



## RETRACING THE TRAJECTORY OF INDIAN COMPETITION POLICY, ITS ETHOS AND ‘SCOPE’

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### ABSTRACT

Owing to the ever-changing landscape of economies throughout the world, competition law has garnered a lot of significance and has undergone tremendous growth amidst this all-pervasive economic dynamism. This phenomenon affords credence to the words of Mr. Fali S. Nariman, “*Competition law is all about economics and economic behaviour*”. Competition law, a field that emerged from the branch of economics, has an all-encompassing framework, taking within its fold of scrutiny a wide range of activities including governmental activities as well as liberal professions like media and entertainment, sports, etc. Through the following discourse the author delves into the fundamentals of Indian competition policy, its evolution and weaves a tapestry surrounding the scope of Indian competition policy in view of the decisional practice of the anti-trust watchdog and other adjudicating authorities along with a tinge of foreign jurisprudence.

**KEYWORDS:** competition law, economics, economic behaviour, competition policy,

anti-trust, adjudicating authorities, jurisprudence.

### INTRODUCTION

In market-based economies, the term ‘competition’ denotes independent endeavours of sellers for buyers’ patronage towards achieving specific business objectives.<sup>1</sup> In India, the 93<sup>rd</sup> Report of the Parliamentary Standing Committee on Home Affairs on the Competition Bill, 2001, although acknowledged the evasiveness and contextuality of the term ‘competition’, remarked that competition is essentially an economic rivalry among economic enterprises to assume greater control over market power.<sup>2</sup> The concept of ‘competition’ encompasses the following manifestations.

#### Perfect Competition

The phenomenon of perfect competition, a situation converse to monopoly, refers to a hypothetical economic model where factors such as large number of buyers and sellers, homogenous products, information asymmetry, absence of entry/exit barriers, etc. work in tandem. The underlying assumption is that the most efficient outcome is arrived at by achieving both allocative and productive efficiencies.<sup>3</sup> Allocative efficiency/*Pareto optimality* postulates that economic resources are allocated efficiently between goods and services, which in turn are allocated efficiently amongst consumers. Productive efficiency implies production of goods and services at the lowest cost possible.<sup>4</sup> Apart from these two, perfect competition also achieves dynamic efficiency wherein competing entities

<sup>1</sup> See Khemani, 1998.

<sup>2</sup> See 93<sup>rd</sup> Report on the Competition Bill, 2001 (2002), para 3.1.

<sup>3</sup> See Vahini, 2016, para 1.2.1

<sup>4</sup> *Ibid.*



constantly innovate. Both the perfect competition and the pure monopoly models fail to concretise in reality.

### Workable Competition

The unrealistic assumptions of perfect competition limit the utility of the model.<sup>5</sup> Even the pure monopoly model fails to concretise in reality. In light of such impractical results, J.M. Clark came up with the idea of ‘workable competition’ in 1940.<sup>6</sup> Clark did not completely discard the instrumentality of perfect competition. He remarked- *“I am not quarrelling with proper use of this standard as an ideal...However, it...[may]...lead to undesirable results...it does not afford reliable guidance to the factors which are favourable to the closest available working approximation to that ideal, under actual conditions.”*<sup>7</sup> Workable competition, thus, came to the fore as a distinct school of thought. Workable competition recognizes that in reality, the market structures oscillate between the conditions of pure competition on one end and monopoly on the other and finally seek to arrive at a workably competitive position.<sup>8</sup> Apropos to the modern concept a market is workably competitive if the market forces push the firms into indulging in allocation of resources, technological innovation, distribution of income, and organization of production.

### Contestable Competition

The ‘Contestable Market Theory’, propagated by many as forming the basis of antitrust law, posits that markets have significant characteristics of a natural

monopoly, however they also allow for free entry and exit of firms.<sup>9</sup> The cost-minimising mechanism of such markets comprises a ‘single seller sans monopoly power’. The potentiality of new firms entering the market disciplines behaviour and therefore, even if operated by a single firm, the market performs in a competitive fashion.<sup>10</sup>

The discussion in the forthcoming section initially traverses through the evolution of competition ‘policy’ in India and lays down its objectives. In the succeeding part, the author ventures into the ‘scope’ of Indian competition policy while dealing with its components, the issue of jurisdictional turfs and other essential aspects.

### LITERATURE REVIEW

The discussion in this research paper commences with an exploration of the Indian competition policy and its objectives. There are 3 globally recognized approaches that determine the policy objectives for any nation- the Harvard Approach, the Chicago Approach and the New Industrial Economics Approach. The New Industrial Economics Approach breaks the stringency associated with the two earlier approaches and presents a flexible milieu wherein firms are not simply reactive but proactive- they formulate strategies to modify the market structure and affect competitors’ conduct (Jacquemin, 2000). The central goals of the Indian competition policy are categorically laid down in the Preamble of the Competition Act, 2002 (“Act”).

A major portion of the forthcoming discussion focuses on the scope of Indian

<sup>5</sup> See Willimsky, 1997.

<sup>6</sup> See Clark, 1940.

<sup>7</sup> Ibid.

<sup>8</sup> See Stocking, 1955.

<sup>9</sup> See Bailey, 1981.

<sup>10</sup> Ibid.



competition policy. The “*effects doctrine*” majorly contributes towards expanding the scope of the Indian competition policy. Pursuant to this doctrine, the Indian competition law can spread its reach to foreign transactions if the effects of such a transaction are felt in India, however the practicality of this doctrine continues to be seen in the Indian context (Maheshwari & Reis, 2012).

