INTERNSHIP PROJECT REPORT

SUBMITTED TO:
THE COMPETITION COMMISSION OF INDIA

UNDER THE GUIDANCE OF

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On the topic
THE LIKELY IMPACT OF PROPOSED AMENDMENTS (2012) TO THE COMPETITION ACT OF 2002 ON THE REGULATORY FRAMEWORK

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INTRODUCTION

THE EVOLUTION OF THE COMPETITION LAW ALL OVER THE WORLD

While the term 'Renaissance' originally referred to a cultural movement that characterized the period from around the 14th to 17th centuries, it has also come to refer to an historic era affecting other aspects of daily life, including that of trade and competition. During this Renaissance period, particularly from the 16th century onward, international trade started booming. While much of this trade and the resultant wealth were illicit, authorities saw the need to regulate trade to engender a spirit of fairness and free competition.

The precursor of modern patent laws, known as the Statute of Monopolies, was passed by England's parliament in 1623. Prior to the Statute of Monopolies, patent laws were subject to abuse by authorities. History reveals that Elizabeth I was known to have granted patents for everyday household commodities such as salt and starch, thereby creating monopolies on necessities.

In the following years, various attempts were made to break monopolies and set laws to encourage competition and free trade. But those with good intentions often found that traders maintaining monopolies had the kind of wealth that bought themselves a favoured position with authorities. Other developments that eventually led to modern competition law included laws relating to restraint of trade. As the term suggests, restraint of trade prevents parties from setting up, or engaging in, similar activities in opposition to one another.

Modern day competition law is generally accepted to have had its foundations in the Sherman Act (1890) and the Clayton Act (1914) – both instituted in the United States. At the time, European countries had various forms of rules and laws to regulate monopolies and competition, but further developments, particularly after World War II and the fall of the Berlin wall in 1990, have elements of the Sherman and Clayton Acts as their foundation. With the rapid development of international trade going into the 21st century, competition and anti-trust laws have had to keep pace. It was following WWI that other countries started to implement competition policies along the lines of those introduced by the United States. Competition regulators were formed to ensure that competition and antitrust policies and laws

1 www.britannica.com last visited on 4th January 2012
3 www.ftc.gov last visited on 4th January 2012
4 ibid
were adhered to. Following the 2nd World War, the Allies introduced regulations to break up cartels and monopolies that had formed during the war years. At the time, this was mainly aimed at Germany and Japan\(^5\). In the case of Germany, it was feared that large industry cartels were manipulated in a manner that gave total economic control of the country to the Nazi regime. With Japan, big business was a hotbed of nepotism resulting in multi-industry conglomerates that controlled the Japanese economy. However, the surrender of both Germany and Japan to the Allied forces at the end of WWII allowed for tighter controls to be enforced, and these controls were based on the principle of those being used in the U.S.\(^6\)

**THE INDIAN CONCEPT**

India took up economic reforms in the earnest in the early 1990s, and in the second phase of reforms it enacted the new competition law to replace the Monopolies Trade Restrictive Practices (MRTP) Act 1969, which had because obsolete in certain respects. It is common knowledge that the provisions of the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) were inadequate to effectively deal with antitrust issues in India and post-1991 (when the Indian government initiated economic reforms and open market policies), substantial portions of the MRTP Act had more or less become redundant.

**PROBLEMS THAT COULD BE IDENTIFIED**

*In Tanfac Industries Ltd., Rep. by vs. Monopolies & Restrictive Trade on 5 February, 2003*\(^7\)

In September 1998 the All India Float Glass Manufacturers Association filed a complaint in the MRTP commission against three Indonesian companies manufacturing float glass. Supreme court in this case had laid down that performed outside India would not be amenable to jurisdiction of the MRTP commission, this decision of the Supreme court led to arming the Competition commission of India under the competition act with the power to take extra territorial action by restraining imports.\(^8\)

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\(^5\) Supra n 5


\(^7\) The competition law in the form of Monopolies and Restrictive Trade Practices as it stands to today does not contain any provision, which can give it jurisdiction to interfere merely with cartel formation. Formation of cartel which takes place outside India is outside the territorial jurisdiction of Monopolies and Restrictive Trade Practices. The Indian importer obtaining goods at a low price does not contravene any law. He has obtained a good bargain.” 2003 (155) ELT 251 Mad (http://indiankanoon.org/doc/1213520/)

\(^8\) [http://www.cuts-international.org/pdf/wiancl.pdf](http://www.cuts-international.org/pdf/wiancl.pdf) last visited on 4th January 2012
In ‘Gir Prasad vs. Government of Uttar Pradesh (Irrigation Department)\(^9\) complaint relating to restrictive, unfair or monopolistic trade practice is maintainable under the MRTP Act before the Commission.

