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REGULATION OF HORIZONTAL AGREEMENTS - A COMPARATIVE STUDY BETWEEN INDIAN AND EU

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RESEARCH ARTICLE

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ABSTRACT

Competition law, a branch of the new era, has often looked at with a lot of speculation and confusion. With the 2002 Competition Act, much of the ambiguity has been cleared up. The entire subject is often classified into three, viz. agreements, abuse of dominance and combinations. The present submission analyses one particular aspect, i.e. horizontal agreements and submits a comparative analysis based on the position in EU. An attempt has been made to analyse the procedure involved in ascertaining the existence of horizontal agreements and how they are dealt with in Iida and the EU. The functionaries involved and their responsibilities have also been highlighted. Ultimately the object is to find a common thread and to bring out the differences in these two jurisdictions. It is seen that though there are differences on a prima facie view, an in depth analysis clarifies that they are similar in nature subject to differences inherent in the territorial jurisdictions.

Keywords: Horizontal agreements, *per se* illegality, European Union, Raghavan Committee Report, Treaty of Functioning of European Union, appreciably adverse effect on competition.

1. INTRODUCTION

Competition Law is designed to be a comprehensive charter of economic liberty which aims at preserving free and unfettered competition as the rule of trade, and that unrestrained interaction of competitive forces will yield the best allocation of economic resources of the country, the lowest prices, the highest quality and the greatest progress[1]. The competition law of every land tries to imbibe this very important ideal of a free society, which relates to production, supply and distribution of goods or provisions of services.

Based on the above principle, the legislature of India has enacted S.3 of the Competition Act, which states:

> 'No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services, which causes or is likely to cause an appreciable adverse effect on competition within India'

At the first instance, agreements of this nature are primarily classified as either horizontal (agreements between parties at the same level of the production chain) or vertical (agreements between parties at different levels of the production chain). The provision prohibits this kind of agreements for the simple reason that they are likely to cause an "*appreciable adverse effect on competition*" (AAEC). Of these, horizontal agreements being more baneful, are treated are illegal *per se* without any further treatment. Vertical agreements, on the other hand, go through an elaborate analysis to determine the nature of their illegality. As a result they are analysed on the basis of the 'rule of reason'.

[1]Northern Pacific Rly Co & Northwestern Improvement Co v. United States of America; 356 US 1(1958)

It is to be emphasised that most of these trends have originated from the case laws in the United States and as a result, it is relevant to occasionally observe these decisions as well in the course of this submission. The courts have in the early days recognised the pros and cons of such kinds of agreements and their possible impacts on not just the society but also the market place.

Subsequently, their importance has been recognised by the world community and has been adopted by several countries. i.e., these agreements, despite geographical boundaries, always find themselves on the wrong side of law. Thus it becomes necessary to analyse the way they are dealt with and the mode and method of regulating them.

- **Objective**

The present written submission purports to analyse the contours of regulation of **horizontal agreements** and the reason for their illegality. A comparative study has been made of the situation in EU and India and the ways in which the laws have helped keep such anti-competitive practices at bay.

2. Material and Methods

Research Methodology is a term used to describe how one has gone about conducting a certain analytical study. The analysis will be done with the help of Secondary data (from internet site and journals). The prime sources of secondary data are online databases like SCC Online and the official website of the Competition Commission, India. My research has also covered the Raghavan Committee Report and textbooks by Richard Whish and Abhir Roy, who are both established authors in their respective jurisdictions, among others.

In the end, a comparative table has also been produced to portray the variations seen n the two jurisdictions.

3. Result & Discussions

The result is staggering in the sense that it reveals that the Indian law, though still at its nascent stage, has succeeded in imbibing many of the complicated principles of Competition Law. The law, on a detailed study reveals that it is similar in nature to that in EU. The provisions though different led to the unequivocal conclusion that they have the same objective and the means sought are also similar.

- **What are Horizontal Agreements?**

Horizontal agreements generally defined fall within the class of prohibited or restricted agreements. As the name suggests, it is an agreement between organisations, enterprises, individuals or associations of them, at the same level in the production chain. It is a common phenomenon for enterprises at the same level to enter into ties with each other in order to gain a competitive advantage, but this sometimes leads to complications and detrimental effects on the market place and as a result might act as a hindrance to the trade, supply, production and other related activities taking place in the market. It is thus also defines as "a restraint of trade imposed by agreement between competitors at the same level of distribution"[2].

- **Indian interpretation**

A more comprehensive idea of the application of horizontal agreements can be made from the discussions of clause 3 of section 3 of the 2002 Act.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

[2] Black's Law Dictionary, 9th Edn. at p.805

*Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of **joint ventures** if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.*

The Act thus enlists specific kinds of agreements, like those that limit or control production, supply, distribution etc., collusive bidding or bid rigging, cartels and other kinds of agreements that affect the market place either directly or indirectly. Though an exhaustive analysis on these agreements is beyond the scope of this discussion, it is important to note that these are the kind of agreements which, if left unrestrained can lead to absolute tyranny and anarchy in the market place.

It is however pertinent to note that, these agreements can lead to substantial economic benefits as well, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.

From the above explanation, one would be led to the conclusion that not all such agreements can have possible detrimental effects on the market place. This is also true. The statutes and regulations, both Indian and foreign, have tried to exempt instances of agreements, which though horizontal in nature do not fall within the prohibited category of agreements. In addition, positive collaborations in the nature of joint ventures have been expressly exempted by the statute as seen in the above statutory provision. Thus, it is important to analyse and understand the true limits of this class of agreements and their impact on the society.

An even better picture of these agreements was drawn by the **Raghavan Committee Report** which contributed significantly to changing the Monopolies and Restrictive Trade Practices Act, 1969 and in the ultimate adoption of the Competition Act, 2002.

- **Report of the High Level Committee on Competition Policy and Law, 2000**

According to the High Level Committee Report, "*horizontal agreements are agreements between two or more enterprises that are at the same stage of the production chain and, in the same market. The most obvious example would be that of agreements between enterprises dealing in the same products*"[3]. The report further clarifies that being at the same stage of the production chain implies, that the parties to the agreement are both (or all) producers, or retailers or wholesalers.

