in general and the Sherman Act, in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights to the protection of our fundamental personal freedoms.”\(^\text{28}\)

The key provisions of the Sherman Act are contained in section 1\(^\text{29}\) and section 2\(^\text{30}\) which are respectively analogous to Article 101 and 102 of the EU treaty. Section 1 of the Sherman Antitrust Act describes precisely and prohibits specific means of anticompetitive conduct, it prohibits agreements in restraint of trade--such as price-fixing, refusals to deal, bid-rigging, etc. The parties involved might be competitors, customers, or a combination of the two. Although the law states that “every contract, combination, or conspiracy in restraint of trade... is declared to be illegal”, it has been interpreted by the courts to mean every contract, combination, or conspiracy unreasonably in restraint of trade. Section 2 of the Sherman Antitrust Act deals with end results that are anticompetitive in nature and forbids monopolizing or attempting to monopolize. Basically it prohibits firms from using bad conduct or abusive behavior to become a monopolist or using such behavior if they're already a monopoly. Notice that it does not prohibit firms from being a monopoly. It only forbids the use of monopolistic power. Thus, these sections supplement each other in an effort to prevent businesses from violating the spirit of the Act, while technically remaining within the letter of the law.\(^\text{31}\)

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\(^{29}\) Section1. 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

\(^{30}\) Section 2: 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

There has also come some subsequent legislation expanding its scope like The Clayton Antitrust Act, passed in 1914, prescribed certain additional activities that had been discovered to fall outside the scope of the Sherman Antitrust Act. For example, the Clayton Act added certain practices to the list of impermissible activities:

1. Price discrimination between different purchasers, if such discrimination tends to create a monopoly
2. Exclusive dealing agreements
3. Tying arrangements

After Clayton Act came the Robinson-Patman Act of 1936 which amended the Clayton Act. The amendment proscribed certain anticompetitive practices in which manufacturers engaged in price discrimination against equally-situated distributors.

1.2 EU Competition law:-

The old Rome Treaty of 1957 is now known as Treaty on European Union\(^{32}\) (previously known as European Community\(^{33}\)) by the Treaty of Lisbon, which was signed on 13 December 2007 in Lisbon and which entered into force on 1 December 2009. EU competition law is contained in Chapter 1 dealing with ‗Rules of Competition‘ of Title VII of the EU Treaty, which consist of Articles 101 to 109(previously Article 81 to 89).

Article 3(3) of the EU Treaty provides that The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Section 3 of the Act is based largely on Article 101\(^{34}\) of EU, which is the law regulating anti-competitive Agreements in EU though the decisions under those Articles are not binding on

\(^{32}\) The previous name ‘European community’ was replaced by ‘European Union’ by the Treaty of Lisbon, which was signed on 13 December 2007 in Lisbon and which entered into force on 1 December 2009.

\(^{33}\) The original name ‘European Economic community’ was replaced by ‘European community’ by the Maastricht Treaty 1992

\(^{34}\) Article10 (EU) -1. The following shall be prohibited as incompatible with the internal 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 internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
India, but they are useful guides in understanding the intent of the legislation. Article 101 and 102 (previously Article 82 dealing with abuse of dominance) are also referred as called “Modernization Regulation”. The EU has granted a number of block exemptions to agreements in various sectors so that it is unnecessary for individuals to apply for individuals to apply for exemption. They relate to agency agreements, exclusive distribution agreements, agreements relating to research and development, specialization agreements, vertical agreements and concerted practices etc.

1.3 UK Competition law:-

The principal domestic law relating to competition in the UK is the Competition Act, 1998. The Enterprises Act, 2002, is complementary to their competition Act. Section 2 of the UK

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(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) 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:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

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Section 2- Agreements etc. preventing, restricting or distorting competition-
(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
(a) may affect trade within the United Kingdom, and
(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.
(2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) 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.
(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.
(4) Any agreement or decision which is prohibited by subsection (1) is void.
(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).
Anti-Competitive Agreements - Underlying Concepts & Principles under the Competition Act, 2002

Competition Act, deals with anti-competitive agreements, decision, and concerted practices. Section2 (1), agreements between undertakings, decisions by associations of undertaking or concerted practices which -

(a) May affect trade within the UK, and
(b) Have their object or effect of prevention, restriction or distortion of competition within the UK.

They are same as set out in Article 101 (EU), as according to section 60 of the Competition Act, 1998, the domestic law in the UK relating to the Competition should be consistent with the corresponding questions arising in the competition law within the Community. Any issue relating to effect on competition with a Community Dimension is provided to be dealt with in accordance with the European Community law, viz. Articles 101 and 102 of the EU Treaty.

2. Anti-Competitive Agreements in India:

The present Act is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite pari materia to the Indian legislation. In United Kingdom, the Office of Fair Trading (OFT) is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in United States deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries are progressive, applied rigorously and more effectively. The deterrence objective in these anti-trust legislations is clear from the provisions relating to criminal sanctions for individual violations, high upper limit for imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies.

(6) Subsection (5) does not apply where the context otherwise requires.
(7) In this section “the United Kingdom” means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.
(8) The prohibition imposed by subsection (1) is referred to in this Act as “the Chapter I prohibition”.

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The Act as laid down in its preamble has been framed on the philosophy of modern competition law to come in line with current policies of GOI with growing national and international trends with regard to competition both at national and international level. It aims at fostering competition and promoting Indian markets against anti-competitive practices by enterprises. Competition laws in India like in any other jurisdiction prohibits all agreements which restrict freedom of trade and cause consumer harm by way of limiting production and distribution of goods and services and fixing prices higher than normal. For example, a cartel of producers, traders, together may fix prices higher than normal leading to loss in consumer welfare.

Principle objective of supplier of goods and services who are in a position to manipulate the market is to maintain their profits at pre-determined levels. They seek to achieve through this various means. Agreements for price-fixing, limiting supply of goods or services, dividing the market, etc. are the usual modes of interfering with the process of competition and ultimately reducing or eliminating competition. Where competition is adversely affected to an appreciable extent, such agreements would be anti-competitive.36

The law prohibiting agreements, practices, and decisions that are anti-competitive are contained in section 3 of the Act. Which provides as under:-

**SECTION 3- ANTI COMPETITIVE AGREEMENTS -- (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 provision of services, which causes or is likely to cause an AAEC within India.**

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36 Ramappa T; Competition Law in India- Policy, issues and Devolvements; Oxford University Press,(2006); pg.50
37 (b) “agreement” includes any arrangement or understanding or action in concert,--
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;
38 (a) “acquisition” means, directly or indirectly, acquiring or agreeing to acquire
(i) shares, voting rights or assets of any enterprise; or
(ii) control over management or control over assets of any enterprise
39 (i) “goods” means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes--
(a) products manufactured, processed or mined;
(b) debentures, stocks and shares after allotment;
(c) in relation to goods supplied, distributed or controlled in India, goods imported into India;
40 (u) “service” means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising
(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\(^\text{41}\) 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\(^\text{42}\);
(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.

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

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

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

\(^\text{41}\)“practice” includes any practice relating to the carrying on of any trade by a person or an enterprise

\(^\text{42}\)“price”, in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing.
shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an AAEC in India.