**FINAL REPEAL OF THE MRTP ACT**

The Ministry of Corporate Affairs, Government of India has issued a Notification dated 28\(^{th}\) August 2009, whereby the most controversial the Monopolies and Restrictive Trade Practices Act, 1969 (“the MRTP Act”) stands repealed and is replaced by the Competition Act, 2002, with effect from September 1, 2009. MRTP Act was a grim reminder of the “licence-quota-permit-raj” of 1970’s & 1980’s. The Act had become redundant post July 1991 when the new economic policy was announced and Chapter III of the MRTP Act dealing with restrictions on M&A activities was made inoperative. The MRTP Commission will continue to handle all the old cases filed prior to September 1, 2009 for a period of 2 years. It will, however, not entertain any new cases from now onwards\(^10\).

**THE ESTABLISHMENT OF THE ACT**

The competition law came in a statute book in January 2003 and it was basically framed to cover very important aspects of the market.

Now every activity, other than sovereign activities and excepted ones fall within the purview of the Competition Act and the Commission established under the said Act.

The competition act focuses on 4 core areas

- Anti-competitive agreements (section 3),
- Abuse of dominance (section 4)
- Combinations regulation (merger and alliance etc) (sections 5 & 6).
- Competition advocacy

*The Act’s objective is 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.*

However, before the commission could be fully constituted, public interest litigation was filed in the Supreme Court challenging its constitution in *Brahm Dutt v. Union of India*\(^11\) the court had ordered that it might be appropriate if two bodies are created for performing two

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\(^9\) (1996) 3 Comp LJ 286 (MRTPC); RTP Enquiry No. 241 of 1995


\(^11\) Writ Petition (civil) 490 of 2003, Bench :- C.J.I, G Mathur, P Balasubramanyan
kinds of functions, one, advisory and regulatory and other adjudicatory. Therefore, in order to make the Commission as an effective watchdog, the Court has held that the presence of the Commission for proceedings before the Tribunal would be proper.  

This was further amended in the year 2006 where

1. There is establishment of competition appellate tribunal for hearing of appeals against the orders passed by the competition commission of India,
2. Pending Unfair Trade Practices (UTPs) cases to be transferred to consumer courts.
3. The Competition Commission of India (CCI) empowered for appointing administrative staff.
4. Division of a dominant enterprise to be ordered by CCI itself, instead of recommending to the Central Government.
5. In case of an opinion given by the CCI on a reference made to it, the sectoral regulators (statutory authorities) have to issue speaking orders.
6. In formulating any policy, now even a State Government can make a reference to the CCI for its opinion on possible effects of such policy on competition.

Lacunas:-

Provisions to deal with abuse of Intellectual Property Rights (IPRs) were weak. Interface between CCI and regulators remains at the discretion of the regulators. Financial and functional autonomy of the CCI impaired through provisions such as Governments power to allocate the budget; power to supersede the CCI; and power to issue policy directives without due process it not only extends not only leniency provisions to all colluding parties and before the submission of report by the Director General (DG), can induce cartel members to come forward and cooperate, but also widens the goal posts of corruption. Local-level checks on anti-competitive practices will get diluted by doing away with the provision to establish regional benches. Complete lack of public consultations (in contrast to the case of The Competition Act, 2002) in the process of drafting the current Bill.