By drawing a parallelism with the position in the US and noting some of the material observations, the report states that, in certain circumstances, firms that are collaborating on some '**socially valuable activity**' may need to agree to do away with competition so as to establish a cooperative relationship. It further makes a note of the fact that the European Community law goes beyond the concept of 'socially valuable activity' and allows restrictive contracts and agreements if it promotes 'progressiveness and consumers welfare'.

The Japanese law on the other hand gives a longer leash to these kinds of agreements. The term used there is action in '**public interest**'; but giving such a free reign for interpretation may sometimes prove counter-productive.

Ultimately, agreements should be considered illegal only if they result in unreasonable restrictions on competition. Under the U.K. law, an agreement infringes the law only if it has as its **object** or **effect** an appreciable prevention, restriction or distortion of competition. This is obviously to be determined on a case-by-case basis.

The report, while recognising that, to form an exhaustive list of such agreements may be a herculean task, identifies certain kinds of agreements which are to be treated as illegal at the very first instance and those that require further treatment. The Committee also acknowledges the presumption that such horizontal agreements (and membership of cartels) lead to unreasonable restrictions of competition and may, therefore, be presumed to have an appreciable adverse effect on competition and are as a result *per se* illegal. Despite arguments to the contrary, the Committee ultimately decided that as a consequence of the harm that can be inflicted on the community by these agreements, they should be held to be *prima facie* illegal.

[3] Ibid at para 4.3.4

- **Extend of illegality: Rule of '*per se*' illegality**

As already noted, the **Raghavan Committee Report** suggested that because of the innate nature of horizontal agreements, they are to be treated as *per se* illegal. The '*per se*' rule and its rationale can be best explained in the context of the US cases in which its nuances were developed.

In ***Northern Pacific Railway Co* v. *United States***[4], the court observed that "*there are certain agreements or practices which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and, therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of "per se" unreasonableness not only makes the type of restraints that are proscribed by the Sherman Act, 1890 more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable-an inquiry so often wholly fruitless when undertaken.*"

The above observation of the US Supreme Court was also followed in the case of ***United States* v. *General Motor Corp***[5]. In simpler words the "rule of reason" calls for an elaborate inquiry into the "reasonableness" of an alleged anti-competitive agreement whereas the "per se" rule condemns an agreement as anticompetitive on the existence of certain parameters without the need for further inquiry.

The inception of the rule of '*per se'*, can be traced to the aspects of the approach embraced in Judge Taft's 1898 opinion in ***Addyston Pipe***[6]. In the decision, Justice Taft attempted to create two distinct classes of restraint of trade. In the first, lay restraints that had no purpose, save restraining trade. These were condemned absolutely at common law, and he reasoned, should be similarly condemned under the Act.

In this way, ***Addyston Pipe*** introduced the concept of "absolutely" prohibited categories of conduct. This rule, in contrast to the 'rule of reason' developed along similar lines in ***United States* v. *Trans-Missouri Freight Association***[7], eliminates the need for a pains-taking analysis into the cause and effect of the agreement in question, as already discussed.

The United States Supreme Court has in the past, determined activities such as price fixing, retail price maintenance, geographic market division, group boycotts, and tying arrangements to be illegal "*per se*" regardless of the reasonableness of such actions.

In ***Jefferson Parish Hospital District. No.* v. *Hyde***[8], the court observed that the rationale for "*per se*" rule, in part, is to avoid a burdensome inquiry into the actual market conditions in situations where the likelihood of anti-competitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anti-competitive conduct. The "*per se*" rule, as opposed to the "rule of reason", has been applied by the courts in respect of particularly harmful agreements such as agreements relating to price fixing, allocation of territories, bid rigging, group boycotts, concerted refusal to deal, and resale price maintenance.

Thus over the course of several years, the US courts have identified specific sets of agreements which, because of the extent of damage they purport to create, are illegal *prima facie*. A better look at the above discussed class of agreements unequivocally points to the items enlisted in Clause 3 of Section 3 of the Competition Act, 2002.

As a natural corollary, there is a presumption in the Act as well, that such agreements which directly or indirectly determine purchase or sales prices; limit or control production, supply, markets, technical development, investment or the provision of services; share the market or source of production or provision of services by way of allocation of the geographical area of the market, type of goods or services, or number of customers in the market or any other similar

[4] 356 U.S.1(1958)
[5] 384 U.S. 127 (1966)
[6] *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir.1898)
[7] 166 U.S.290, 328 (1897)
[8] 466 US 2 (1984)

way; and directly or indirectly result in bid rigging or collusive bidding, cause appreciable adverse effects on competition in India.

In other words, they are per se illegal and the burden of proof will be on the defendant to prove that the agreement in question is not causing an appreciable adverse effect on competition.

The rising concern about these kinds of arrangements and the lack of sufficient regulation to control and monitor them was one of the core reasons for the adoption of various bodies of law relating to their control mechanism.

- **What is a regulation?**

Regulation generally means to control. It involves monitoring the activities in order to ensure that they do not deviate for the set patterns or accepted guidelines. The same applies in the legal parlance as well. It is the act or process of controlling by rule or restriction[9].

The answer to the above question thus involves steps or strategies adopted by the relevant authority to streamline the legal mechanism to prevent or punish violators of the set standards. The following steps will help better understand the concept:

1. **Setting the norms**, as a basic standard to be followed in the land;
2. **Mechanism to check** or analyse the conditions periodically or as and when they arise;
3. **Corrective mechanism** to prevent future instances or to punish the violators

Thus, to regulate horizontal agreements, it becomes necessary to follow the above steps. The following part shall contain an application of these steps in the Indian scenario and in European Union.