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

(a) “tie-in arrangement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
(b) “exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
(c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
(d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
(e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
(a) the Copyright Act, 1957 (14 of 1957);
(b) the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection)Act, 1999(48 of 1999),
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.
The term anti-competitive agreements as such has not been defined by the Act, however, Section 3 prescribes certain practices which will be anti-competitive and the Act has also provided a wide definition of agreement under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India. Section 3(2) simply declares agreement under section 3(1) void.

Section 3(3) deals with certain specific anti competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deal with restraints imposed through agreements among enterprises in different stages of production or supply etc. for example agreement amongst manufacturer and supplier.

Section 3 (5) provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of section 3.

Competition laws in all over the world usually places anti-competitive agreements in two categories namely – horizontal agreements and vertical agreements. Horizontal agreements are generally viewed more seriously than the vertical agreements. Firms enter into agreements, which may have the potential of restricting competition. A scan of the competition laws in the world will show that they make a distinction between “horizontal” and “vertical” agreements between firms. The former, namely the horizontal agreements are those among competitors and the latter, namely the vertical agreements are those relating to an actual or potential relationship of purchasing or selling to each other. A particularly pernicious type of horizontal agreements is the cartel. Vertical agreements are pernicious, if they are between firms in a position of dominance. Most competition laws view vertical agreements generally more leniently than horizontal agreements, as, prima facie, horizontal agreements are more likely to reduce competition than agreements between firms in a purchaser seller relationship.43

The Act have not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in section 3(3) and section 3 (4) are horizontal and vertical agreements respectively. It is to be noted that section 3(3) and section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti competitive agreements.

43 www.cuts-international.org/doc01.doc
3. Anti-Competitive Agreement under the MRTP Act:

As discussed earlier Competition laws in India were governed by the MRTP Act, 1969 which was substantially taken from U.K Legislations, particularly the Restrictive Trade Practices Act, 1956 and Resale Prices Act, 1964. This Act established the Monopolistic and Restrictive Trade Practices. The material difference in the framework and scheme of the two enactments are

The emphasis under the MRTP Act was in respect of trade practices that adversely affected competition and were subject to the rule of reason. Under the MRTP Act till the cease and desist order was passed by the MRTP Commission, a particular trade practice was not considered void or illegal whereas this is not the case under the Competition Act. In term of the provisions of MRTP Act, fourteen trade practices were listed which were deemed to be restrictive and the respondent has to prove his innocence before the MPRTC. It was deeming provision and almost identical to per se illegal in public interest.\(^4\)

A comparison of section 33\(^4\) of the MRTP Act, 1969 with the corresponding provisions of Section 3 of the Competition Act, 2002 would show that the anti-competitive agreements

\(^{44}\) IICA report on competition law and policy “induction training for mid level staff of the CCI, pg 27, 28, 29.
\(^{45}\) Section 33- Registrable agreements relating to restrictive trade practices.
(1) Every agreement falling within one or more of the following categories shall be deemed, for the purpose of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely :-
(a) any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
(b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchaser some other goods;
(c) any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
(d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;
(e) any agreement to grant or allow concessions or benefits, including allowances, discounts, rebates or credit in connection with, or by reason of, dealings;
(f) any agreement to sell goods on condition that the prices to be charged on re-sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;
(g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;
(h) any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;
(i) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;
(j) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;
(ja) any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;
(jb) any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods;
particularized in sub section 3 and 4 of the Competition Act, 2002 are somewhat akin to restrictive trade practices specified in clauses (a)-(d), (f)-(h), (j), (ja), (jb) of sub-section 1 of section 33 of the MRTP Act, 1969.

4. Rules Applied in the Interpretation of Anti-Competitive Agreements:

After taking all the relevant factors into account in a given statute, there should be still some principles on which one can arrive at a conclusion on the effect of the anti-competitive conduct or practice on competition. The courts all over the world including India have come to judge violations of anti-competitive agreements by the following three main approaches namely:

4.1 The Rule of Reason:

The ‘rule of reason’ approach weighs the reasons of a certain action taken and the economic benefits and costs of that action before coming to a judgment. Under the rule of reason, the effect on competition is found on the facts of a particular case, and its effect on the market condition, and existing competition including the actual or probable limiting of competition in the relevant market.

The rule of reason is a legal approach where an attempt is made to evaluate the pro-competition features of the restrictive business practice against its anti-competitive effect in order to decide whether or not the practice should be prohibited. Blacks’ law dictionary defines the law of reason in anti-trust law as a ‘judicial doctrine holding that trade practice violates the Sherman Act only if the practice is unreasonable restraint of trade, based on economic factors’. In the US, the rule of reason is applied in a more specific way. The principle question is whether the agreement will increase market power; if there is no significant indication to this effect, there is no case. On the other hand, if the indication is very strong and there are no obvious efficiencies from the agreement and no good explanation that the

(k) any agreement not hereinbefore referred to in this section which the Central Government may, by notification specify for the time being as being one relating to a restrictive trade practice within the meaning of this sub-section pursuant to any recommendation made by the Commission in this behalf;
(l) any agreement to enforce the carrying out of any such agreement as is referred to in this sub-section.
(2) The provisions of this section shall apply, so far as may be, in relation to agreements making provision for services as they apply in relation to agreements connected with the production, storage, supply, distribution or control of goods.
(3) No agreement falling within this section shall be subject to registration in accordance with the provisions of this Chapter if it is expressly authorized by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement.

46 World Bank/OECD: Glossary of Industrial organization economics and Competition Law
47 Black’s Law dictionary, 7th edition, pg. 1033
agreement is the response of market or is helping to deliver something better or at lower prices, there is a presumption of anti-competitive effects and the defendant must come forward to show that there is no market harm. If there is no presumption, the plaintiff must produce more evidence of market power or its increase. Supreme Court, in *Tata Engineering and locomotive co. Ltd. V. Registrar of restrictive trade agreements*\(^{48}\) observed that to determine whether the restrain promoted or suppressed competition, it was necessary to consider three matters: first, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint was imposed. Third, what is the nature of restraint and what is its actual and probable effect. Agreements under section 3(4) are subjected to test of this *rule of reason*.

Hon.ble Supreme Court of India observed “it will thus be seen thus be seen that the ‘rule of reason’ normally requires an ascertainment of the facts or features peculiar to the particular business; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable; the history of the restraint and the evil believed to exist, the reason for adopting the particular restraint and the purpose or end sought to be attained and its only on a consideration of these factors that it can be decided whether a particular act, contract or agreement, imposing the restraint is unduly restrictive of competition so as to constitute restraint of trade”\(^{49}\)

**4.2 The Per Se rule:**

‘*Per se*’ is a Latin phrase meaning “in itself “in legal terms it basically means that the courts will regard a certain action to always be harmful and therefore it must only be proved that the defendant has committed the action to find him guilty.