The scope of competition regulation also envisages sectoral conflicts. A model that is in consonance with the “*necessary and sufficient test*” affords a potential solution to resolve such conflicts (Sharma, 2014). The third element of the analysis of the scope of Indian competition policy is the wide ambit of the definition of “enterprise” under the Act, as showcased by the trajectory drawn by various cases and orders. The fourth element comprises analysis of the broad definition of “agreement” through case laws and also emphasizes that the scope of the Act is broader than that of the Indian Contract Act, 1872 (“*Contract Act*”) (Srivastava & Baranwal, 2014).

## METHODS AND RESULTS

The author’s research is based on both primary and secondary sources. The primary sources that have been referred include the provisions contained in the Act, few reports of the government as well as decisions of the various adjudicating authorities. The secondary sources include prominent books as well as notable articles/research papers.

The results of the research have been elaborated upon in the Conclusion and can be summarized as follows:

- (i) A workable application of the “effects doctrine” can be ensured if the CCI enters into bilateral/multilateral agreements with other foreign regulators under Section 18.
- (ii) Issues related to competition across various sectors of the nation must be governed along the same thread of competition policy.
- (iii) The language of the Act is such that it aims at widening the definition of enterprise, thereby widening the scope of the Act.

## DISCUSSION

### 1) Competition Law and Policy

The supreme and overarching mandate of competition regulation in India flows from the Indian Constitution. It stipulates securing of a social order for the purpose of promotion of people’s welfare by the State<sup>11</sup> as well as, formulation of policies towards distributing control and ownership of material resources of the community in furtherance of the common good and preventing concentration of wealth and means of production to the common detriment.<sup>12</sup> Competitive forces in the market ensure economic efficiency and innovation amongst the competing entities and consumer welfare in the form of lower prices for the consumers. However, the downside to this is that firms may also be motivated by the desire of acquiring greater market power. This is done by restricting competition, colluding with competing firms or engaging in other anti-competitive practices. These are called as market imperfections/failures.

<sup>11</sup> Art. 38 of the Indian Constitution.

<sup>12</sup> Art. 39 of the Indian Constitution.



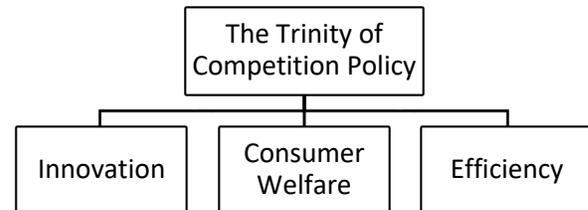
### a) Evolution of Competition Policy in India

It was the onset of the ‘LPG effect’- Liberalization, Privatization and Globalization- and the resultant deregulation of the economy that necessitated formulation of competition policy across different jurisdictions. Since 1990, and as on 18 October 2001, more than 40 developing nations or countries in transition had adopted competition law frameworks.<sup>13</sup> However, in India, the formulation dates back to 1969, even before the LPG effect was felt in the Indian economy. The concerns of that time centred around abatement of income inequalities and equitable distribution. The Monopolies and Restrictive Trade Practices Act, 1969 (“**MRTP Act**”) was enacted in light of these concerns and to give effect to ‘socialist’ objectives. Later on, in response to the LPG effect, and after a long trail of inquiries including the recommendations of the Raghavan Committee, the new Competition Act, 2002 was passed. However, it was only in 2009 that the Act fully came into force to correct the follies of the erstwhile MRTP Act, which was altogether from another era and catered to the needs of another time.

### b) Objectives of Competition Policy

As per a White Paper published by the United Kingdom (“**UK**”) government- “A World Class Competition Regime”- “*Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs*

and providing incentives for the efficient organisation of production”.<sup>14</sup> Therefore, in essence, the competition policy revolves around the 3 main goals of innovation, consumer welfare and efficiency.



The following exposition is derived from these 3 objectives.

- (i) Allocative and Productive Efficiencies (technical economic efficiencies)
- (ii) Consumer Welfare
- (iii) Redistribution of wealth and dispersal of economic power (promotion of economic equity and not just economic efficiency)
- (iv) Integration of Markets (for instance the competition policy of the European Union encourages a level playing field while facilitating cross-border transactions and integration)<sup>15</sup>

Predominance of a particular goal depends upon the political and social emphasis of the legal system in which they operate. There are a few approaches in this regard.

The *Harvard School of Antitrust* focuses on circumscribing market power. It formulated a Structure-Conduct-Performance (“**SCP**”) paradigm, which recognizes market power as

<sup>13</sup> See OECD, 2001.

<sup>14</sup> See Department of Trade and Industry, 2001.

<sup>15</sup> *Supra* note 4 at para 1.4.3.



an essential factor and forges a direct relationship between market concentration and its impact on consumer welfare.<sup>16</sup> However, this postulate was followed with much stringency as it led to penalization of firms even for practices that benefitted consumers.<sup>17</sup> Thus, it was too quick to find fault with aggressive competition.<sup>18</sup>

The *Chicago School of Antitrust*, progeny of Aaron Director's work in the 1950s, provides an inverted causation of the SCP paradigm. Scholars supporting this approach believed that markets should be given a "free rein" and any competitive imbalances in the market could be corrected without regulator-indulgence.<sup>19</sup> They discarded the presumption of illegality (or the so-called "pro-plaintiff-orthodoxy"<sup>20</sup>) under the Harvard Approach and emphasized upon proof of specific anticompetitive effects before holding an entity liable.<sup>21</sup> The antitrust jurisprudence established by the Chicago School holds ground even today, however, it fails to identify many forms of strategic behaviour by dwelling too much upon long-run considerations and discarding the more critical short-run considerations.<sup>22</sup> The approach involved myriad ideas comprising multiple analyses and an absolute lack of uniformity. It was challenged by many scholars. Therefore, a once instrumental development is now termed by many scholars as a "wasteful distraction".<sup>23</sup>