The competition (amendment) act, 2007

The Competition (Amendment) Act, 2007 was approved by the Parliament in September 2007 and received Presidential assent on 24th September 2007. The amendment brought

\[http://www.nishithdesai.com/Media_Article/2012/Competition%20Law%20In%20India%20Vs%20USA%20And%20EU.pdf\] last visited on 4th January 2012
significant changes in the then existing regulatory infrastructure established under the Competition Act. A few of the major changes are set out below:

- The Commission to be an expert body which will function as a market regulator for preventing anti competitive practices in the country and would also has advisory role and advocacy functions.
- The Commission to function as collegiums and its decisions would be based on simple majority. Omits power of the Commission to award compensation to parties against proven anti competitive practices indulged in by enterprises.
- Allows continuation of the MRTP Commission till two years after the constitution of the Commission for trying pending cases under the MRTP Act and to dissolve the same thereafter.
- Notification of all “combinations” i.e. Mergers, Acquisitions and Amalgamations to the Commission made compulsory.
- Establishment of a Competition Appellate Tribunal with a three member Quasi judicial body to be headed by a retired or serving judge of the Supreme Court or Chief Justice of High Court to hear and dispose appeals against any direction issued or decision made or order passed by the Commission.

**The competition (amendment) Act 2009**

This was promulgated on 14-10-2009 to amend section 66 of the competition act and this section was amended to provide for continuation of the MRTP commission for 2 years to deal with the pending cases under the MRTP act and to empower Competition commission of India to deal with the cases under the MRTP act and pending Unfair Trade Practice cases to stand transferred to the National Commission establishment under the consumer protection act, 1986

**NOW THERE ARE FURTHER LACUNAS AND CHALLENGES, THAT CAN BE IDENTIFIED**

1. **Business Awareness and public perception**: The Competition Act is gradually beginning to bite. But the level of awareness even among economic stakeholders is limited. It is also perceived by some to be an albatross around the neck of industry. Very few perceive the Act as “business friendly” which, in the ultimate analysis, will lead to higher
efficiency, lower cost and improvement of quality – goals which would gladden the hearts of not just business but equally of consumers.

2. **Strategic focus:** The intention of the legislature was to ensure that the Commission keeps in mind its strategic focus so that it produces maximum benefits from the Act. In the initial period, we have seen a large influx of cases pertaining to the real estate, entertainment, and pharmaceutical retail sectors. While not minimizing their importance for the general public, it would seem there is scope for focusing on more heavy weight sectors which can yield handsome dividends in terms of enhanced competitiveness and hence lower prices. The strategy focus – which will necessarily keep evolving – is something which the more robust competition jurisdictions around the world have followed with advantage.

3. **Interface with Sectoral regulators**
4. **Robust data for economic analysis**
5. **Capacity building and institutional strengthening of the competition commission**
### THE SALIENT FEATURES OF THE COMPETITION BILL 2012