The *Per se* rule and its rationale has been explained by US courts in a number of cases. Like in *Northern Pacific Railway Company v. United States*\(^{50}\) the Court observed that there are certain agreements and practices which because of their pernicious effects on competition and lack of any redeeming virtue are confusedly presumed to be unreasonable and therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints that are prescribed by the Sherman Act more certain to everyone concerned, but it also avoids the

\(^{48}\) (1977) 2 SCC 55; Board of Trade of City of Chicago V. United States 246 US 231 (1918)
\(^{49}\) Mahindra and Mahindra Ltd v. UOI (1979)2 SCC 529
\(^{50}\) 356 US 1 (1958)
necessity for an incredibly complicated and prolonged investigation into the entire history of industry involved, as well as related industry, in an effort to determine at large whether a particular restraint has been unreasonable, an inquiry so often wholly fruitless when undertaken. In Jefforson Parish Hospital Distt. No. 2 v. Hyde51 the court observed that the rationale for per se rule, in part, is to avoid a burdensome inquiry into the actual market conditions in situations where the likelihood of anti-competitive conduct is so great as to render unjustified the cost of determining whether the particular case at bar involves anti-competitive conduct.

The per se rule, as opposed to the rule of reason has been applied by the Courts in respect of particularly harmful agreements such as agreements relating to price-fixing, allocation of territories, bid-rigging, group boycotts, consulted refusal to deal and resale price maintenance. It should be noted, however, that in recent years, the approach of US courts have undergone a transition from dichotomous approach based on two distinct rules per se rule and the rule of reason, to a more nuanced and case-specific inquiry tailored to the suspect conduct in each particular case52.

Referring to these decisions especially Northern Pacific Railway case (discussed above) in my view section 3(3) could not be said to be covered under Per Se rule. Going through the above discussion and various decisions by Court especially Northern Pacific Railway case it can be drawn that this principle which is well established and applied in US competition law successfully with regard to anti-competitive agreements, but in my view in India as per the language of the statute Per Se rule is not at all applicable on anti-competitive agreements as under section 3 of the Act.

In India there is no concept of per se rule under completion law as such. However, Evidence Act, 1872 under section 4 clause 3 provides for “conclusive proof” which gives an artificial probative effect by law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is an irrebuttable presumption and the same as what is called as the Per Se rule in US law.

51 466 US 2 (1984)
52 Polygram Holding Incorporation v. FTC 416 F.3d 29 (D.C.Cir. 2005)
4.3 The rule of presumption:

Since the Act in section 3(3) used the term “shall be presumed” so it becomes important to elaborate this principle of interpretation as well while discussing anti-competitive agreements. The principle have been provided in the Evidence Act, 1872 under section 4 clause 2 which says: “whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”

Hence the expression shall presume leaves no discretion with the Court to make the presumption and it is a legislative command to Courts to raise a presumption and regard such fact as proved unless and until it is disproved. The question of calling upon the parties to formally prove a fact does not arise. The Court is bound to take the fact as proved until the evidence is given to disprove it. In this sense the presumption is always rebuttable, however, it cannot be held to be synonymous with “conclusive proof” as discussed earlier in the per se rule.

The principle of ‘shall presume’, used in section 3(3), has been explained by Courts in India in numerous cases. Supreme Court in Sodhi Transport co v. State of Utter Pradesh observed that ‘the words “shall presume” have been used in Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and not laying down a rule of conclusive proof.’ the Court also observed that ‘a presumption is not in itself evidence but only makes a prima facie case for the party in whose favor it exists. It indicates the person on whom the burden of proof lies. But when the presumption is conclusive, it obviates the production of any other evidence. But when it is rebuttable, it only points out the party on which lies the duty of going forward on the evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over.

Therefore it can be drawn from the above discussion that in case of agreements listed in section 3(3), once it is established that such an agreement exist, it will be presumed that the agreement has an AAEC and then the burden of proof will come on to the alleged defendant.

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55 AIR 1980 SC 1099
Hence the presumption as provided under section 3(3) can be rebutted by the party concerned in particular case.

5. Important terms used in the provisions of section 3:- Agreement:-

The term agreement is defined very widely under the Act in section 2(b) it provides that “agreement” includes any arrangement or understanding or action in concert:—
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

This is an inclusive definition which includes any arrangement or understanding or action in concert, it includes formal and informal, written or oral agreements. It also includes agreements which are not even meant to be legally enforced.

An Agreement can be said to be a mutual understanding between two or more persons. Black’s Law Dictionary defines agreement as “A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances, a manifestation of mutual consent by two or more persons”. According to Iyers Law Lexicon, agreement is the “Coming together of parties, in opinion or in final determination, the union of two or more minds in a thing done or to be done, a mutual assent to do a thing”. It has also been defined as “The occurrence of two or more persons in affecting or altering their rights and duties”.57

5.1 Appreciable Adverse Effect on Competition (AAEC):-

The term appreciable adverse effect has not been defined in the Act, but section 19(3) of the Act provides for certain factors to be given due regard by the commission while determining whether an agreement have AAEC or not, namely:—

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;

57 Osborn’s Concise Law Dictionary 8th Ed. P. 26
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.\footnote{58}

The first three factors, relates to negative effect on competition while the remaining three factors relates to beneficial effects. Thus in assessing whether an agreements have appreciable adverse effect on competition, both the harmful and beneficial effects shall be taken into consideration while determining any case under section 3 by the commission. *Barriers to new entrants* can be created, for example, though an agreement to set unduly high standards. *Driving existing competitors out of the market* will happen for example if an enterprise enters into an exclusive supply agreement with distributors that oblige them to discontinue their trade with other suppliers, or if certain supplier enters into agreement to sharply reduce the price with a view to drive out competitors who are not party to the agreement. *Competition may be foreclosed* if an enterprise enters into a long term agreement with a raw material or components suppliers, there by adversely affecting supplies to competitors. *Accrual of benefits to consumers* can arise from lower prices or improved quality or more efficient delivery of services. *Improvements in production or distribution of goods or provision of services* are found for example when there is rapid after-sale service or when a large range of products being stocked by distributors. Promotion of technical, scientific and economic development may arise from agreements relating to research and development or specialization in production.

Section 19(3) seems to be a mandatory provision and the Commission is bound to apply these factors for arriving at AAEC. According to commission, the provisions of Section 3(3) are for forming a prima facie opinion and not the final one. The parameters given in Section 19(3) are not the ′cause′ of AAEC but a result thereof. For example, if an “agreement” results into the creation of barriers or driving existing competitors or forecloses the competition and so on, there has to be AAEC.

The focal point of competition should be the actual and potential business conduct of firms in a given market and not on the absolute or relative size of firms. What needs to be seen by the commission is that whether a firm can exercise “market power”, i.e. engage in business practices which substantially lessen or prevent competition.\footnote{59}

This approach to determine the AAEC is somewhat based on rule of reason that is common in the competition laws in most countries mainly Article 101 of EU treaty as discussed earlier.

\footnote{58 See section 19(3)\footnote{59 Shri Govind Agarwal Vs. ICICI Bank Ltd., Shri Norbert Lobo Vs. Citibank, Shri Gulshan Kumar Gupta Vs. BHW Home Finance Ltd.(para 63) Decided On: 07.06.2011 by CCI. (MRTP Cases)}}
5.2 Cartels:

Section 3(3) provides that cartels engaged in identical or similar trade of goods or provision of services which results in anything provide in section 3(3) (a) to (d), shall be presumed to have AAEC. The Act defines Cartel under section 2(c) it says “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Cartels are so unambiguously harmful that competition law and competition authorities, almost everywhere, reserve their strictest treatment for them, and have stepped up their battles against cartels. In the Act, cartels are presumed to be anticompetitive; the penalty can be 10% of turnover or three times the illegal gains, compensation claim can be made, search and seizure raids can be carried out with a magistrate’s permission, and there is a ‘leniency’ provision for a cartel member who makes a full and true disclosure that is vital. It is important that the business community makes itself conversant with the law and companies develop internal compliance programmes to avoid, even inadvertently, falling on the wrong side of the law.