The follies associated with these approaches became the subject matter of future discourse on competition policy and the antitrust fraternity arrived at a tipping point- the *New/Modern Industrial Economics Approach* was devised. While combining the finest elements of the above two approaches, the new approach represents a paradigm that is far away from an exact science as it conducts theoretical and empirical analyses to produce different models/concepts/typologies depending upon the circumstances.<sup>24</sup> According to this approach, firms don't simply respond to external conditions, but attempt to formulate strategies to mould their economic environment by modifying the market structure and competitors' conduct and therefore, the "unidirectional causality" of SCP (from structure to conduct and further from conduct to performance) breaks.<sup>25</sup>

The **Indian Competition Policy** facilitates building a business environment, which enhances static and dynamic efficiencies, ensures consumer welfare and prevents abuse of market power.<sup>26</sup> A cursory reading of the Preamble to the Act indicates that the legislation seeks to achieve both economic goals (allocative/productive efficiencies) as well as social goals (consumer welfare and economic equity)-

(i) "**Promote and sustain competition in the market**" – This would be ensured by

<sup>16</sup> See Lelissa, 2018.

<sup>17</sup> For instance, in 1945, the Aluminum Co. of America was penalized for engaging in aggressive competition by taking advantage of economies of scale, which had in fact benefitted the customers, as they were able to deliver quality products at low prices. See *United States v. Aluminum Co. of America* 148 F.2d 416 (2d Cir. 1945).

<sup>18</sup> See Piraino, 2007.

<sup>19</sup> See Fox, 1987.

<sup>20</sup> See Kobayashi & Muris, 2012.

<sup>21</sup> *Supra* note 19.

<sup>22</sup> See Hovenkamp, 1985.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Jacquemin, 2000.

<sup>25</sup> *Ibid.*

<sup>26</sup> See Planning Commission, 2008.



preventing practices having appreciable adverse effect on competition (“AAEC”).

(ii) **“Promote the interests of consumers”** –

The Supreme Court of India (“SC”), in *CCI v. SAIL*<sup>27</sup>, stated that the main objective of competition is to create a market responsive to consumer preferences. The SC also pointed out the difference between the consumer welfare objectives of the Consumer Protection Act, 1986 and the Competition Act. Consumer protection law deals with market failures that are ‘internal’ to the consumers that affect their subjective ability to effectively make a choice.<sup>28</sup> Competition law deals with failures that are ‘external’ to the consumer and that bring forth the market’s objective inability to provide adequate options to the consumer.<sup>29</sup>

(iii) **“Ensuring freedom of trade”** – This goal has a political and social angle to it. Ensuring freedom of trade endorses the political tenet of ensuring “freedom for all” and the social goal of safeguarding the interests of small and medium enterprises.

## 2) SCOPE OF INDIAN COMPETITION POLICY

Competition law regimes of various countries have had their own evolutionary sagas. Competition law in India is at an embryonic stage as the Act was accorded assent in January 2003 and the substantive provisions related to competition enforcement were notified only on May 20, 2009. The scope of

the Act has been continually enlarged through amendments as well as judicial interpretations, rendering precedents.<sup>30</sup>

### a) The Effects Doctrine

The territorial scope of the Act extends to whole of India except the state of Jammu and Kashmir.<sup>31</sup> Nonetheless, this stipulation becomes superficial by virtue of the “effects doctrine”, enshrined in Section 32 of the Act. It empowers the Competition Commission of India (“CCI”) to expand its jurisdiction while transcending the “principle of territoriality”. The legal view taken is that anticompetitive actions/behaviour would fall within the mischief of the Act even if the enterprise involved in such acts/behaviour is not located in India, provided, the effect of the said acts/behaviour is felt in India.<sup>32</sup> Before the Act was enacted, MRTP Commission’s reach was restricted in terms of foreign cartels. This is evidenced by the judgment of the SC in *M/S Haridas Exports v. All India Float Glass Mfrs. Assn. & Ors.*<sup>33</sup>, where it was held that the effects doctrine could be applied only in case of restrictive trade practice after the goods were imported into India and the Commission did not have jurisdiction over a foreign cartel unless a cartel member had a business activity in India. Section 32 of the Act has been resolutely imbedded in the competition law fabric to overcome such shortcomings. It allows the CCI to scrutinize any agreement/abuse of dominant position/combination if AAEC is felt in the relevant market in India and pass such directions or orders as it deems fit.<sup>34</sup>

<sup>27</sup> *CCI v. SAIL* (2010) 10 SCC 744.

<sup>28</sup> *See Nebbia*, 2013.

<sup>29</sup> *Ibid.*

<sup>30</sup> *See Tuljapurkar & Dokaru*, 2016.

<sup>31</sup> The Competition Act, 2002, § 1(2).

<sup>32</sup> *See Maheshwari & Reis*, 2012.

<sup>33</sup> *Haridas Exports v. All India Float Glass Mfrs. Assn.*, AIR 2002 SC 2728.

<sup>34</sup> *Supra* note 33.



Furthermore, Section 18 of the Act sets out CCI's duties and is indicative of the Legislative intent to empower the CCI to safeguard freedom of trade.<sup>35</sup> Being wary of the lacunae associated with extraterritorial jurisdiction and issues revolving around the enforcement of private international law, Section 18 empowers the CCI to enter into any memorandum/arrangement, on Central Government's prior approval, with any foreign agency for the purpose of discharging its duties/functions under the Act.<sup>36</sup>

Sections 32 and 18 of the Act empower the CCI to bring acts/agreements/combinations taking place outside India within its scrutiny; however, the practical application of such powers is yet to be seen. Although the CCI is well-empowered, it would be necessary for the CCI to object to foreign anticompetitive endeavours in a timely manner as it would be tedious to reverse their effects once the transaction/agreement/combination taking place in a foreign jurisdiction has been consummated.<sup>37</sup> Till date, there have been no regulations related to antitrust matters beyond the Indian territorial limits. In light of increased globalisation of markets and the advantage of synergies created by inter-jurisdictional combinations, the effects doctrine and the principles of extra-territorial jurisdiction assume pivotal importance.