#### Amendments in the new competition bill in comparison to the prevailing act

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<td>1.</td>
<td>The words “excluding the taxes if any levied on sale of such goods or provision of services” are to be added after the words “goods and services” in section 2 clause (y)</td>
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| 2.     | The explanation in Section 3 subsection 4 with regards to certain terms like  
- “Tie-in-arrangement” some other services was added.  
- “exclusive supply agreement” in this recipient of services is also added  
- “Exclusive distribution agreement” in this also a provision of services or also added.  
- “Refusal to deal” services lie from goods bought or goods availed are also brought under the purview.  
- “Resale price maintenance” the services in an agreement and the price stipulated for services shall be included.  
The amendment to section 3 in sub clause 5 the words any other law for the time being in force relating to protection of other intellectual property rights instead of the specific mention of the act. |
<p>| 3.     | In section 4 Abuse of Dominant position by an enterprise or group the words “jointly or singly is added” |
| 4.     | In section 5 the definition of group which are directly or indirectly are in a position to exercise 26% of the voting rights is replaced with 50% of the voting rights |
| 5.     | A new section 5A is added namely “Power to specify different value of assets and turnover” Notwithstanding anything in section 5, the Central Government may, in consultation with the Commission, by notification, specify different value of assets and turnover for any class or classes of enterprise for the purpose of section 5. |
| 6.     | In section 9 the words “other members” is removed and only the chairperson will be appointed by the central government and after the subsection The Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of and further changes to subsection (d) that the chairperson of the commission-member and (e) one expert instead of 2 who has professional experience |</p>
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<td>7.</td>
<td>In section 20 Notice has been made mandatorily, a reference has been removed</td>
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<td>8.</td>
<td>In section 21 the words “issue raised by any party” is replaced by “arises” in subsection (a). It is made mandatory for the statutory authority to make a reference to the commission to check whether it is contrary to the act, by replacing the words “may from “shall”. The proviso shall be removed which talks of the authority to take up the case suo moto.</td>
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<td>9.</td>
<td>In section 21A the words “raised by any party” is changed by “arises”. The words “this act is replaced by “any act” It is made mandatory for the commission to make a reference to the issue to the statutory body instead of the words “may” the word “shall” is put in. The proviso is removed which talked of the commission taking up the case suo moto.</td>
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| 10. | In section 26 of the principal Act,—  
(a) In sub-section (7), after the words "in accordance with the provisions of this Act", the words "and make appropriate orders thereon after hearing the concerned parties" shall be inserted; (b) in sub-section (8), after the words "in accordance with the provisions of this Act", the words "and make appropriate orders thereon after hearing the concerned parties" shall be inserted. |
| 11. | In section 27 (b) this proviso shall be inserted "Provided further that no such penalty shall be imposed by the Commission under this section without giving an opportunity of being heard to the producer, seller, distributor, trader or service provider, as the case may be;" In clause (g) "Provided further that while passing orders under this section, the Commission shall give due regard to the opinion given by the statutory authority, where such opinion has been obtained under the provisions of sub-section (I) of section 21A of this Act." this is to be added. |
12. In section 31 in subsection 11 instead of 210 days 180 shall be substituted for the commission to issue order
   In subsection (12) the word 90 days is extended to 180 days shall be given to the parties as time for extension.

13. Instead of the subsection 3 in section 41 the following shall be substituted
   (a) for sub-section (3), the following sub-sections shall be substituted, namely:—

"(3) Where in the course of investigation, the Director General has reason to believe that any person or enterprise, to whom a notice under sub-section (2) has been issued,—
   (a) has omitted or failed to provide the information or produce documents as required notice; or
   (b) would not provide the information or produce documents which will be useful for, or relevant to, the investigation; or
   (c) would destroy, mutilate, alter, falsify or secrete the information or documents useful for, or relevant to, the investigation, then, he may, after obtaining the authorisation from the Chairperson of the Commission,—

   (i) enter, with such assistance and force, as may be required, the place or places where such information or documents are expected to be kept;
   (ii) search such place or places, as the case may be;
   (iii) seize documents and take copies of information, including electronic mail, hard disk of computer and such other media;
   (iv) Record on oath statements of persons having knowledge of the information or documents referred to in sub-clause (iii).

(4) The provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (3)."

The explanation shall be removed
STATEMENT AND OBJECTIVES AS STATED BY THE BILL

The Competition (Amendment) Bill, 2012, *inter alia*, provides the following, namely:—

(a) to insert a new sub-clause (g) in clause (i) of sub-section (5) of section 3 so as to provide that anti-competitive agreements shall not restrict the matters regarding the protection of intellectual property rights for the purposes of clause (i) of subsection (5) of the said section;

(b) To amend section 4 of the Act relating to abuse of dominant position so as to provide that no enterprise or group either jointly or singly shall abuse its dominant position;

(c) To amend sub-clause (i) of clause (b) in the *Explanation* to section 5 so as to increase the percentage of voting rights from twenty-six per cent or more to fifty per cent or more for the purpose of regulation of combinations;

(d) To insert a new section 5A in the Act so as to confer power upon the Central Government to specify, in consultation with the Commission, different value of assets and turnover for any class of enterprises for the purpose of section 5 of the Act;

(e) The reference of issues by the Statutory Authority to the Commission and the Commission to the Statutory Authority are made mandatory;

(f) To empower the Commission to decide the matter after hearing the concerned parties in cases where the Commission may not agree with Director General’s investigation;

(g) to make provision that no penalty shall be imposed by the Commission for contravention of the provisions of section 3 or section 4 without giving an opportunity of being heard to the concerned person; (h) to amend sub-section (11) of section 31 so as to reduce the period from two hundred and ten days to one hundred and eighty days within which the Commission has to pass an order or issue direction on combinations and also to amend subsection...
(12) of the said section so as to increase the period from ninety working days to one hundred and eighty days to bring the time period on par with sub-section (11); (i) to amend section 51 of the Act so as to substitute the expression ‘‘the Secretary’’ in place of the ‘‘the Registrar’’ in clause (a) of sub-section (2) of the said section as there is no post of the Registrar in the Commission.