- **Indian Scenario**

The jurisprudence on anti-competitive agreements in India is still at the nascent stage as the Competition Act (hereinafter also referred to as 'the Act') and the Competition Commission of India (hereinafter also referred to as 'CCI' or "Commission") and the Competition Appellate Tribunal (Hereinafter referred to as 'CAT') are all of recent origin.

Let us now analyse the regulatory mechanism in India:

- **Setting the standards**

The Act fails to make any direct mention of 'horizontal agreements' though the concept in all its intricacies has been captured and discussed at length. The relevant section, i.e. clause 3 of section 3 as already discussed above, both states and clarifies the position of horizontal agreements.

The definition covers a wide range of activities which are prohibited and further clarifies that the Act does not provide that all agreements between enterprises and person are prohibited. It also recognises and condones positive synergies that emanate from agreements between enterprises.

It is pertinent to note however that the provision explicitly states that it is only if the agreement creates '*an appreciable adverse effect on competition within India*' it comes within the prohibitive ambit of clause 2 Section 3 of the Act.

- **Appreciably Adverse Effect on Competition *(*AAEC)**

The Act does not define what '*an appreciable adverse effect on competition*' is, it however enlists many conditions which if satisfies would constitute an appreciable adverse effect on competition. Accordingly, clause 3 of section 19 states,

"*The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—*

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

[9] Black's Law Dictionary at p.1398

The provision is thus indicative of factors that are to be taken into consideration for determining whether an agreement or a practice has an appreciable adverse effect on competition provision of services, on prices or other important aspects of their competitive interaction. Cartels, for instance, are a form of horizontal agreement between producers of goods or providers of services for price-fixing or sharing of market. The Act treats horizontal agreements much more harshly than vertical agreements. A conjoint reading of Sections 3(3) and 19(3) provides the set standards or the substantive law against the propagation of horizontal agreements.

- **Checking for deviation**

Once the law has been set by the legislature, the duty then vests on the authorities assigned under the Act, to make sure these norms are followed as instructed, or to take immediate action where necessary if these instructions or guidelines have been violated. The purpose here is to ensure that the guidelines under clause 3 of section 19 are rigorously followed and any appreciable adverse detected as the earliest to ensure rectification. India it primarily involves four steps:

a. Filing of information

In India, the regulatory process starts with clause 1 of S.19[10] of the CA, 2002. It is a discretionary provision which grants the Commission the authority to inquire into any alleged contravention of the provision of section 3 or 4 of the Act. It directs that the Commission may take cognizance of the offense in any of the three following ways:

i. Receipt of information from an informant[11]; or
ii. Reference by State or Central Government or a statutory authority; or
iii. *Suo moto.*

Thus any private individual, statutory authority or the Government can appraise the CCI of the existence of an anti-competitive practice. Once the information has been received it is left to the CCI to determine its importance and whether it is in fact anti-competitive, as alleged.

b. Forming prima facie opinion

On the receipt of the information, the CCI is to first form an opinion as to the nature of the alleged agreement based on the prima facie material on record. Although the term prima facie has not been defined, it is a settled position[12] that a prima facie view implies an examination of materials on record and not a detailed analysis into the case. The CCI can make one the following two decisions relying on these records:

- There exists **no *prima facie*** case for investigation
- There ***exists a prima facie case*** for investigation

b.1 There exists no *prima facie* case for investigation:-

If however the CCI is of the opinion that, no case against the alleged offenders exists, on the basis of the *prima facie* information, it is at the discretion to forthwith close the case and pass any other orders as it deems fit[13]. The Commission is also obligated to send a copy of the order to the informant, Government or statutory authority as the case maybe.[14].

[10] (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
(b) a reference made to it by the Central Government or a State Government or a statutory authority.

[11] It is critical to note that the term "complainant" has been replaced by the term "informant" by the Amendment Act of 2007, the rationale for such a change is to alter the nature of the proceeding from an adversarial proceedings and to do away with the need of the "complainant" to appear before the concerned authority (CCI in this context) at the time of the proceedings.

[12] *Shin-Etsu Chemical Co. Ltd*. v. *Aksh Optifibre Limited &Anr*. (2005) 7 SCC 234 and *Ramdev Food Products (P) Ltd*. v. *Arvindbhai Rambhai Patel & Ors*. (2006) 8 SCC 726.

[13] *Mohit Manglani* v. *M/s Flipkart India Pvt. Ltd. & Ors,* Case No. 80 of 2014 decided on 23.04.2015 - it was held that an exclusive arrangement between manufacturers and e-portals is not against Section 3. It is rather to help the consumer make an informed choice.

In the case of *M/s. K Sera Sera Digital Cinema Pvt. Ltd.* v. *Digital Cinema Initiatives. LLC, The Walt Disney Company India, M/s Fox Star Studios, M/s NBC Universal Media Distribution Services Pvt. Ltd. etc.*[15] ("*K Sera Sera Case*") it was held that if no *prima facie* case could be established to show an adverse effect on competition, then, the CCI can close such matters under Section 26 (2). Appeals are available at this stage as well.[16] In re *Accreditation Commission for Conformity Assessment Bodies Pvt. Ltd*[17] *is an illustration of this position.*

The case was one under sections 3 and 4 of the Competition Act against the National Accreditation Board for Certification Bodies (NABCB), one of the constituent Boards of the Quality Council of India (QCI); National Accreditation Board for Testing and Calibration Laboratories (NABL); and 12 other respondents which are various ministries/departments of Govt. of India, including the parent Departments of NABCB and NABL – Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry and Department of Science & Technology (DST), Ministry of Science & Technology respectively. The contention of the ACCAB was that the NABCB and the NABL were manipulating their dominant position thereby preventing the complainant form entering the market.