#### **b) CCI at Loggerheads with Sectoral Regulators**

Many a times, the powers of CCI and other sectoral regulators coincide. Sections 18, 21, 21A, 60 and 62 of the Act forge a situation of conflict of jurisdiction.<sup>38</sup> The Securities and

Exchange Board of India ("SEBI") is one such sectoral regulator. Various SEBI regulations direct it to prohibit unfair/fraudulent trade practices and also regulate mergers and acquisitions. Recently, the SEBI had asked the CCI not to consider an 'Information' filed by a credit ratings agency ("CRA"), Brickwork Ratings India Pvt. Ltd. ("Brickwork"), which moved the CCI alleging price gouging by its peers. The complaint was regarding cartelisation by big CRAs.<sup>39</sup> SEBI's dissension was on the ground that for any contravention of the CRA Regulations, SEBI was the appropriate investigative authority. CCI snubbed SEBI's contention by placing reliance on *CCI v. Bharti Airtel Ltd. and Ors.*<sup>40</sup> ("*Bharti Airtel*") where it was held that mere presence of a sectoral regulator does not completely oust CCI's jurisdiction because CCI is the experienced body in carrying out competition scrutiny. CCI had asked SEBI to provide information on whether any action was in progress on the matter. SEBI didn't disclose such information and thus, CCI stated that it had the requisite jurisdiction to decide the issue on merits.

In *Bharti Airtel*, the tussle for jurisdiction was between the CCI (market regulator) and the Telecom Regulatory Authority of India ("TRAI") (sectoral regulator). It was categorically stated that the provisions of the Act are specifically tailored to investigate anticompetitive issues and the significant role afforded to the CCI under the Act cannot be overlooked. The SC advocated for the maintenance of 'comity' between specific sectoral and market regulators. The SC also

<sup>35</sup> Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Federation of India, Case No. 03/2009 (CCI).

<sup>36</sup> The Competition Act, 2002, proviso to § 18.

<sup>37</sup> *Supra* note 33.

<sup>38</sup> *See* Garg, 2020.

<sup>39</sup> Brickwork Ratings India Pvt. Ltd. v. CRISIL Ltd, Case No. 47/2019 (CCI).

<sup>40</sup> *CCI v. Bharti Airtel Limited and Ors.* (2019) 2 SCC 521.



insinuated that the solution to striking a balance lies in allowing the specific regulator to deal with the matter at the first instance and once it arrives at findings related to prima facie evidence of indulgence in anticompetitive activities, the market regulator can take over further investigation as per the provisions of the Act. Such a balanced approach would be in consonance with Section 60 of the Act.

On the one hand, the non-obstante clause encapsulated in Section 60 of the Act gives the Act an overriding effect. On the other hand, Section 62 of the Act bespeaks the need for maintaining harmony with other statutes. This perceived issue of overlap of jurisdiction was wisely envisaged by the Legislature while passing the Competition (Amendment) Act, 2007. A mechanism for carrying out consultations between the CCI and other statutory authorities was introduced, embodied under the consolidated compass of Sections 21 and 21A of the Act.<sup>41</sup> Under Section 21, the sectoral regulators may refer issues before them to the CCI, having regard to its competence to deal with broad competition issues.<sup>42</sup> Section 21A of the Act envisages a reverse position and states that the CCI may refer issues before it to specific sectoral regulators, having regard to their expertise in technically complex matters.<sup>43</sup> However, the use of the term “*may*” in both the provisions is indicative of the non-binding nature of this consultation-mechanism. Any potential instrumentality of this voluntary mechanism has failed on account of the turf wars between different Ministries - Ministry of Corporate Affairs

(the agency of CCI) and other ministries comprising different statutory authorities (for instance, the Ministry of Communications-the agency of TRAI).<sup>44</sup> The Indian Competition Policy takes within its fold both the Act as well as the laws governing specific sectors and therefore, the above-discussed overlaps pose serious issues.

One tranche of sectoral legislations broadly incorporate competition goals in the absence of specific provisions, such as the TRAI Act, 1997.<sup>45</sup> The other tranche comprises legislations such as the Electricity Act, 2003 that contain more specific stipulations, similar to those included in the Act.<sup>46</sup> Such legislation significantly differ from the competition legislation. Competition law is largely reactive and aims at safeguarding competition by relying on ex-post regulation (except in case of merger control), while sectoral regulation is pro-active and aims at maintaining a market structure that facilitates competition through ex-ante regulation.<sup>47</sup> This dissimilitude in approaches would lead to different results in the same matter. There is no straitjacket solution for resolving this issue. It has also perplexed other nations.

The solution lies in devising a model depending upon the following four factors – (1) *experience and practical application*; (2) the *institutional culture* of a nation; (3) the *type and goals* of the competition regime; and (4) the *choices made by politicians and policy-makers* in the country.<sup>48</sup> An ‘*exclusivity model*’, where the competition issues lay absolutely within the domain of either the competition law authority or the specific sectoral regulator, would fail owing

<sup>41</sup> See Poddar, 2018.

<sup>42</sup> See Sharma, 2014.

<sup>43</sup> *Ibid.*

<sup>44</sup> See Mehta, 2005.

<sup>45</sup> *Supra* note 42.

<sup>46</sup> *Ibid.*

<sup>47</sup> See Dabbah, 2011.

<sup>48</sup> *Ibid.*



to the lack of technical expertise on part of the competition authority as well as a lack of competition-specific expertise on part of the sectoral regulators. There is also the issue of cross-sectoral overlap and the uncertainty as to whether the different sectoral regulators involved would cooperate.