The Bill seeks to achieve the above objectives.

CRITICAL ANALYSIS OF THE AMENDMENTS MADE

- “Turnover” in its dictionary meaning means that the annual sales volume net of all discounts and sales taxes. And in this act it includes value of sale of goods which due to amendment will exclude the taxes, if any levied on sale of such goods or provision of services (service tax or sales tax). This change of definition of turnover was basically very undesirable because in actual practice too the word turnover was exclusive of all taxes and before this amendment, there was flexibility for the commission to either opt for including or excluding the taxes as per conditions/case may be. But now making it mandatory has made it a compulsion for the commission to exclude taxes even if certain no. of cases where it had to be included as a part of turnover, for e.g. impact maybe high to customers

Impact also falls in section 5 for Combination, combination can be defined as the acquisition of enterprise of a party who is either in India and which may include the aggregate value or the Turnover the value is 300 Crores/ turnover more than 1500 million U.S. $. Etc. The actual amount has increased the definition of combination has widened up in respect of the acquisitions made by an enterprise over others so there will be less no. of filling.

The penalty under section 27(b) will go down if the value of the turnover is decreased.

- The amendments in section 3 are superficial in nature and are unnecessary because the section 3(4) reads 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;

13 http://www.businessdictionary.com/definition/turnover.html last visited on 4th January 2012
(c) Exclusive distribution agreement;
(d) Refusal to deal;
(e) Resale price maintenance,

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

The section itself contains the provision, that services are inclusive, there was not a single case earlier also which had a conflict regarding this, whether services were exclusive or inclusive the amendments were not required and if such a requirement was felt it could have been developed through a case law/judgment. The drafters could have just mentioned the that the amendment was mere explanatory and it does not affect the section.

The other amendment in section in sub clause which relates to protection of intellectual property rights was very strict and it contained certain acts like the copyright act, the patent act, the trade and merchandise act, the geographical indications act, the design act, the semiconductor and integrated circuit layout design act, now the amendment act brought the concept of “any other law relating to any other intellectual property rights” , the ambit is increased the no. of tools to intellectual property right have increased and now it may even include The seeds Act, the trade secrets act, the industrial designs act, the protection of plant variety etc.

- The abuse of dominant position under section 4, includes enterprise or group “jointly or singly”, directly or indirectly imposes unfair discriminatory.
  (i) condition in purchase or sale of goods or service; or
  (ii) Price in purchase or sale (including predatory price) of goods or service; or.
  (iii) Price in purchase or sale (includes predatory pricing) of goods or service.

The legislators here have tried to bring in the concept of joint dominance/collective dominance, which does not have a clear definition.

The drafters should have specially defined the term joint dominance/collective dominance so as to avoid ambiguity.

- The explanation of group under section 5 means “two or more of the voting rights in other enterprise which exercise twenty-six per cent or more of the voting rights”
It was amended to fifty percent because of the fact that 50% means a stronger hold on the group and 26% as such is not a substantial amount of hold and control over the organization.

- There is insertion of a new section called 5A “Powers to specify different value of assets and turnover”.

Notwithstanding anything in section 5, the Central Government may, in consultation with the Commission, by notification, specify different value of assets and turnover for any class or classes of enterprise for the purpose of section 5.”

This means that the drafters want to provide different thresholds for assets and turnover by the central government in consultation with the commission. Value of “Turnover” and “Assets” are required to be assessed by an enterprise in order to evaluate, whether such enterprise comes under the ambit of Section 5 or not.

Here it can be seen that there is a paradigm shift in the existing power given to the commission to the central government to determine the value of threshold in consultation with the commission for any class or classes of enterprise.