Activities of cartels results in collusion. Collusion refers to combinations, conspiracies or agreements among sellers to raise or fix prices and to reduce output in order to increase profits.\(^6^0\)

OECD and other organizations have estimated the harm caused by cartels in billions of dollars each year. Developing countries are particularly vulnerable. A World Bank paper estimated that in 1997, developing countries imported US $ 81.1 billion worth of goods from industries which witnessed price fixing conspiracies during 1990s; this represents 6.7% of the imports and 1.2% of the GDP in the developing countries. Japan & USA respectively estimated that cartels raised prices by 16.5% and 60-70%. A number of countries reported price declines after anti-cartel enforcement, e.g., Sweden and Finland reported 20-25% fall in asphalt, UK 30% in football replica kits, and Israel 40-60% in envelopes. On average, over-charges are estimated between 20-30% with higher over-charges in case of international cartels. Cartels have variously been described as “highway robbery” and the “supreme evil of anti-trust”. Competition laws generally treat cartels as per se violations, not requiring actual proof of harm.

\(^6^0\)http://stats.oecd.org/glossary/search.asp
Some countries treat cartels as criminal offences including the US, Canada, Japan and UK. This is based on the logic that while the laws provide severe fines, in practice, this presents problems because a fine may be too high for the enterprise to bear, leading to bankruptcy and loss of jobs. Thus, punishment for natural persons is required, and is provided in many countries, including imprisonment in nine countries. Punishment for individuals can also increase the effectiveness of leniency programmes. 61

Many countries have been tightening their laws with regard to cartel e.g., Australia is considering a proposal for criminalization of cartels and barring individuals from office as directors; Brazil has created an intelligence centre for cartel investigation plus provision for dawn raids and wire tapping; and France, Hungary, Israel, Japan, Netherlands and European Commission have introduced leniency programmes. International cooperation has reached its highest level against cartels. Several competition authorities have undertaken awareness programmes for business, procurement agencies, consumers and others.

5.3 Decision:-

The term decision is not defined by the Act but it forms a very important role in determining the anti- competitive behaviour. Hence it becomes important to understand the meaning of “decision” in terms of the Act.62

The Act presumes decision taken by association of enterprises or association of persons engaged in identical or similar trade of goods or provision of services as having AAEC on the competition if such decision results in any of the activity enumerated under section3(3)(a) to (e)

Decision has a wide meaning. It may include, for example, the constitution of rules of an association of undertakings or its recommendations or other activities.63 In the day to day conduct of the business of an association, resolutions of the management committee or of the full membership in general meeting, binding decisions of the management or executive committee of the association, or rulings of its chief executive, the effect of which are to limit the commercial freedom of action of the members in some respect, will all be decisions of the association.64 The key consideration which is to be observed by the Court under Section 3(3) is whether the effect of the decision taken, whatever form it takes, either by association of enterprises or association of

62 See section 3(3) of the Act
persons causes any AAEC in India subject to conditions under section 3(3) (a) to (d), if it does so then only it will be covered under this section.

5.4 Enterprises:

The meaning of enterprises for the purpose of this Act has been defined under Section 2(h) of the Act as under:

“‘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 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.

Explanation.-For the purposes of this clause,—

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

The substance of the definition of enterprise is that it can either be a person (section 2(l)) or a department of government subject to the conditions specified in the definition carrying on an economic activity in the supply of goods or services. The definition makes it clear that all person or department of the government, any other entity cannot for the purpose of the Act, be treated as an enterprise unless it is engaged in commercial activities.

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65 Section 2 (h)
66 Section 2(l)
5.5 Trade Associations:-

Trade associations have not been specifically dealt under the Act but they come under the purview of section 3 for they are merely association of enterprises engaged in similar kind of trade.

Trade association can be defined as an association of business organizations having similar concerns and engaged in similar fields, formed for mutual protection, the interchange of ideas and statistics, and the establishment and maintenance of industry standards.\(^67\)

Trade associations in India, as a socially responsible body and in enlightened self interest, can proactively promote compliance on the part of enterprises as well as themselves. They make a positive contribution to the economy, particularly to the specific industry they represent. They can legitimately lobby the authorities to resolve problems facing the industry, or create awareness about new laws or taxes or environmental issues, or ready the industry to meet new challenges. But the very fact that an association brings together competitors presents the risk that they will enter into an agreement that might violate the competition law. Any such agreement held under the auspices or cover of a trade association, can spell trouble for not only the conspiring firms but also for the association and its office bearers.

5.6 Person:-

The term ‘person’ has been defined very widely under section 2(l)\(^68\) it would cover every conceivable entity. It would include an individual, a Hindu undivided family, a company, a firm, an association of persons, whether incorporated or not, in India or outside India, a registered co-operative society, a local authority and every artificial juridical person, not falling under any above said category.

\(^{67}\) Black's Law Dictionary, 8\(^{th}\) edition p. 133

\(^{68}\) Section 2 (l) “person” includes—

(i) an individual;
(ii) a Hindu undivided family;
(iii) a company;
(iv) a firm;
(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
(vii) any body corporate incorporated by or under the laws of a country outside India;
(viii) a co-operative society registered under any law relating to cooperative societies;
(ix) a local authority;
(x) every artificial juridical person, not falling within any of the preceding sub-clauses;
However it is to be noted that persons and entities defined above will fall under the ambit of section 3 only if their activities results in any of the effect mentioned under section 3(3) and 3(4).

5.7 Practice:-

The term practice have been defined under section 2(m) of the Act as “practice” includes any practice relating to the carrying on of any trade by a person or an enterprise. It is an inclusive definition.

There have been practical difficulties to establish the existence of an anti-competitive agreement between the firms. The fact is that firms engaging anti-competitive behaviour have developed sophisticated mechanics of hiding their behaviour so that they escape the liability under the competition laws. Hence the competition laws of most of the countries have introduced a safety net in the form of prohibition on concerted practices However, in the Act particularly the word concerted practices had not been used it says “practice carried on”, or decision taken by, any association of enterprises or association of persons” which indicates meeting of minds of enterprises resulting into practice carried in by associations of enterprises.

According to Lord Denning “people who combine together to keep up prices do not shout it from the housetops. They keep it quite. They make their own arrangements in the cellar where no one can see. They will not put anything in writing or even into word. A nod or will do. Parliament as well is aware of this. So it included not only an ‘agreement’ properly so called, but any ‘arrangement’, however informal.”

A leading case discussing concerted practices in EU is Imperial Chemical industries v. Commission, in which the ECJ defined concertation under Article 81(1) (now Article 101) as

“A form of coordination between undertaking which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risk of competition.”