In such a scenario, a shift from *exclusivity* to ‘*concurrency*’ provides a more effective solution. A concurrency model would operate as a *synergy model*, wherein different regulators can function under a symbiotic mechanism. Each regulator can benefit from the expertise of the other. Successful examples of such concurrency models can be found in the UK, Australia, Canada, Finland, Germany, etc. with slight variations. In the UK, the Office of Fair Trading (“OFT”) and 6 sectoral regulators together form a common forum, known as the ‘Concurrency Working Party’ (“CWP”), which serves as a platform for arriving at agreeable arrangements for the successful application of Articles 101 and 102 of the Treaty on the Functioning of the European Union.<sup>49</sup> The Competition Act (Concurrency Regulations), 2004 serves as the concurrency framework and embodies the legal and regulatory basis to bring about harmony between the different regulators under UK’s Competition Act, 1998.<sup>50</sup> As per an OFT guideline titled *Concurrent Application to Regulated Industries (2014)* the CWP follows a ‘case allocation criterion’ in order to determine which body is better equipped to take action/lead the investigation.<sup>51</sup>

There is a third model of cooperation wherein the respective competences of different

bodies are clearly defined to promote policy coherence amongst them while implementing their respective mandates.<sup>52</sup> Each regulator exercises jurisdiction over its clearly defined area and prior consultation may be conducted in case one body seeks the specialized knowledge and expertise of the other. Following suit, the Competition Commission of South Africa has entered into a memorandum with sectoral regulators.<sup>53</sup> The concurrency and cooperation models appear to offer a potential solution for India. However, they would fail in light of the hierarchic institutionalized culture and the constant power play between the various Ministries. Additionally, formation of concurrency models would involve budgetary and manpower issues as regulators depend on their respective Ministries for budgetary allocations and sanctioning of staff appointments.<sup>54</sup>

Because the CCI is the ultimate authority to assess antitrust issues, the best-suited model for India appears to be the exclusionary model. However, it should not be adopted stringently. The CCI should not be conferred with absolute primacy in a way that ousts the sectoral regulators from the competition law rubric. The Legislature must take upon itself to ensure that all sectoral laws provide for settlement of competition disputes in conformity with the framework of the Act and the underlying philosophy of competition. The CCI could be included in drafting ex-ante regulations of sectoral regulators that would ward off the possibility of conceptual divergences between different regulations; at the same time a clear demarcation must be created between the

<sup>49</sup> See Smith, 2004.

<sup>50</sup> *Ibid.*

<sup>51</sup> See Competition & Markets Authority, 2014.

<sup>52</sup> See UNCTAD, 2006.

<sup>53</sup> *Ibid.*

<sup>54</sup> See Singh, 2008.



functions of the regulators by amending sectoral laws to the effect that sectoral regulators must be prevented from taking action against anticompetitive practices in an ex-post fashion.<sup>55</sup> Moreover, the mechanisms provided under Sections 19(1)(b) (permitting CCI to conduct anti-competitive inquiry on reference being made by a regulatory authority), 21 and 21A must be actively resorted to in order to achieve a perfect balance.

Such an exclusionary model is also in consonance with the ‘*necessary and sufficient test*’ proposed by Mr. K.K. Sharma, ex-Director General (“DG”) of the CCI.<sup>56</sup> Sharma described the said test in the following words - “*The jurisdiction belongs to the regulator whose statute is ‘necessary and sufficient’ to inquire into and finally adjudicate the issue without having to import the provisions of the other’s statute.*”<sup>57</sup> According to this test, in a situation where a regulator does not find the provisions of its governing statute ‘necessary and sufficient’, it should resort to the mechanism provided under Sections 21 or 21A of the Act to tap onto the expertise of the other regulator.<sup>58</sup>

### c) Wide Definition of ‘Enterprise’

For raising any kind of allegation against an entity under the Act, the entity must qualify the term ‘enterprise’ under Section 2(h) of the Act. The broad scope of this defining provision is captured in the following words:

*“A person or a department of the Government...engaged in any activity...or*

*the provision of services, of any kind... but does not include any activity of the Government relating to the sovereign functions...including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.”*<sup>59</sup>

While breaking down the above definition, we come across the first component that is “person”, which has been defined under Section 2(l) of the Act. It provides a comprehensive definition and takes within its fold an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals, any corporation, any body corporate incorporated under foreign laws, a cooperative society<sup>60</sup>, a local authority and lastly, every other artificial juridical person, not falling within any of the preceding categories.

### (i) Harnessing the Non-Sovereign Dimension of Department of Government

The definition under Section 2(h) comprises “department of the Government” as another component. CCI decided in *Shubham Srivastava v. Department of Industrial Policy & Promotion*<sup>61</sup> that a department of the government is tantamount to an ‘enterprise’ if the functions performed by it are towards controlling of goods or the provision of services. For instance, in one case the office of the Secretary of the Home Department was held to be an ‘enterprise’ due to its function

<sup>55</sup> *Supra* note 48.

<sup>56</sup> *Supra* note 43.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> The Competition Act, 2002, § 2(h).

<sup>60</sup> Malwa Industrial and Marketing Ferti-Chem Cooperative Society Ltd. v. CCI, Appeal No. 25/2015 (COMPAT).