If this amendment was sought to be in public interest then the drafters could have just mentioned the term public interest instead of delegating so much power to the central government the section could have remained as it is (section 5)

There is no set of guidelines to the central government to determine the threshold, such power is unlimited and does not have any authority and it may run the risk of being declared as ultravires.

This amendment was sought to be there for scrutinizing the pharma sector their turnovers are quite less as compared to the other sectors and they would not fall in the thresholds that were set.

The government has taken a view on having different thresholds for different sectors is not uncommon in the world. Jurisdictions like China, even the EU then Netherlands- they have different kinds of calculations for the financial sector because the financial sector, the assets look huge but they are not assets because these are deposits, which have to be given back to the depositors. So having just an arithmetical threshold creates this problem of many more cases coming to the competition agencies than they can actually handle.

The word consultation in its dictionary meaning means that “A conference between two or more people to consider a particular question” but in the case of State of Gujarat Anr v.
Hon’ble Mr. Justice R. A Mathur (decided on January 2\textsuperscript{nd} 2013) has said that the word consultation requires a meeting of minds between parties that are involved in the consultation process on the basis of the material fact and points, in order to arrive at a correct or at least a satisfactory solution....consultation must be effective, meaningful, and purposeful. According to this judgement the decision of the commission shall prevail. According to this judgement the decision of the commission shall prevail as the commission’s decision is in concurrence to the decision of the central government.

- The amendment in sub-section (1) of section 9, "and other Members" shall be omitted and the “chairperson” and he will be the person who will be appointed by the central government the member from now shall be appointed by the chairperson. The chairperson shall now appoint a member, because they might act as a cohesive team and work together towards betterment (for a better team play and coordination)

- The amendment in section 20 is consequential to amendments made in the year 2007

- In section 21 the words “raised by any party” is replaced by the word “arises” this was mere rephrasing of the section as the power of the commission to take up a case suo moto has been omitted after this amendment. It is made mandatory for the statutory authority to make a reference to the commission to check whether it is contrary to the act, by replacing the words “may from “shall”. The inter regulatory consultation is sought to be made compulsory. The proposed amendment is unlikely to achieve the goal in the absence of consequences flowing from non consultation. Further, the proposal will delay the proceedings.

- In section 21A the words “raised by any party” is changed by “arises”, this was mere rephrasing of the section as the power of the commission to take up a case suo moto has been omitted. The error “this act” is replaced by “any act” was cured which earlier existed. It is made mandatory for the commission to make a reference to the issue to the statutory body instead of the words “may” the word “shall” is put in. The inter regulatory consultation is sought to be made compulsory. Here the proposed is unlikely to achieve the goal in the absence of consequences flowing from non consultation. Further, the proposal will delay the proceedings.
In section 26 in subsection (7) this was basically a casus omissius which means “When a statute or an instrument of writing undertakes to foresee and to provide for certain contingencies, and through mistake, or some other cause, a case remains to be provided for, it is said to be a casus omissus.” The proposed amendment seeks to fill the vacuum in the existing act. The existing provisions do not provide for passing of an order by the commission holding the enterprises not guilty of contraventions in cases where the DG holds the enterprises in contravention.

The other amendment in sub-section (8), after the words "in accordance with the provisions of this Act", the words "and make appropriate orders thereon after hearing the concerned parties" shall be inserted this amendment also seeks to provide for filling the vacuum in the existing act. The existing provisions do not provide for passing of an order by the commission holding the enterprises not guilty of contraventions in cases where the DG holds the enterprises in contravention.

In section 27 (b) of the act a proviso is to be added after “Impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

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

"Provided further that no such penalty shall be imposed by the Commission under this section without giving an opportunity of being heard to the producer, seller, distributor, trader or service provider, as the case may be;">

The drafters have given these limited number of people which have an opportunity of being heard what about other people and other intermediaries, a person apart from these mentioned above does not have the right to be heard The drafters could have mentioned that “person or enterprise” instead of listing out people

On the other hand it can be seen that the people mentioned in the list i.e. producer, seller, distributor trader and service provider are the most crucial people to an enterprise which are the ones responsible for committing a violation of the competition.

The other amendment to this section relates to an addition in the proviso which is passing of such other order or issue such directions as it may deem fit.