The CCI after examining the information / documents provided as well as on hearing the complainant passed an Order dated 07 November 2012 under section 26(2) of the Competition Act, 2002 dismissing the complaint stating that "Commission finds that no *prima facie* case was made out against the opposite party". This order was passed by majority members of the CCI. However, there was also a minority Order dated 07 November 2012 under section 26(1) of The Competition Act, 2002 by one of the members of CCI on the complaint filed by complainant. An appeal was filed at this stage to the COMPAT and was taken up by the appellate body, though subsequently dismissed because COMPAT also failed to see sufficient grounds for a case. Thus appeals are available at the stage of prima facie rejection and subsequent appeals after the case has been heard and merits are also available.

b.2. There exists a *prima facie* case for investigation :-

In case the CCI is of the opinion that there is a valid case on the basis of the prima facie information, it will direct the Director General, who is the investigative arm of the CCI, to commence investigation[18]. The proviso further adds that the CCI may club or join any information received prior to the information at hand, if the subject matter of both the prior and latter is essentially and substantially the same.

The DG receives his directions from the CCI as to the action that has to be taken in order to commence investigative proceedings. The *prima facie* order which the CCI issues to the DG outlines the terms of the investigation. As already noted, the DG is only a wing of the CCI. As a result, his powers and functions are subject to the directions issued by the CCI. He does not have the power to increase the scope of the investigation[19]. Further, based on the scheme of the act and attendant regulations, any step taken by the DG has to be in consonance with direction and stipulation of the order of the CCI.

As a quasi-judicial body, the Commission is bound by certain constitutional principles and is bound to disclose reasons for its rulings[20] and consequently, the opinion expressed by the Commission under Section 26 (1) of the Act, should not

[14] Clause 2 of section 26

[15] Case No. 30 of 2015, decided on 22.04.2015

[16] Nishith Desai Associates, Competition Law in India - A Report on Jurisprudential Trends, 2015 at p.23; see http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf

[17] *Case* No. 51/2012, dated 07/11/2012

[18] Clause 1 of Section 26. See *M/s. Magnus Graphics* v. *M/s. Nilpeter India Pvt. Ltd*.; Case No. 65 of 2013, order dated December 12, 2013 - where, based on a preliminary review of the provisions of the agreement and a preliminary examination of the effect of such clauses in terms of Section 3 of the Act, the Commission concluded a prima facie case and directed further investigation. Similarly, *in M/s. Financial Software and System Private Limited* v. *M/s. ACI Worldwide Solutions Private Limited &Ors;* Case No. 52 of 2013, Order dated September 4, 2013 - based on a preliminary review of the clauses of the relevant agreement and its impact in terms of Section 3 of the Act, the Commission directed the DG to investigate further.

[19] Abhir Roy and Jayant Kumar, "*Competition Law in India*", Eastern Law House, 2nd Edn. p. 38

[20] *Seimens Engineering & Manufacturing Co. of India Limited* v. *Union of India &Anr*. (1976) 2 SCC 981

take into account merits of the contentions, should be based on a preliminary review of material on record and finally, the order passed, should have reasons.

c. Investigation by the Director General

As noted above, if the CCI finds any contravention, it directs the DG to conduct an investigation. The DG on receipt of the directions from the CCI, is required to conduct an in depth analysis of the issue at hand and submit his report within the prescribed time[21].

The first task in the investigative procedure of the DG is to classify the agreement at hand as either horizontal or vertical, the reason being that horizontal agreement are illegal *per se*[22] whereas the illegality of vertical agreements is determined on the basis of the 'rule of reasonability'. For the sake of the present submission, the discussion shall be restricted to investigation and inquiry of horizontal agreements.

If the agreement is thus found to be horizontal in nature[23], the first course of action is to check if it falls within any of the exempted categories.[24]

They generally fall under agreements related to intellectual property rights[25], exports[26] or those authorised by the Government[27].

If the agreement in consideration does not fall within the list of agreements clearly exempted by the statute, then by the rule of *per se*, they will become void.[28]The DG thus completes his analysis and submits his report to the Commission. In the course of the investigation, the informant, the opposite parties and third parties may be invited to make written submissions or oral submission, including depositions and interviews[29].

The question regarding the duration of time allowed to the Commission/DG to conduct investigation perturbed many at a point of time. It is a fact as obvious as daylight that the CCI has been vested with such wide ranging powers with the

[21] Clause 3 of section 26
[22] Infra 'Extend of illegality'
[23] As per section 3(3) of the Act
[24] Exceptions :
S.3(5) Nothing contained in this section shall restrict—
(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—
(a)the Copyright Act, 1957 (14 of 1957);
(b)the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.
S.54 The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—
(a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;
(b)any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
(c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government:
Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.
[25] S. 3(5)(i)
[26] S. 3(5)(ii)
[27] S. 54
[28] Clause 2 of Section 3 of the Competition Act, 2002
[29]Abhir Roy and Jayant Kumar, p. 38

sole intention of ensuring speedy justice. But the Act itself specifies no time period within which the proceeding are to be initiated or concluded. To clarify this ambiguity and solve this predicament, the Supreme Court in *CCI* v. *Steel Authority of India*[30] examined the functioning of the Commission and held that:

A. *Regulation 16*[31] *prescribes a limitation of 15 days for the Commission to hold its ordinary meeting to consider whether prima facie case exists or not and in cases of alleged anti-competitive agreements…… the opinion on the existence of prima facie case has to be formed within 60 days. Though the time period for such acts if the Commission has been specified, still it is expected of the Commission to hold its meetings and record its opinion about the existence or otherwise of a prima facie case within a period much shorter than the stated period.*
B. *All proceedings, including investigation and inquiry should be completed by the Commission/DG most expeditiously and while ensuring that the time taken for completion of such proceeding does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.*
C. *Wherever during the course of enquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible as and in any case not later than 60 days.*
D. *The DG in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in the absence of the report by the DG in terms of S.26 (2) of the Act. The reports by the DG should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of S.26(1) of the Act.*
E. *The Commission as well as the DG shall maintain "complete confidentiality" as envisaged under S.57 of the Act and Regulation 35 of the Competition Commission of India (General) Regulation, 2009. Wherever the "confidentiality" is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force.*

Thus though the Act doesn't specifically state a limitation, it is expected of the Commission to complete the proceedings expeditiously.

d. Proceedings before the CCI

This stage, in contrast to the initial stage, involves a more detailed analysis of the merits of the case. Once the report has been prepared and the DG has found that there has in fact been no contravention of the provisions of the Act, the CCI may then invite objections and comments, if any.[32]

After consideration of the objections, if the CCI is in agreement with the findings of the DG it may pass orders as necessary and communicate them to the parties concerned[33]. If however, it is of the opinion that further investigation is necessary, then the CCI may direct further investigation by the DG or may conduct an inquiry on its own[34].