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69 (x) "trade’ means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services
70 RRTA v W.H. Smith n Sons Ltd. (1969) 3 All ER 1065
71 1972 E.C.R. 619at page 64, 65.
The ECJ further added that by its very nature a concerted practice have all the elements of contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.\textsuperscript{72}

Conceptually concerted practices are not easy to define with precision and its application depends on facts and circumstances of a given case. A concerted practice is a form of coordination between the parties where they have not reached the stage of actual agreement. But knowingly coordinate their actions and cooperate with one another instead of competing with each other. Criteria of cooperation and coordination in no way requires the working of an actual plan and it must be understood in the light of concept inherent in EC treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on common market including the choice of person and undertaking to which he makes offers or sells.

The test for concerted practice is that the parties have substituted for the risk of competition practical co-operation between the parties between the parties, which culminated in a situation, which does not correspond with the normal conditions of the market.

In order to constitute a concerted practice, a action by a group of competitors need not reach the level of agreement, but must be knowingly coordinated with the further knowledge that the effect of coordination will be to substitute effectively cooperative for competitive conditions. In addition to constitute violation of Section 3 coordinated conduct must have an AAEC as per the conditions laid down in Section 3(3) (a) to (d)

For the purpose of present study Section 3 can broadly be divided into four parts namely:

1. General prohibition [section 3(1)and section 3 (2)]
2. Horizontal agreements[section 3(3)]
3. Vertical agreements[section 3(4)]
4. Exceptions[section 3(5) and (3) ]
6. General Prohibition:-

Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India. Section 3(1) is that such agreement must cause an AAEC within India. So the key elements for application of section 3(1) are agreement between enterprises and its AAEC within India. It is to be noticed that section 3(1) prohibits agreements which causes appreciable adverse effect in India only.

On reading the section 3(1) it becomes clear that Act does not provide that agreements between enterprises and persons are prohibited it clearly states that No enterprise or association of enterprises or person or association of persons shall enter into any agreement which causes or is likely to cause an AAEC within India. It is also clear from the provision if an agreement does not have any adverse effect on competition within India then it will remain out of the preview of this provision, but if someone alleges that agreement is likely to cause an appreciable adverse effect, then there will arise an action under this Section. The provision of section 3(1) cast a duty upon enterprises to examine the proposals for agreement from its long term effect on competition in the market.

Section 3(2) declares all the agreements void entered into contravention of the provisions contained in section (1).
7. Horizontal Agreements

Agreements prohibited under section 3(3) are described as horizontal agreements for they apply to similar or identical trade of goods or provision of services. A careful reading of section 3(3) prompts that it restricts three things namely agreement, practice and decision including cartels who are identical or similar trade of goods or provision of services. The Act under this sub-section presumes following activities as to have appreciable adverse effect on competition.

1. Agreement between :
   - Enterprises
   - Associations of enterprises
   - Persons
   - Associations of persons
   - Person and enterprise

2. Practice carried by:-
   - Association of enterprises
   - Association of persons

3. Decision taken by:-
   - Association of enterprises
   - Association of persons

4. Cartels

Who are engaged in identical or similar trade of goods or provision of services including cartels only if any of their activity:-

   - Determines either directly or indirectly purchase or sale prices.
   - Limits or controls production, supply, markets, technical development, investment or provision of services.
   - 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;
   - Directly or indirectly results in bid rigging or collusive bidding\(^73\)

\(^{73}\) Section 3(3)(a)to (d)
It is to be noted that under section 3(3) agreements, decisions and practices between similar trade of goods or provision of services is a condition precedent for prohibition. For the violation of Section 3(3) (b), it must be established that there exists an agreement, practice carried on or, decision taken by entities mentioned therein, including cartels, engaged in identical or similar trade of goods or provisions of services, which result in effects mentioned in clauses (a) to (d) of sub-section (3) of Section 3 of the Act. These include acts that limit or control production, supply, markets, technical development, investment or provision of services.\(^{74}\)

### 7.1. Types of horizontal agreement prohibited under Section 3(3):-

Section 3(3) of the Act expressly mentions four types of horizontal agreements that are presumed to have an AAEC as mentioned above. Now we will discuss those agreements in detail.

#### 7.1.1 Agreements that directly or indirectly determine purchase or sale prices:--

Price fixing agreements, as the name suggests are agreements to fix, directly or indirectly purchase or sale prices. The term price fixing is applied to a wide range of actions taken by competitors having a direct effect on price and includes a number of agreements such as agreements on price, agreements on credit terms, agreements to adhere to published prices etc.\(^ {75}\).

In *Southern Motors Rate Carriers Conference Inc. et. al. V. United States*\(^ {76}\), it was observed that the term price fixing generally refers to a process by which competitors agree upon prices that will prevail in the market for the goods or services they offer. The Competition Act, however refers to agreements to determine both purchase and sale prices. For instance, if a group of manufacturers of product ‘A’ enter into an agreement not to sell product ‘A’ below a fixed price.

Price fixing agreements between competitors negatively impact competition as they prevent prices from being fixed by the competitive forces in the market. Consumers may thus, be forced to pay higher prices for good than they would pay in competitive market. The aim and result of every price fixing agreements, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves the power to control the market and to fix

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\(^{74}\) Shri Govind Agarwal Vs. ICICI Bank Ltd., Shri Norbert Lobo Vs. Citibank, Shri Gulshan Kumar Gupta Vs. BHW Home Finance Ltd.(para 61) Decided On: 07.06.2011 by CCI. (MRTP Cases)


\(^{76}\) 471 US 48 (1985)
arbitrary and unreasonable prices. The reasonable price fixed today, may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed without placing on the government, in enforcing the law, the burden of ascertaining from day to day whether it has become unreasonable through the mere violation of economic conditions.”

7.1.2 Limits or controls production, supply, markets, technical development, investment or provision of services:

Agreements that limit or control production, supply, markets, technical development investment or provision of services are also considered to be anticompetitive. An example of such an agreement is one where there is a clause that the distributor must ensure the selling of 100 cylinders a month.

An agreement limiting production may lead to a rise in prices of the concerned product. Similarly, limiting technical development that may help in lowering the costs of a product, may affect the interests of consumers. Livingstone notes that limiting production maintains high prices by ensuring that there is no surplus and therefore, demand remains steady; limitation of sales has a similar effect as well as discouraging competition for new entrants.

Agreement for limiting or controlling production are anticompetitive for two reasons; one that by controlling production. The supply is kept low as compared to the demand creating artificial scarcity; second the agreement, in effect restricts competition between the parties themselves so that the efficient ones among them also cannot go ahead with further production and dislodge the less efficient from the market.

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77 See Arizona v. Maricopa County Medical Society 457 US 332(1982); Unites States v. Trenton Potteries 273 US 392(1926)
7.1.3 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 the number of customers in the market or any other similar way

This category covers the agreements referred to as market sharing agreements. Market sharing or market division agreements may be either to share markets geographically or in respect of consumers or particular categories of consumers or types of goods or services in any other way. An example of geographical market sharing would be an agreement between manufacturer ‘A’ and a manufacturer ‘B’ (both manufacturers of product ‘P’) that ‘A’ will sell product ‘P’ in a certain geographic area, while ‘B’ will sell product ‘P’ in another area and A will not sell P in the area allotted to ‘B’ and vice versa.