The other amendment to this section is:-

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

Another proviso shall be added and that is “Provided further that while passing orders under this section, the Commission shall give due regard to the opinion given by the statutory authority, where such opinion has been obtained under the provisions of sub-section (1) of section 21A of this Act.” which means that the commission while passing the order will have to take into regard the opinion given by the statutory authority, where such opinion shall been obtained under the provisions of section 21A, subsection (1) which talks of taking up of an issue which would be contrary to the provisions of this act but Vice-versa has not been provided i.e. the other sectoral regulators are not to give due regard to the opinion of the commission in respect of the references made by them under section 21

- Another amendment in section 31 which talks of giving of notice by the commission with a certain number of days the amendment this will help the transactions to conclude quickly. the drafter have reduced two hundred ten days to one hundred and eighty days, this amendment is industry friendly. Another amendment to this section is in subsection (12) of this section which states that there are ninety days which are extended to one hundred and eighty days

- In section 41 the Director General has been given the power to investigate contravention and has to assist the commission in investigating into any contravention of its provisions and he shall have powers like the powers of a civil court under the code of civil procedure, 1908 i.e. powers of search and seizure, the subsection 3 is taken away and the amendment that is put in place is that of
"(3) Where in the course of investigation, the Director General has reason to believe that any person or enterprise, to whom a notice under sub-section (2) has been issued,—

(a) Has omitted or failed to provide the information or produce documents as required notice; or

(b) Would not provide the information or produce documents which will be useful for, or relevant to, the investigation; or

(c) Would destroy, mutilate, alter, falsify or secrete the information or documents useful for, or relevant to, the investigation, then, he may, after obtaining the authorisation from the Chairperson of the Commission,—

(i) enter, with such assistance and force, as may be required, the place or places where such information or documents are expected to be kept;

(ii) Search such place or places, as the case may be;

(iii) Seize documents and take copies of information, including electronic mail, hard disk of computer and such other media;

(iv) Record on oath statements of persons having knowledge of the information or documents referred to in sub-clause (iii).

(4) The provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (3)."

These powers are similar to the powers of the Director general, the director, the chief commissioner of income tax and the commissioner of income tax under section 132 (1) of the Income tax Act 1961, further the amendment for the sake of preventing violation is good

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16 Authorities empowered to authorize a search

Under the Income Tax Act, 1961 following income –tax authorities are empowered to authorize a search under the provision of section 132-

(a) The Director General
(b) The Director
(c) The Chief Commissioner of Income Tax
(d) The Commissioner of Income tax

Conditions precedent for authorization of search: the power to authorize search and seizure can be exercised only when the Director of Inspection or the commissioner has reason to believe

(1) That even after the requisitions under the relevant provisions mentioned in section 132 (1) (a), the required books and documents have not been produced.

(2) That any person, whether requisition under the above provision is made or not, will not or would not produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under Income Tax Act, or

(3) That any person is in possession of any money, bullion jewellery or any other valuable article or thing representing either wholly or partly of undisclosed income or property.
because it does have constitutionality even section 132 of the income tax act was challenged on the grounds of being unconstitutional in nature.

The constitutional validity of section 132 was considered by the Supreme Court in Pooran Mal v. Director of Inspection (Investigation) Income Tax. In this case it was observed that the provisions contained in section 132 and rule 112 of the income tax rules, 1962 are not violative as to articles 19(1)(f) and (g) because the restrictions place therein were to be reasonable restrictions.

In Bhupendra Ratilal Thakkar v. CIT it was held that section 132 of the Income Tax Act, is neither incompetent nor invalid as infringing any of the fundamental rights guaranteed under section 14, 19, 21 and 31 of the Constitution.

The other amendment is that the director general has to take authorization from the chairperson

- In section 51 the word registrar was replaced by the word secretary as there is no position for a registrar.

- In section 53A (a) of the Act “to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act; this is Consequential to the proposed amendment in section 26 i.e. the existing provisions do not provide for passing of an order by the commission holding the enterprises not guilty of contraventions in

CONTINUATION OF FOOTNOTE NO. 16)

Circumstances for authorization of search [clauses (a), (b), and (c)]:

(i) Clause (a) of sub section (1) of section 132: under clause (a) of section 132, an authorization for search and seizure may be issuance in consequence of non-compliance with summons or notice.