If ultimately the opposite party is found guilty of the offences charged, penalty or such other punishments as may seem necessary are imposed upon him, else he is acquitted.

d.1 Manner of Inquiry Section under S.36

The Commission and DG are vested with the same powers as a Civil Court under the Code of Civil Procedure, 1908 in respect of 5 matters:

- Summoning and enforcing the attendance of any person and examining him on oath
- Requiring the discovery and production of documents
- Receiving evidence on affidavit
- Issuing commissions for the examination of witnesses or documents
- Requisitioning, any public record or document or copy from any public office[35]

[30] (2010) 10 SCC 744
[31] 'Regulations' in this context refers to the CCI (General) Regulations, 2009
[32] Clause 5 of section 26 of the Competition Act, 2002
[33] Clause 6 of section 26 of the Competition Act, 2002
[34] Clause 7 of section 26 of the Competition Act, 2002
[35] Sec. 123 & 124 of Evidence Act

Experts' specific for the case inquiry in fields such as economics, commerce, accountancy, international trade or any discipline may also be appointed by the CCI[36]. The Act also allows for authorisation by the Commission:

(a) to direct any person to produce before the DG or the Secretary or an officer authorised - any books or document of trade in his possession or custody (e.g. Accountant / Auditor)

(b) to direct any person to produce before the DG or the Secretary or an officer authorised any books or document in his possession in respect of trade carried by him (e.g. Owner- Partner)

d.2. Validity of the report of the DG

While this Section explicitly gives CCI the power to direct the DG to investigate matters, to close the matter if the DG finds no contravention and to issue orders for further investigation if the DG finds a contravention in his report, it does not explicitly give the CCI the power to disagree with the DG and close the matter even when the DG has found a contravention.

Though there have been various cases till now where the CCI has disagreed with the DG and closed the matter therewith, there have also been dissenting opinions. Member R. Prasad[37]of the CCI has in most of these cases stated the inability of the CCI to pass such orders as there is no explicit section or provision giving the CCI such powers. This lacuna in the Act has given rise to ambiguities relating to the powers of the CCI and nature of the DG's report.

The question thus remains. Does the report remain binding on the CCI? Or is it merely recommendatory in nature?

COMPAT's latest order in the case of *M/S Gulf Oil Corp. Ltd.* v. *CCI& others*[38]has brought some clarity to this vagueness. While determining the question of whether it is mandatory for CCI to pass an order under Section 26(7) for further inquiry after the DG has found a contravention in his report, it stated-

"*The report of the DG is only recommendatory in nature and it is not binding on CCI in any manner. It is only if the CCI formulates an opinion on the basis of the report, that the DG has either not done full investigation or that the further investigation is necessary then it proceeds under Section 26(7) and not otherwise. Therefore, it is not in every case where the CCI disagrees with the report of the DG, it has to proceed under Sec 26(7).*[39]"

Though this Judgment has brought certainty and clarity in determining the nature of the DG's report, yet it does not provide an answer to the most fundamental questions of CCI's power to close the matter while disagreeing with the DG's report which has found contravention. This ambiguity can be resolved by either a legislative amendment in the Act or by a purposive interpretation of Section 26 by the Judiciary.

- **Corrective action**

Upon completing the inquiry in accordance with law, as mentioned above, the Commission is required to pass such order(s) as it may deem appropriate in the facts and circumstances of each case in terms of section 27 of the Act which deals with various order(s) including an order to a person/enterprise or association to discontinue or not to re-enter in such agreements, imposing financial penalties, directing the modification of the agreement(s) or complying with its direction including payment of cost, if any.

Or in other words, the Competition Commission can pass the following order(s) amongst others under S.27:

- **Cease and desist order**: It includes direction(s) to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position as the case may be[40];
- **Imposition of penalties**: Impose financial penalty, as the commission may deem fit, upon each of such person or enterprises, which are parties to such agreements (or abuse). Section 27(b) provides that penalty shall not be exceeding 10% of the average of turnover for three last preceding financial years. However, in case of a 'Cartel',

[36]Clause 3 of section 36 of the Competition Act, 2002

[37]*Refer M/s. Pankaj Gas Cylinders* v. *Indian Oil Corporation Ltd*.; in order dated 6th June 2011 of Case No. 10 of 2010; *Prints India* v. *Springer India Private Limited &Ors*, in order dated 3rd July 2012 of Case no. 16 of 2010; *M/s Royal Energy Ltd*. v. *M/s India Oil Corporation Ltd. & Ors.* in order dated 9th May 2012 in Case No. 1/28 (C-97/2009/DGIR)

[38]Appeal No. 82 of 2012

[39] Ibid Paragraph 27

[40]Id. clause (a), see *M/s Santuka Associates Pvt. Ltd.* v. *All India Organisation of Chemists and Druggists*, Case No. 20/2011

penalty is stringent. It is imposed upon each producer, seller, distributor, trader or service provider included in that 'cartel' up to three times of its profits or of 10% of its turnover, whichever is higher, for each year of the continuance of the agreement[41].

- **Modification of agreement**: The commission is also empowered to direct that agreements shall stand modified to the extent and in the manner as may be specified in order to ensure that the enterprise brings the contravention to the end in order to achieve the objective of the Act[42].
- **Issue of directions**: The commission has the power to direct the concerned enterprises to abide by such orders as the commission may pass and comply with the directions, including payment of costs, if any. The commission may pass such order(s) which are not mentioned above in order to bring end to the contravention[43].
- **Residuary powers of commission**: The commission has the power to pass such order or issue directions as it may deem fit[44].