<sup>61</sup> Sh. Shubham Srivastava v. Department of Industrial Policy & Promotion, Case No. 39/2013, (CCI).



of issuing a notification regarding a grant of licence for e-ticketing as it amounts to control over provision of services.<sup>62</sup> Therefore, while examining whether an entity is an enterprise, the functional aspects assume paramountcy, as opposed to the institutional aspects (form or constitution of the entity).<sup>63</sup> In a particular case, the SC, while underscoring the relative nature of the notion of enterprise, took upon itself to clarify its ambit in the following words:

*“These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an ‘enterprise’ within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade.”<sup>64</sup>*

Activities carried out by departments that are aligned with the sovereign functions of the Government (viz. atomic energy, currency, defence and space) are precluded from the scope of ‘enterprise’, however, those associated with production, supply, storage, acquisition, distribution, control of goods cannot be excluded from the Act’s cover.<sup>65</sup> In applying the functional test, it must be

examined if the function can be performed even by a third party and is alienable in nature.<sup>66</sup> If the answer to this is in the affirmative then the function in question cannot qualify as a sovereign function.

Additionally, Section 54 of the Act confers upon the Central Government the power to grant exemption from the application of the Act or any of its provisions to any enterprise performing a sovereign function on behalf of the government.<sup>67</sup> The said exemption can be granted solely in relation to activities relating to sovereign functions of the Government, and not with respect to all the activities.<sup>68</sup> What amounts to a sovereign function is not *res-integra* anymore. In *Agricultural Produce Market Committee v. Ashok Harikuni & Anr*<sup>69</sup>, the apex court made the following points clear:

- ❖ Sovereign functions may carry wide ramifications but essentially they are “primary inalienable functions”, exercisable only by the State.
- ❖ Different functions could be “ramifications of ‘sovereignty’” but not all of them can be primary inalienable functions.
- ❖ The “dichotomy between sovereign and non-sovereign functions” can be determined by finding which of the functions can be performed by private bodies. Those, which can be, are not sovereign functions.

<sup>62</sup> Shri. Debapriyo Bhattacharya v. The Principal Secretary, Home (General-A) Department, Case No. 54/2011 (CCI).

<sup>63</sup> CCI v. Coordination Committee of Artists and Technicians of W.B. Film and Television, AIR 2017 SC 1449.

<sup>64</sup> Travel Agents Association of India v. Department of Expenditure, Case No. 04/2020 (CCI).

<sup>65</sup> Uttarakhand Agricultural Produce Marketing Board and Ors. v. CCI, 2017 SCC OnLine Del 11499.

<sup>66</sup> Next Radio Limited v. Prasar Bharti, Ministry of Information and Broadcasting, Case Nos. 29/2016 and 19/2017 (CCI).

<sup>67</sup> The Competition Act, 2002 § 54(c).

<sup>68</sup> Union of India v. CCI & Ors, AIR 2012 Del 66.

<sup>69</sup> Agricultural Produce Market Committee v. Ashok Harikuni & Anr, (2000) 8 SCC 61.



- ❖ Even functions over which the State has monopoly may be non-sovereign.
- ❖ Even a non-profit making entity can be an ‘enterprise’. Absence of a mere quid pro does not exclude an entity from the ambit of Section 2(h).

The line of delineation between sovereign and non-sovereign functions is blurring and except for a limited set of functions, the State does not enjoy immunity.<sup>70</sup> The following table exhibits the decisional practice of adjudicating authorities with respect to application of Section 2(h) to departments of Government and statutory bodies –

Sr No.	Case	Entity under Scrutiny	Decision
1.	<i>Gurgaon Institutional Welfare Association v. Haryana Urban Development Authority (Case No. 94 of 2016)</i>	HUDA-statutory body established under the HUDA Act, 1977	It was observed that the allotment of institutional plots is undertaken even by private developers and thus, is not an inalienable function that is relatable to the government's
2.	<i>Meet Shah and Ors. v. Union of India and Ors.</i>	Ministry of Railways and Indian Railway Catering and Tourism Corporation	sovereign function. In the ‘market for sale of tickets by railways in India’, the 2 entities are covered within the definition of enterprise.
3.	<i>Next Radio Limited and Ors. v. Prasar Bharti, Ministry of Information and Broadcasting</i>	Ministry of Information and Broadcasting	The functions of constructing towers and providing co-location services by the entity were held to be non-sovereign in nature.
4.	<i>Uttrakhand Agricultural Produce Marketing Board and Ors. v. CCI and Ors.</i>	Uttrakhand Agricultural Produce Marketing Board-body corporate of the State of Uttrakhand, entrusted	In the context of the function of distribution of liquor, the entity was held to be an enterprise.

<sup>70</sup> N. Nagendra Rao vs. State of Andhra Pradesh, AIR 1994 SC 2663.



		with the development and regulation of 'Mandies'.		<i>Industries v. State of Odisha and Ors. (Case No. 16 of 2019)</i>	Corporation Ltd.- 100% government-owned company functioning under the Food Supply & Consumer Welfare Department, Government of Odisha	economic activities of procurement of paddy, custom milling of rice and distribution of rice and thus, qualified as an enterprise under the Act.
5.	<i>Biswanath Prasad Singh v. DG of Health Services and Ors. (Appeal No. 63 of 2014, COMPAT)</i>	DG of Health Services, Ministry of Health and Family Services (CGHS)	CGHS provides healthcare services to the target group and complements its resources by empanelling hospitals, including private hospitals too. It was concluded that this process of empanelment is not facilitation but a clear provision of service and therefore the entity is an enterprise.			
				7. <i>Shravan Yadav and Ors. v. Volleyball Federation of India and Ors. (Case No. 1 of 2019)</i>	Volleyball Federation of India ("VFI")- National Sports Federation for Volleyball, recognised by the Ministry of Youth Affairs & Sports, Government of India.	The CCI took note of its earlier decisions involving the All India Chess Federation <sup>71</sup> , Hockey India <sup>72</sup> , BCCI <sup>73</sup> , and held that VFI is an enterprise owing to its economic activity of organising tournaments.
6.	<i>Maa Metakani Rice</i>	Odisha State Civil Supplies	The entity was engaged in			

<sup>71</sup> Hemant Sharma & Ors. v. All India Chess Federation, Case No. 79/2011 (CCI).