(ii) Clause (b) of sub section (1) of section 132: under clause (b) of section 132(1), an authorization of search and seizure may be issued in case of likely non-compliance with summons or notice.

(iii) Clause (c) of sub section (1) of section 132: under clause (c) of section 132(1) an authorization for search and seizure may be issued in case of possession of undisclosed money etc.

According to L.R. Gupta v. Union of Income, the word ‘undisclosed’ means the income which is hidden from the department. Hence, the clause (c) refers to cases where the assessee knows that the moveable asset is income or represents income which is taxable but not disclosed for the purpose of taxation.

17 1974 AIR 348, 1974 SCR (2) 704
18 [1976] 102 ITR 531 (SC)
cases where the DG holds the enterprises in contravention but after this amendment even in case of the competition appellate tribunal will give regard to decision of the DG where he holds that the enterprise is in contravention

- In section 63 (3) Every notification issued section 5A i.e. power to define threshold for different value of assets and turnover by the central government shall be discussed by the parliament as stated in the section.
NEED FOR FURTHER AMENDMENTS

Confederation of Indian Industry (CII) has said the Competition Act does not appropriately address the industry's concerns and needs to be amended for ensuring that M&A regulations promote growth.

The industry body's appeal is particularly in regard to Sections 5 and 6 of the Competition Act, 2002, which mandates large companies to seek the Competition Commission of India's (CCI) nod before going ahead with merger or acquisitions. "We believe that the current provisions of the competition law do not adequately address the concerns of the industry, especially with regard to the regulation of combinations. We have highlighted the issues in the past too and again request for an amendment of the Competition Act to make it conducive to the industrial and economic growth of the country,"

The CII feels that grouping the assets or turnover of business conglomerates without considering the different product markets being addressed by various entities in the conglomerate, is not a proper approach.

Stressing that coordination of regulatory filings across multiple jurisdictions in cross border M&A may be time-consuming, CII has suggested that the parties to a proposed combination should be allowed to voluntarily notify the Commission of a combination at any time prior to or within thirty days of the decision to combine without having to wait for the trigger event.

Further, with a view to avoiding frivolous appeals by third parties like competitors with vested interest, CII has suggested that the Appellate Tribunal should admit an appeal only on being convinced of its material impact on the appellant.

The CII also said that the government needs to be provided flexibility to exempt enterprises from time to time to promote sectors of business which are affected by the international economic climate\(^\text{19}\)

IMPACT OF THE PROPOSED AMENDMENTS

As stated by several distinguished people about the new bill is that “Direct search and seizure would mean that gathering evidence would be faster and that investigations would be kept confidential.

This amendment will give the commission substantial powers to go after cartels. They further said that this provision was in line with international norms.

The new Bill, when passed, would make it mandatory for the competition panel to decide on corporate mergers and acquisitions (M&A) within a stipulated time limit of 180 days. The current stipulation is 210 days that will help in speeding up the process.

The government has added a new part to Section 5 of the Act, which deals with business combinations of corporate entities. The new Section 5A gives the central government the power to specify different values of assets and turnover for scrutinizing combinations.
CONCLUSION

Competition Law is a complex mixture of a country's law, economics and administrative action intended to favour competition in the economy. Since competition is seen as critical to economic development, competition law seeks to protect this competitiveness in the economy. The underlying theory behind competition law is the positive effect of competition in an economy's market, acting as a safeguard against misuse of economic power. The link between competition law and economic development emphasized over and over again seems rather undeniable and the need for competition law seems like the order of the day. The operation of competition law by prevention of anti-competitive agreements, prohibiting abuse of dominant position by firms and regulation of combinations which might adversely affect competition in the economy, thus seems crucial for India. It is therefore keeping that in mind that the Indian Parliament enacted the Competition Act, 2002. The preamble and the statement of objects and reasons of the Act also evidence that the broad economic development objectives were a consideration to adopting the Act and yet are on its path.

But after analysing the bill it can be said that the present legislative proposals, as piloted in the House are poor in conception and poorer in execution.