Thus, the Commission has powers to pass two types of order(s) i.e.

- imposing financial penalties and
- direct the enterprise / association to remove / modify / amend the clauses of an agreement which are infringing the provisions of Competition Act.

However, an area of the Act where application is not certain and CCI adjudication lacks clarity is imposition of penalty. CCI orders imposing penalty do not have a discernible rationale which provides a legal or economic basis for imposition of a particular percentage of penalty. This issue was addressed by COMPAT in M*/s. Excel Crop Care Limited* v. *Competition Commission of India & Ors.*[45] It is important to note that COMPAT accepted the ruling on merits of CCI in this case and modified the CCI order on imposition of penalty. In this case, COMPAT held that it was important to articulate the reasons as to why a particular percentage of penalties were being imposed and secondly, what would be the relevant turnover for such imposition. In this case, COMPAT held:

While arriving at a conclusion about the relevant turn over it would be open to the authorities like CCI to rely on the general principles expressed in those guidelines regarding the method of calculation etc. However, it should be an endeavour of the authorities to apply those principles not mechanically or blindly but after carefully considering the factual aspects. Such factual aspects could include the financial health of the company, the necessity of the product, the likelihood of the company being closed down on account of unreasonable harsh penalty etc.

At the same time the authorities would be well advised in considering the general reputation and the other mitigating factors like the first time breaches as also the attitude of the company. This list is certainly not exhaustive and the authority can and should consider all the relevant factors while considering the relevant turn over as also considering the extent of penalty on that basis. It should also be reiterated at this stage that there should be proportionality in the award of penalty, which principle has been enshrined in several judgments of the Apex Court.[46]

Thus being a quasi-statutory body, it is vested with the duty if following principles of natural justice when delivering its orders or decisions.[47]

a. Competition (Amendment) Act, 2007

It is interesting to note that initially the CCI was vested with the authority of imposing compensation as well upon the offender. In 2007, the Competition (Amendment) Act, 2007 amended section 27, relating to orders by the Commission after inquiry into agreement or finding of abuse of dominant position, and the power to award compensation was

[41] Clause (b)
[42] Clause (d)
[43] Clause (e)
[44] Clause (g)
[45] Appeal 79 of 2012, Order dated October 29, 2013
[46] Id. Para 63
[47] SAIL Case (2010) 10 SCC 744

henceforth conferred to the Appellate Tribunal (CAT) by the new section 53N and as a result of this, the sub clause (c) and (f) of section 7 of the Competition Act were omitted. Thus S.27 is generally remedial in nature.

b. Competition (Amendment) bill, 2012

The proposed bill was expected to grant the DG with greater powers in tune with the powers granted to authorities under other statutes in the country like the Income Tax Act or SEBI. The Bill for the first time had provided for the satisfaction of DG, before he seeks authorization from the Chairperson. If in a particular case, the DG has '*reason to believe'* that a party has not provided information within its possession or that it would be destroyed, subject to certain conditions precedent, an authorization may be sought from the Chairman for conducting investigation.

As per the new Bill, the DG may enter the place where the information may be kept; search such a place; seize the documents and take copies of information in any media and even record on oath statements of persons having knowledge of the information. Additionally, it is proposed that the provisions of the Code of Criminal Procedure, 1973 shall apply with respect to such searches and seizures.

By replacing the requirement to seek prior sanction from the Magistrate and substituting it with a requirement to seek prior sanction from the Chairperson of CCI, the Bill makes it easier for DG to carry out *dawn raids*[48]. On 22 September, 2014, the Director General, Competition Commission of India ("CCI"), conducted its first-ever 'dawn-raid' at the premises of M/s JCB India Ltd., subsidiary of a UK based construction company ("JCB").

According to news reports, the raid was conducted due to JCB's alleged non co-operation in the process of investigation by the DG in an allegation of abuse of dominant position. This was however based on the 2002 Act. A quicker and more expeditious approach is sought to be achieved though the new amendment bill. S. 41 of the proposed bill merely relies on the DG's belief in the truth of the matter so as to initiate an investigation. The new provisions came under severe criticism and as a result the bill lapsed. The Indian government is yet to learn from the foreign experience.

- **European Union**

- **Setting the standard**

Horizontal cooperation agreements are agreements entered into by undertakings operating at the same stage of the value chain in order to achieve a variety of efficiencies. While these are generally pro-competitive, they may raise anti-competitive concerns.[49]In the European context, the treaty on the Functioning of the European Union and its associated regulations control the effect of horizontal agreements in the market place. Since the entry into force of Regulation 1/2003 in May 2004, the Commission could formally decide that the criteria of Article 101(3) were satisfied in relation to a particular agreement only by adopting a declaration of inapplicability under Article 10 of that Regulation[50]. Prior to the regulation, the Commission could grant an 'individual exemption' stating that the criteria of Article 101(3) were satisfied in the case of horizontal agreements.

- **Application of Articles 101 of the Treaty on the Functioning of the European Union (known as 'TFEU')**[51](Formerly Articles 81 of the EC Treaty)

This article is provided under chapter 1 (i.e. Rules on Competition) of Title VII of TFEU and enlists the acts which are prohibited as being anti-competitive.

a. Article 101 (Earlier Article 81 TEC[52])

1. The following shall be prohibited as incompatible with the internal market*:*

[48]A surprise visit at dawn, especially by police searching for criminals or illicit goods - http://www.oxforddictionaries.com/definition/english/dawn-raid

[49]Damien Geradin, Anne Layne-Farrar, Nicolas Petit, "EU Competition Law and Economics", Oxford University Press, 2012 at Ch.7 para 7.01

[50] However the Commission has never resorted to this measure. See Richard Whish and David Bailey, "*Competition Law*", 7th Edn., Oxford University Press, 2012 at p.261

[51]Treaty of Functioning of European Union, 2008 (as amended by the Treaty of Lisbon 2007)

[52] Treaty Establishing European Community, as originally signed on 25th March 1958

All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) Limit or control production, markets, technical development, or investment;

(c) Share markets or sources of supply;

(d)Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

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

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101(1) thus purports to lay down an illustrative list of agreements that are prohibited by law, though it is by no means an exhaustive list. Article 101(1) maybe declared inapplicable where the criteria set out in Article 101(3) are satisfied. In short, an agreement which is prohibited by Article 101(1) and which does not satisfy Article 101(3) is stated to be automatically void by virtue of Article 101(2).