Market sharing agreements are considered to be anti-competitive as they reduce the choice available to customers in a competitive market. Such agreements also reduce competition between the parties to agreement. Prof. Whish observes that geographic market sharing is particularly restrictive from the customers’ point of view since it diminishes choice; at least where the parties fix prices, a choice of product remains and it is possible that restriction of price competition will force parties to compete in other ways. Market allocation agreements eliminate the need to police the pricing practices of the companies party to the agreement and the need for producers with different costs to agree on appropriate prices.

7.1.4. Directly or indirectly results in bid-rigging or collusive bidding

Bid-rigging has been defined in the explanation to subsection (3) of Section 3 of the Act. According to the explanation, bid-rigging means “any agreement between the enterprises or persons referred to in sub-section 3 engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.”

The OECD Glossary points out that there are two common forms of bid-rigging, one in which firms agree to submit common bids and the other where bids are submitted in such

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80 In *ACF Chemifarma v. Commission of European Communities [1979] ECR 661*, it was observed that the sharing of domestic markets has its objective, the restriction of competition and trade within the common market (para 128, with regard to Competition of European Communities)
82 http://stats.oecd.org/glossary/search.asp (OECD Glossary of statistical terms)
a way that each firm wins an agreed number or value of contacts. An instance of bid-rigging agreement is a combination of dealers in meat who agree *inter alia*, not to bid in conjunction with each other. Another example may be where a group of firms agree to file bids in such a way that one of them wins the bid. It is clear that bid rigging agreements hinder the process of competitive bidding as the winner of the bid to be submitted is already upon between the parties.

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83 Supra note 85  
84 Swift and Co. V. United States 196 US 375
8. VERTICAL AGREEMENTS:-

Vertical Agreements are agreements between persons at different levels of the production chain such as an agreement between a manufacturer and a distributor. Section 3(4) deals with certain specific vertical agreements. It provides as under-

“Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

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

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an AAEC in India.

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

(a) “tie-in arrangement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
(b) “exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
(c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
(d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
(e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.”

“Vertical restrains can have both pro- and anticompetitive effects that respectively benefit or harm consumers. Vertical agreements can also give rise to competition concern particularly

85 Section 3(4)
where the parties concerned enjoys market power. Horizontal agreements are generally more
damaging to the competitive process and consumer interests so that a per se prohibition approach in
their regard might also affect negatively consumer interests.“ 86

Vertical Agreements are acknowledged too have pro-competitive effects. In Continental TV
Inc. V. GTE Sylvania Inc. 87 it was observed that “Vertical restriction promote inter-brand
competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his
products. Economists have identified a number of ways on which manufacturers can use such
restrictions to compete more effectively against other manufacturers.” Vertical agreements, form eh
point of view of economic, if not legal analysis, are thought of as an intermediate form of vertical
integration 88. Vertical integration can be pro-competitive in the sense that it allows a firm to
improve the efficiency of its operations either through creating transaction cost efficiencies or
through enabling a firm to overcome difficulties in contracting with an external party.

Three key potential anticompetitive effects of vertical restraints which can occur at the
upstream level, the downstream level or both: foreclosure and rising rivals’ cost; dampening
competition between players in the market; facilitating collusion between players in the market. 89
Vertical restraints can facilitate collusion among competitors by helping competitors to overcome
obstacle they otherwise would face in attempting to maintain price above competitive levels and
they can raise competitors’ cost. By foreclosing or disadvantaging competing firms, vertical
restrains create barriers to entry or expansions so that rivals can no longer discipline the offending
firm’s price increase; so one leads to collusion and the other to exclusion. 90

It is to be noted that under section 3(4) Act certain agreements namely tie-in arrangements,
exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price
maintenance, shall be in contravention of the provisions of the section 3(1) only if they causes or
are likely to cause an AAEC in India. Now we will discuss in detail the specific types of agreements
prohibited under section 3(4).

86 Buttigieg Eugene, Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust
pg.(81&119)
87 433 US 36 (1977)
88 http://stats.oecd.org/glossary/search.asp (OECD Glossary of statistical terms)
89 Biro Z and Fletcher ‘The EC green paper on Vertical Restraints: An Economic Comment’ (1998) 19 ECLR 129.
111.
8.1 Types of Vertical Agreement Prohibited Under Section 3(4):

8.1.1 Tie-in arrangements:

Tie-in arrangements have been defined in explanation (a) to Section 3 (4) as including any agreement requiring a purchaser of goods (called tying product), as a condition of such purchase, to purchase some other goods (called tied product).

This practice is often resorted to by the enterprises to use the popularity of a product (tying product) to promote the sale of a less popular product in the anti-trust cases that Microsoft faced in the US and the EU, one off the allegations was that Microsoft used its dominance on personal computer operating systems (tying product) to push the sale of its other products, specifically its internet browser and media players systems (tied products)91.

According to Fox, tying-in arrangements (and exclusive dealing) can have net negative effects if they fence off so much of the market that not even a few efficient-sized competitors can survive or can bring their products to the market efficiently. In such cases, consumer prices are likely to rise and the practice is likely to be found to be illegal under a market-based rule of reason 92. In Jefferson Parish Hospital, the US Supreme Court observed that the essential characteristic of an invalid tie-in arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms 93. In Kodak, the Supreme Court held that the questions to be asked in a tie-in case were: first, whether two separate products were involved; second, whether the defendant had required the tied product to be purchased with the tying product; third, whether a substantial amount of inter-state commerce had been affected; and finally, whether the defendant had market power in the tying product 94. Tying, in the US, has been subject to the modified per se rule, under which it is per se unlawful whenever the seller has sufficient economic power with respect to the tying product to restrain appreciably free competition in the market for the tied-in product 95. Tying, in the US, has been subject to the modified per se rule, under which it is per se unlawful whenever the seller has sufficient economic power with respect to the tying product to retain appreciably free

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91 United States v. Microsoft Corporation 258 F. 3d (DC Cir, 2001)
93 466 US 2 (1982)
95 Northern Pacific Railway Co. et al v. United States 356 US 1 (1958)
competition in the market for the tied-in product. The recent trend, however, is towards dilution of this approach, and courts seem willing to hear and weigh the defendant’s arguments that the tie was efficient and did not cause competitive harm.

An example of a ‘tie-in’ or ‘tying’ arrangements is if a manufacturer f product ‘A’ and ‘B’ requires an intermediate purchaser, who wants to purchase product ‘A’ to also purchase product ‘B’. Tying may result on lower production costs and may also reduce transaction and information costs for producers and provide them with increased convenience and variety. Tie-in arrangements can have negative effects on competition if they fence off so much of the market efficiency. In case of tie-in arrangements, competition with regard to the tied product may be affected as the purchase may be forced to purchase the ties product at prices other than those at which it is available in a competitive market or he may be forced to purchase a product that he does not require. In Northern Pacific Railway Co. V. United States, the Court observed that, “They (tying arrangements) deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time, buyers are forced to forgo their free choice between competing products. For these reasons, “tying arrangements fare harshly under the laws forbidding restraints of trade.”

8.1.2 Exclusive supply agreement

This category includes “Any agreement restricting in any manner, the purchase from acquiring or otherwise dealing in any good other than those of the seller or any other person”. A case in point is where the buyer asked the manufacturer not to manufacture identical goods for any other buyer without his consent.