<sup>72</sup> Dhanraj Pillay and Ors. v. Hockey India, Case No. 73/2011 (CCI).

<sup>73</sup> Surinder Singh Barmi v. Board for Control of Cricket in India, Case No. 61/2010 (CCI).



<p>8.</p>	<p><i>Arun Anandagi ri v. Institute of Chartered Accountants of India (Case No. 93 of 2013)</i></p>	<p>Institute of Chartered Accountants of India- statutory body established under the Chartered Accountants Act, 1949</p>	<p>Though the entity exercises a regulatory function, it also carries out other commercial activities like conducting professional courses and publication of books. While differentiating economic activities from regulatory activities, it was held that organizing seminars could not qualify for the exemption under Section 2(h).</p>		<p>of Railways</p>	<p>of the Act in relation to the services in question. Moreover, the Central Government can grant exemption only w.r.t activities relating to sovereign functions. In light of the fact that the entity was engaged in an activity related to “provision of services, inter alia, of transportation of goods by railroad”, which was not an inalienable function of the State, the entity was held to be an enterprise.</p>	
<p>9.</p>	<p><i>Union of India v. CCI</i></p>	<p>Union of India, through Chairman, Railway board, Ministry</p>	<p>It was noted that no notification was issued by the GOI under Section 54</p>	<p>10 .</p>	<p><i>Dish TV v. Prasar Bharti (Case No</i></p>	<p>Prasar Bharti- under Prasar</p>	<p>The entity was engaged, inter alia,</p>



<p>44 of 2010)</p>	<p>Bharti (Broadcasting Corporation of India) Act, 1990</p>	<p>in the commercial activities of broadcasting various TV programs including advertisements that are envisaged under Section 2(h).</p>	<p>exclusions- firstly, activities related to sovereign functions of the Government, which depends upon the facts of each case and secondly, activities covered by the departments of Central Government dealing with atomic energy, currency, defence and space, which is a categorical exclusion.<sup>80</sup></p> <p><b>(ii) Wide Connotation to “Services”</b> The term “services” enjoys a wide ambit as it includes a “service of any description” and encompasses a wide range of sectors- banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, processing, supply of energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news/information and advertising.<sup>81</sup> Thus, every possible type of activity gets covered under the definition of “service”. Furthermore, the definition under Section 2(h) takes within its fold activities related to provision of services “of any kind” thereby affording a very wide connotation to the array of activities that can fall under the definition of services.<sup>82</sup></p> <p><b>(iii) The Case of Trade Unions</b> The issue of roping in trade unions within the scrutiny of the CCI was addressed in <i>CCI v. Coordination Committee of Artists and Technicians of W.B. Film and Television and</i></p>
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Although there is another series of cases, where the Bar Council of India<sup>74</sup>, Department of Financial Services<sup>75</sup>, Department of Excise, Entertainment and Luxury Tax<sup>76</sup>, Department of Agriculture & Cooperation<sup>77</sup>, Ministry of Civil Aviation<sup>78</sup>, Department of Sales Tax<sup>79</sup>, etc. have been held to be falling outside the ambit of Section 2(h), the functions in question were clearly regulatory in nature. Section 2(h), undisputedly, continues to enjoy a wide domain by roping in various entities for effective scrutiny. Thus, as far as the exclusionary aspect of Section 2(h) is concerned, there are only two

<sup>74</sup> Thupili Raveendra Babu v. Bar Council of India and Ors, Case No. 50/2020 (CCI).

<sup>75</sup> National Insurance Company Ltd. and Ors. v. CCI, Appeal No. 94/2015 (COMPAT), where it was held that DFS is neither engaged in insurance business directly nor through its subsidiaries.

<sup>76</sup> United Breweries Limited v. The Commissioner, Department of Excise, Entertainment and Luxury Tax, Government of National Capital Territory of Delhi, Case No. 22/2019 (CCI), where it was held that grant of license in discharge of statutory functions falls within the realm of public policy and not Section 2(h).

<sup>77</sup> Saurabh Bhargava v. Secretary, Ministry of Agriculture and Cooperation, Case No. 70/2011 (CCI).

<sup>78</sup> Vineet Kumar v. Ministry of Civil Aviation, Case No. 18/2013 (CCI).

<sup>79</sup> Taj Pharmaceuticals v. Department of Sales Tax, Case No. of 69/2015 (CCI).

<sup>80</sup> Biswanath Prasad Singh v. DG of Health Services and Ors, Appeal No. 63/2014 (COMPAT).

<sup>81</sup> The Competition Act, 2002, § 2(u).

<sup>82</sup> *Supra* note 81.



*Ors.*<sup>83</sup> The Coordination Committee, undisputedly, qualified to be a ‘person’ according to Section 2(l) of the Act. However, it was not involved in any commercial activity directly. Such a trade union, acting on its own, in the absence of any connection with another entity, could not be considered as an “enterprise” or an “association of persons” under Section 3 of the Act. If the Coordination Committee were looked at in isolation, merely as a trade unionist, then the finding of the erstwhile Competition Appellate Tribunal (“COMPAT”) regarding the Coordination Committee not qualifying as an “enterprise” would have been faultless and the decision could be sustained. However, the apex court noted that a very significant and germane fact was “lost in translation”.