It is important to bear in mind that the treaty does not go into the definitions of the words used in the text such as undertaking[53], association of undertakings[54]etc. and that task has been left to the EU Courts. At the same instance, it is only agreements and concerted practice between undertakings that are caught by the claws of Article 101.

In *toto*, the decisions points towards one unfaltering idea; that an infringement of Article 101 (and/or 102) occurs only if the distortion to competition law is brought about by an undertaking or any association of undertakings which has its objective an intention of attaining profit by means of agreements or other forms of concerted practice which create unfair competition conditions and are therefore prohibited by law.

b. Exemptions under EU law

Exemptions to Article 101 behaviour fall into three categories:

[53] See *AC-Treuhand* v. *Commission* [2008] ECR II-1501, [2008] 5 CMLR 962, para 144: 'the gradual clarification of the notions of "agreement" and "undertaking" by the Community judicature is of decisive importance in assessing whether their application in practice is definite and foreseeable.'

Undertaking

1.*Hofner and Elser* v. *Macrotron GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306, para 21: 'the concept off undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.'

2. *Pavlov* [2000] ECR I-1577, [2002] 4 CMLR 913, para 57: 'it has also been consistently held that any activity consisting in offering good s and services on a given market is an economic activity.'

[54]Association of undertakings

1. *AROW* v. *BNIC OJ* [1982] L 379/1, [1983] 2 CMLR 240: ' a trade association does not fall outside the Article 101(1) because it is given statutory functions or because the members are appointed by the Government

First, Article 101(3) creates an exemption where the practice is beneficial to consumers, e.g., by facilitating technological advances (efficiencies), but does not restrict all competition in the area. In practice very few official exemptions were given by the Commission and a new system for dealing with them is currently under review.

Secondly, the Commission has agreed to exempt *'Agreements of minor importance'* (except those fixing sale prices) from Article 101. This exemption applies to small companies, together holding no more than 10% of the relevant market in the case of horizontal agreements and 15% each in the case of vertical agreements (the *de minimis* condition).

Thirdly, the Commission has also introduced a collection of *block exemptions* for different types of contract and in particular in the case of vertical agreements[55]. These include a list of permitted contract terms, and a list of those banned in these exemptions (the so-called *hard-core restrictions*).

- ***GlaxoSmithKline Services Unlimited* v. *Commission*[56]**

The case before the Commission was concerning a policy double pricing entered into the appellants in this case. Lower prices were charged to the domestic purchasers and a higher price was fixed on export sales. The Commission came to the conclusion that this agreement between GSK and a number of Spanish wholesalers, which resulted in a higher charge to the other Member States had infringed 101(1) of the TFEU as a restriction by object. The reason was that the agreements had the effect of excluding or impeding parallel trade. Furthermore, GSK had failed to prove that they came within any of the exceptions in 101(3).

On appeal, the General Court reversed this decision, holding that the Commission had erred in coming to a conclusion that the agreement was restrictive by object and that it had failed to carry out a detailed enquiry under A. 101(3). It said that the objective of article 101 is to stop 'reducing the welfare of the final consumer of the products in question.' The Commission must not only find a reduction of parallel trade, but also say why this damages competition.

On further appeal to the ECJ, it concluded that the Commission was right in coming to the conclusion that the agreement was restrictive by its very object but the General Court's finding that the Commission had failed to conduct a full enquiry of the argument in relation to 101(3) was also confirmed. It opined that "it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 85 (of the EC Treaty) aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."

Article 101(3) grants an exemption for agreements between undertakings which contribute to improving the distribution of goods or to promote technical or economic progress that will be passed on to consumers, without imposing restrictions which are not necessary to attain these objectives, and without eliminating a substantial part of the competition in the relevant markets. GSK claimed that the agreements would secure advantages on the upstream market by encouraging innovation, and on the market itself, by guaranteeing an optimal distribution of medicines, which will ultimately benefit consumers.

Clear rules on horizontal agreements are thus important for doing business in Europe and industry welcomed our initiative to update the rules. They called for increased legal certainty, for more guidance on specific types of information exchange between competitors, on "paid-for" research, and on standardisation agreements amongst other things. The basic approach of the Block Exemption Regulations ("BERs") and Guidelines is to allow competitors to cooperate when this contributes to economic welfare, without the risk of distorting or eliminating competition.

The Commission's BER on Horizontal agreements focus primarily on the following six types of agreements, being type of agreements that potentially generate efficiency gains:

1. Research and development (R&D)
2. Production
3. Purchase
4. Commercialisation
5. Standardisation, and
6. Information exchange

[55]Commission Regulation no.330/2010 of 20 April 2010

[56](2009) C-513/06

These fall within the renewed block exemptions for horizontal agreements.[57] In the case of these block exemptions; care has to be taken to determine whether they actually or potentially fall within the exemptions. Since a direct pigeon-hole process is inapplicable, the Commission provides for allocation of agreements on the basis of '**centre of gravity**' approach[58], which basically tests if the agreements are violative or exempted at its core of operations.

- **Checking for deviation**

The analysis or monitoring function in EU is similar to the Indian style. The first step is to check if the alleged act is in consonance with Article 101(1) or if it falls within the accepted exceptions as under Article 101(3).

Step1 : Nature of the agreement

The guidelines draw a distinction between agreements restricting competition by 'object' or those that have a 'restrictive effect' on competition. They are terms that have to be read disjunctively[59]. The former are by their very nature restrictive and hence void, the latter on the other hand has to be assessed in terms of its content and its economic and legal context. Contrary to popular belief, Article 101(1) deals with both horizontal and vertical agreements. Our focus is primarily on the former, i.e. dealing with horizontal agreements.