Exclusive dealing arrangements may serve useful economic function without harm to competition and even encourage competition or they can case substantial harm to competition depending upon many facts and circumstances. Such agreements directly affect supplies from one group to another or give preferential terms or confine dealing with the exclusive group of firms which may reduce the competitive capacity in the market for the participating groups.

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98 356 US 1 (1958)

99 Explanation (b) to Subsection 4

100 DGIR v. Studds Accessories (P) Ltd RPC 331/1998
Exclusive supply or dealing agreements may be anti-competitive if they block or create barriers to entry by not permitting other manufacturers to enter the market. The prices paid by consumers may also rise. Such agreements may thus lead to anti-competitive effects. Exclusive dealing agreements may foreclose the buyers from purchasing goods from the suppliers of their choice and foreclose access to outlets for their product.

8.1.3 Exclusive distribution agreement

Any agreement or limit, restrict or otherwise withhold the output or supply of any goods or allocate any area or market for the disposal or sale of goods may fall within the category of exclusive distribution agreements. For instance, if a manufacturer requires the wholesaler to supply a certain amount of product ‘P’ to each retailer or some retailers. Withholding supply of goods may lead to a rise in the prices of goods which would be unfavourable to consumers. Similarly, allocation of areas for the disposal of good may affect intra-brand competition.

8.1.4 Refusal to deal

This includes agreements which restrict, or are likely to restrict, by any method the persons or classes of persons or whom goods are sold or from whom goods are bought. Refusal to deal may arise if the purchaser is a bad credit risk, does not carry sufficient inventory or provide adequate advertising, display etc. In Tutikoran Alkali Chemicals. Manufacturers supplied only to large buyers and ignored small buyers; this is an instance of refusal to deal. Refusal to deal is anticompetitive, if a dominant firm to enforce anticompetitive practices such as resale price maintenance and selective distribution agreement practises it.

8.1.5 Resale price maintenance

Explanation (e) states that ‘resale price of maintenance’ includes an agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. Resale price maintenance can reduce intra-brand competition and increase

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101 Explanation (c) to section3( 4)
102 Explanation (d) to section3( 4)
103 World Bank/ OECD Glossary
104 (1995)16 CLA 196 (MRTPC)
transparency of prices, which may facilitate collusion\textsuperscript{105}. Resale price maintenance is in some countries treated under the per se rule e.g. in the US, because it could be the sign of a cartel\textsuperscript{106}.

The Indian Competition Act inter alia prohibits anticompetitive agreements of the kinds mentioned above. It is particularly severe on horizontal agreements, including cartels. The penalty provided is ten percent of the turnover or three times the profit, whichever is greater. There is a whistleblower type provision for lesser penalty on a party to a cartel that comes clean with full and true disclosure that yields vital information, and cooperates with the Competition Commission. The definition of cartel includes an association that indulges in anticompetitive activity. The stakes thus are high and the consequences severe.

\textsuperscript{105} See Whish, Richard, n.39, p.591
\textsuperscript{106} See ‘Fox, Eleanor supra n. 37, see also Ramappa, T. (2006): ‘Competition Law in India: Policy, Issues and Developments’, New Delhi
9. Exceptions:-

The Act prohibits agreements that have AAEC on competition, but there have been incorporated certain exceptions to this effect. Section 3(5) provides for exception from the provisions of section 3. Section 3(3), however, also provides for exception for joint ventures.

9.1 Exception for the protection of certain IPRs:-

Section 3(5)(i) provides, exemption from the application of section 3, to the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under–

(a) The Copyright Act, 1957 (14 of 1957);
(b) The Patents Act, 1970 (39 of 1970);
(c) The Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) The Geographical Indications of Goods (Registration and Protection)Act, 1999(48 of 1999),
(e) The Designs Act, 2000 (16 of 2000);

Hence, like competition laws in other countries the Act recognises the value of IPRs an an incentive to creativity and economic growth. However, for exemption under section3 (5) restriction must be reasonable and necessary to protect IPR.

9.2 Exception to agreements related to export:-

Many countries exempt anti-competitive agreements relating to exports from the operation of law; this is presumably on the ground that such anti-competitive agreements harm only overseas consumers and are therefore of no concern to the national authorities

Section 3(5) (ii) exempts the right of any person to export goods from India up to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

It means export agreement relating only to the production, supply, distribution or control of goods or provision of services is exempted. According to Meyerman , ‘in the course of reaching
agreement on export prices or terms of sale, for example, the participant may exchange information about domestic prices or output, that would permit them to reach an explicit or tacit agreement affecting domestic market' 107

9.3 Exemption for joint ventures:-

Proviso attached to this section3 (3) exempts 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. The term joint venture108 has not been defined in the Act. In general terms it means the cooperation of two or more individuals or businesses in which each agrees to share profit, loss and control in a specific enterprise.109 A joint venture can also be defined as an association of firms or individuals formed to undertake a specific business project. It is similar to a partnership, but limited to a specific project (such as producing a specific product or doing research in a specific area).110

108 http://www.investopedia.com/terms/j/jointventure.asp#axzz1kFyfLoOA
109 See proviso attached to section 3(3)
110 Supra Note 83
V. WHY ANTI COMPETITIVE AGREEMENTS ARE PROHIBITED

For a market economy to function properly the competition must be free and fair. In a competitive market all the competitors will try to gain consumer confidence and increase its market share by continuously trying to improve the quality of the goods, look to reduce prices and find more efficient means of production.

Generally the consumers everywhere even in the most developed countries, have poor information of the necessary particulars of any product, including the current market price, the price range or the quality of the suppliers, and comparable products or services. Suppliers, who over a period of time, have acquired, on account of various factors, the power to manipulate the market, do everything in their power to prevent the development of a market that is free from interference. One reason for this is their intention of retaining the fixed percentage of profits, and this can be possible only by restraining or eliminating competition. Eliminating competition altogether is their objective. The means to achieve that objective are myriad and that is why any legislative definition of any anti-competitive practice or conduct is general, inclusive and also states that the practices prescribed as anti-competitive are not exhaustive.

Competition in market enhances consumer welfare and creates an effective allocation of resources. As stated in the foregoing that most business enterprises attempt to enhance market power and monopolize the market, as such competition does not arise automatically in all markets. Governments and statutory regulators are well placed to take steps to rectify adverse effect of monopolization of markets by few. Small and medium-sized business is very important to a healthy economic growth. The very existence of small and medium-sized business is a positive indication of promotion of competition in markets. However, these smaller units never get a chance to grow if they are not protected in some way against the anti-competitive activities of very powerful, well established business in the same industry.

A balanced amount of regulation does not mean that the benefits of free competition in the market are entirely eroded. Individuals and other businesses that may be adversely and unfairly affected by anti-competitive activities in a market can more effectively seek redress if clear regulatory regime is in place. So, the fundamental objective of regulating anti-competitive
agreement is to have free and fair operation of big or small or medium-sized business within market and their activities necessarily needs to be regulated by a regulator.111

One more valid argument for the prohibition of anti-competitive agreement is that it will prevent international cartels from indulging in anti-competitive practices in our country

Hence keeping in view the interest of the consumers and to promote a healthy competition in the market anticompetitive agreements are prohibited under the Act. These prohibitions acts as a check on enterprises or persons who may indulge in anti-competitive agreements or have tendency to manipulate the market, and therefore, prohibits them from entering into agreements, which may have the potential of restricting competition in the market.