The COMPAT failed to take into consideration the fact that the Coordination Committee as well as the Eastern India Motion Picture Association (“EIMPA”) are associations of enterprises/constituent members and these members are engaged in production, distribution and exhibition of films. Both the Coordination Committee and the EIMPA joined together and acted in a coordinated and concerted manner by giving call of boycott of competing members (i.e. the informants in this case). The SC, therefore, observed that the matter must not be viewed in a narrow way by regarding the Coordination Committee as a trade union, in disregard of the fact that it is “backing the cause” of its constituent members that are in fact “enterprises”. The said constituent members of these two bodies indulge in decision-making with respect to production, distribution or exhibition of films on behalf

of the members who are engaged in the similar or identical business. Decision of the Coordination Committee and the EIMPA reflected collective intent of the members. Therefore, in light of these facts and circumstance the matter could not have been rebuffed by merely giving it a “cloak of trade unionism”.

#### **d) “Agreement” Under the Competition Act**

The delineation between the scope of competition law and consumer law has already been established in the previous sections. When compared to the Contract Act, the Competition Act is wider in scope. The regulatory purview of Contract Act is limited to contracts only while the Competition Act takes within its scrutiny any “agreement” and this term is much more comprehensive and extensive than a “contract”.<sup>84</sup> The Competition Act defines the term “agreement” under Section 2(b) of the Act. This defining provision encompasses not just an agreement as understood in the conventional way. It gives an inclusive definition and, in essence, indicates that an “agreement” entails an express or overt meeting of minds (any arrangement, understanding or action in concert) that may or may not be enforceable by legal proceedings. Even in the context of restrictive covenants in non-compete agreements, the remedies available under the Competition Act are wider in scope when compared to the Contract Act.<sup>85</sup>

The expressions “arrangement”, “understanding” and “action in concert” amplify the scope of the term agreement.<sup>86</sup> The stipulation under Section 2(b) has been

<sup>83</sup> *Supra* note 64.

<sup>84</sup> Srivastava & Baranwal, 2014.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Supra* note 4 at para 3.1.1.1.



designed and crafted in a manner that produces a sweeping and enormous coverage for anti-competitive measures carried out jointly and does not necessitate presence of an explicit agreement. It has been recognized that the definition under Section 2(b) also covers instances where actions are carried out on the basis of a mere nod or a wink.<sup>87</sup> Enterprises have designed more discreet ways of colluding. There may be absence of direct evidence of concerted action or cooperation and the CCI has to rely on corroborative evidence. The existence of an agreement need not be proved ‘beyond reasonable doubt’; it is to be tested on the benchmark of ‘preponderance of liability’.<sup>88</sup> To escape the eye of the competition watchdog, anti-competitive endeavours are carried out in a clandestine manner, involving secret meetings and minimum documentation. Moreover, any documentation/explicit evidence is usually only fragmentary and sparse and therefore in such cases, it becomes necessary to reconstruct certain details by deduction.<sup>89</sup> In light of this, the existence of an agreement must be construed from “*a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement*”.<sup>90</sup> Existence of an agreement is the crux of the Chapter “Prohibition of agreements” and a

contravention of section 3 in the absence of an agreement cannot be visualized.<sup>91</sup>

## CONCLUSION

*“Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.”*

- Joseph E. Stiglitz

A workably competitive market, where the market forces push the firms into indulging in technological innovation, allocation of resources, organization of production, and distribution of income, is in consonance with modern understanding.<sup>92</sup> However, the preliminary conceptual analysis conducted by the author leads to the inference that, although there is a panoply of contradictory opinions, the *contestable competition theory* appears more pragmatic in view of the contemporary phenomena where there exist a lot of industries involving limited number of participants and where the traditional theories requiring large number of buyers and sellers fail. After mapping through the goals that are quintessential to the Indian competition policy, the author’s multifarious analysis of the scope of the Indian competition policy revealed the following results:

- ❖ In the context of the “effects doctrine”, the subject matter jurisdiction of the CCI in extra-territorial matters is not prone to

<sup>87</sup> Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab, Suo Moto Case No. 03/2012 (CCI).

<sup>88</sup> In Re: Aluminium Phosphide Tablets Manufacturers, Suo Moto Case No. 02/2011 (CCI).

<sup>89</sup> In Re: Express Industry Council of India v. Jet Airways (India) Ltd. and Ors, Case No. 30/2013 (CCI).

<sup>90</sup> *Ibid.*

<sup>91</sup> Shri V. Ramachandra Reddy and Ors. v. M/s HDFC Bank Ltd. and Anr, Case Nos. 7/28, 25/28, 8/28, 9/28 & 10/28 (CCI) (Dissenting Order of R. Prasad).

<sup>92</sup> *Supra* note 9.



any challenges, but the enforcement jurisdiction poses a dilemma that can be resolved only by virtue of bilateral/multilateral agreements between the CCI and the foreign competition regulators under Section 18 of the Act.

- ❖ The antitrust concerns of various sectors must be governed along the same thread, marking a convergence of Indian competition policy and sectoral regulations. Such a model (based on a flexible exclusivity model and the necessary and sufficient test) would go a long way in forging better and complimentary inter-sectoral relationships. In a case involving the electricity sector, the CCI captured the essence of the model proposed by the author in the following words:

*“...sectoral regulators focus on the dynamics of specific sectors, whereas the CCI has a holistic approach and focuses on functioning of the markets through increasing efficiency through competition. In fact their roles are complementary to each other and share the objective of obtaining maximum benefit for the consumers.”<sup>93</sup>*

- ❖ Lastly, if one attempts a conjunctive reading of the word “enterprise” under Section 2(h) and the definitions of “person” and “service”, the panoramic scope of the Indian competition policy becomes lucid. It becomes evident that the design of the Legislature was to widen the definition of enterprise and thereby widen the scope of the Act.<sup>94</sup>

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<sup>93</sup> Shri Neeraj Malhotra v. North Delhi Power Limited and Ors, Case No. 6/2009 (CCI).

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<sup>94</sup> India Trade Promotion Organisation v. CCI and Ors, Appeal No. 36/2014 (COMPAT).



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