111 IICA report on competition law and policy “induction training for mid level staff of the CCI, pg 42
VI. IMPACT OF ANTI-COMPETITIVE BEHAVIOR ON DEVELOPING ECONOMIES

There are reasons to believe that developing economies tend to be more vulnerable to anti-competitive practices than developed countries. The reasons include: high ‘natural’ entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; asymmetries of information in both product and credit markets; and a greater proportion of local (non-tradable) markets. Thus it may be particularly important to protect, consumers in developing countries against cartels, monopoly abuses, and the creation of new monopolies through mergers. Bid rigging in public procurement markets (i.e. collusive tendering) is also pervasive in many developing economies, and merits vigorous enforcement initiatives.\footnote{112}{A World Trade Organization (WTO) report (WTO, Trade Policy Review – Report by the Secretariat: INDIA [2007], WTO Document No. WT/TPR/S/182. p. 96.)}

Taking into account the fact that competition is essential for governance, in his address to the central hall of parliament, dated 03.07.2007, the then President, Dr. Abdul Kalam observed;

“The challenges in realizing the developed India vision 2020 provide also opportunities for innovation in every aspect of governance and legislative actions. As we review the governance system and legislative processes for the 21st century, full advantages and implications of technological revolutions, national and global connectivity, globalization and international cooperation and competition have to be taken into account.”\footnote{113}{http://www.abdulkalam.nic.in/abdulkalam/speeches.jsp}

Prime Minister Mr. Manmohan Singh in his speech have pointed out that there are 10 areas in which industry leadership can go a long way to ensure that our growth process is both inclusive and broad-based. One of the areas he mentioned was need for more competition;

“To desist from non-competitive behavior the operation of cartels by groups of companies to keep prices high must end. It is unacceptable to obstruct the forces of competition from having freer play. It is even more distressing in a country where the poor are severely affected by rising commodity prices. Cartels are a crime and go against the grain of an open economy. Even profit maximization should be within the bounds of decency and greed! If a liberalized economy has to succeed, we must give full play to competitive forces and the private sector should show some self-
"restraint in this regard." Section 3 aims at achieving the above policy prescription of Prime Minister.

Competition in the market can be effected through anti-competitive practices adopted by enterprises which often results in market failures. If competition is to be sustained and its benefits are to be realized, such anti-competitive practices must be controlled. The harm could be even greater in developing countries, because there the markets are generally more delicate as concentration levels are higher, dominant position is more prevalent and entry barriers are higher for example regulatory restrictions, inadequacy of capital etc.. The vulnerable sections of society, who form the major portion of developing countries’ population, are more liable to fall into traps of poverty by price hikes and other shocks generated by anti-competitive practices. Competition law keeps a check on those practices. Moreover, competition fosters economic growth, thereby creating opportunities of employment which is the most essential tool for alleviating poverty.

114 http://pmindia.nic.in/speech/content.asp?id=548 accessed on 18.08.2010
VII. CONCLUSION AND SUGGESTIONS

The new economic policy of 1991 on one hand has made our life comfortable as the goods and services required for our use are available in abundance and on the other hand it has also opened a new challenge for preventing anti-competitive agreements by manufacturers and service providers. Under the Act there has been made adequate provisions for preventing anti-competitive agreements and has also created an institution i.e. commission to ensure effective implementation of law. However Act and CCI are to be adequately empowered to take of such situations. Provisions relating to prohibition of anti-competitive agreements under the Act are, to some extent adequate to maintain fair competition in the market and thereby protect interest of consumers. However they are needed to be strictly observed and implemented.

Competition law is often confused with that of consumer law but I would like to make it clear that both the laws are different as far as the area they deal with. It is to be noted that consumer laws have their focus on demand side of economics while competition law is supply side of economics. Competition law aims at smoothening the supply in the market so that healthy competition in the market can be sustained and to check that supply in the market do not get hindered by any anti-competitive factor.

The positive impact of competition in terms of enhancing efficiencies, incentivizing innovation and increasing consumer welfare is well known and recognised. Competition allocates productive resources to their best uses and causes firms to develop new products, services and technologies, giving consumers greater selection of products.

Successful implementation of any Competition regime has two distinct limbs; enforcement of competition laws and advocacy of benefits of competition among various stakeholders. Experience suggests that, in the process of transition from planned economy to a more open economy, the application of competition law can usefully support other policy initiatives. Trade policy, industrial policy, privatization, deregulation, regional policy and social policy all need to be conducted in a manner attuned to the market mechanism for an economy to function as efficiently as possible. A carefully and skilfully designed competition regime in an environment of competition culture acts as a catalyst for trade liberalization, foreign direct investment, and other economic policies which have the like objectives of promoting sustainable development, growth and welfare of the common man.
In order to make any competition regime successful, therefore, apart from enforcement of competition laws, vigorous advocacy of benefits of competition is also required. Towards this end, a broad based consultation with those associated with trade policy, industrial policy, privatization, deregulation, regional policy and social policy is needed to make all these policies compatible with competition. These policies need to be conducted in a complementary manner and it is important that a mechanism exists for incorporating the “competition dimension” within all such government decisions and policies.

Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interests, the matters under it should be dealt without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated which may result in great damage to the open market and thereby to country’s economy

Going through anti-competitive agreements under new competition law regime in India I have some suggestions, as to provision of anti-competitive agreement, which in my view needs to be addressed and therefore, should be given place under the statute.

1. **Rule of Presumption** under section 3(3) should be converted into *Per Se* at least for cartels and they should also have criminal sanctions as in USA, Brazil, and Russia. In a developing country like ours *Per Se* approach will serve the object in more effective way resulting in fewer cases of violations due to strict prohibition of law.

2. For the actions and conduct mentioned under section 3(3)(a) to (d) no further analysis of AAEC should be required, if act and conduct which are prohibited have indeed

3. Heavy fines should be imposed for violation under the Act to attract leniency.

4. Competition advocacy programmes in school and colleges should be taken up as in Brazil.

5. In cases of violations under the Act disqualification of officials (e.g. directors) from holding any positions in future, should be prescribed. There should also be made provisions for confinement for such violations.

6. Cartels should be expressly criminalised under the Act.

It is needless to say that this dynamic statute can and will touch and change the way Corporate India functions on a day to day basis. What is important for companies to note is the fact that some age old practices, which earned legitimacy because of their longevity and failure of the MRTP Commission to address them, would become the primary targets of the well-empowered CCI. Enterprises in India, therefore, need to understand the new law and update themselves regularly on the new policies and regulations.
Is the Competition Act truly reflective of the changing economic milieu of our country? In an economic situation, which can be best described as a mixed economy; only time will tell whether the Competition Act addresses the ground realities that exist today. However, the new Act is definitely a step in the right direction by harmonizing the competition policy with international trade and policy.

The commission’s proactive role in India in uncovering cartels and other anti-competitive agreements would go a long way in encouraging fair market practice and deepen competition. The orders of commission reflect the robustness of the system as well as confidence to stem out the anti-competitive practice from markets in India. Need of the hour is to further strengthen and provide more teeth to commission, as brought out above.
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