Step 2 : Is it exempted under Article 101(3)?

Some horizontal agreements, since they do not produce any adverse effect on competition, have been expressly exempted by Article 101(3). The burden of proof is however on the undertaking raising this defence to prove that the agreements falls within the specified exception. The Commission, while recognising the benefits that can be generated by horizontal co-operation agreements, has to ensure that effective competition is maintained. Article 101 provides the legal framework for a balanced assessment taking into account both adverse effects on competition and pro-competitive effects.

If the agreement in question is in fact in contravention of the relevant provisions, a report of the same is prepared by the DG Competition and submitted to the Commission. The procedure that follows is similar to the Indian position. These reports and analyses by the Commission and copies are sent to the parties if there is any violation. Objections are invited and on the basis of these reports; further enquiry maybe conducted, if the Commission so sees it fit.

Ultimately, the decision will be rendered on the basis of all the relevant information. An Appeal is available to the General Court from the Commission and a further right of appeal to the ECJ also exists.

If ultimately the opposite party is found guilty of the offences charged, penalty or such other punishments as may seem necessary are imposed upon him, else he is acquitted.

- **Corrective action**

At the first instance, it is to be remembered that under A. 105 (1) of the TFEU, the Commission had absolute discretion to deal with complaints. It is entitled not only to decide on the grounds on which the issue is to be decided but also has the authority to reject it on the ground that there is insufficient interest of the EU in the matter[60].

Cases to investigate anti-competitive agreements are basically triggered by:

1. A complaint
2. The initiative of the competition authority (national authority or the European Commission), i.e. *suo moto*
3. An application under the leniency programme[61].

Radical changes to the way in which the EU Competition rules are implemented were introduced when Regulation 1/2003 came into force. When the European Commission launches an investigation, its powers include the right to request information, enter premises, seize record etc.

[57] Slaughter and May, EU Competition Rules On Horizontal Agreements, 2012; see https://www.slaughterandmay.com/media/64578/the-eu-competition-rules-on-horizontal-agreements.pdf

[58] Richard Whish at p. 589

[59] *Societe Technique Miniere* v. *Maschinenbau Ulm* [1966] ECR 235, p.249, [1966] CMLR 357, p.375; *GlaxoSmithKline Services Unlimited* v. *Commission* [2009] ECR I-9291, [2010 4 CMLR 50, para 55

[60] *CEAHR* v. *Commission*; T-427/08, ECR, EU:T:2010:517 at para27

[61] Wherein a participant in a cartel may avoid a fine or have it reduced if it provides information on the cartel.

The Commission has extensive powers to investigate suspected breaches of the competition rules under Regulation 1/2003. It can initiate on its own or respond to complaints. The Commission can require answers to questions, production of documents and other information, and it may conduct on-site inspections either with or without notice. Commission officials have the right to enter premises where documents may be found, including private home and cars.

The Treaty only explicitly provides for nullity of agreement that violate Article 101 of the TFEU. The nullity of Article 101(2) is absolute and can be relied on by anyone[62]. It is deemed to have existed *ab initio,* so the court does not render the contract or clause void but simply confirms that it was void from the start.

If on the basis of its initial investigation, the Commission decides to pursue an in-depth investigation, it sets out a **statement of objection** (SO) which it sends to the parties in question. Companies under the investigation may access the Commission's files and respond to the SO. They may also request a hearing[63]. If after this stage, the Commission is still convinced that there is an infringement, it may issue an **infringement decision**[64] which may include the imposition of fine on the parties[65].Where breaches have been established, the Commission may impose fines of up to 10% of the total worldwide turnover in the preceding business year. In fixing the amount of the fine the Commission is required to have regard to the gravity of the infringement and its duration. The European Commission does not have the power to fine individuals or send them to jail. Some Member States do however have such powers, e.g. the UK.[66]

In the alternative, the Commission may decide to adopt a **commitment decision**[67] where no fines are imposed. Here, the parties make an undertaking to address the Commission's competition concerns, normally for a given period, if they breach this commitment, they may be fined. The commitment is imposed in the light of the principle of proportionality.

The Competition Laws of EU prohibit an anti-competitive agreement in Article 101(1), including price fixing. According to Article 101(2) any such agreements are automatically void. Article 101(3) establishes exemptions, if the collusion is for distributional or technological innovation, gives consumers a "fair share" of the benefit and does not include unreasonable restraints that risk eliminating competition anywhere.

We have thus seen that two conclusions that are arrived at by the Commission in the case of anti-competitive agreements. **It has to be noted that the TFEU provides only that the agreement will be rendered *void ab initio***. In addition, the power of imposing penalty comes from the regulation.

- **Differences**

The differences between the two jurisdictions can this be highlighted as follows:

No.	Criteria	India	European Union
1.	Horizontal and vertical agreements	Dealt with under. Ss. 3(3) and 3(4) respectively.	Single provision deals both agreements, viz. A. 101(1)
2	Application	only to competitive practices within Indian	to competitive practices within the Union
3	Basis of Determination	AAEC	object and effect
4	Regulatory orders	Difference in the nature of orders. (section 27)	Orders issues are different in nature (Regulation 1/2003)
5	Dawn raids	not prevalent	Often used and are an

[62] *Estaciones de Servicio* v. *LV Toba e Hijos SL*, 2008 E.C.R. I-6681, para 74

[63] In such circumstances, an independent Hearing Officer is appointed who acts as an independent arbiter to come to a conclusion on the exercise of procedural rights between the parties and the DG Competition.

[64] Article 7 of Regulation 1/2003; http://www.collyerbristow.com/business/dispute-resolution/competition-law/infringements-of-competition-law-notable-decisions

[65] See Retail Food Packaging Cartel case, Parking Heater producer, Blocktrains cartel case etc.

[66] Field Fisher Waterhouse, EU Competition Law - Article 101 and Article 102, 2010 at p. 6; see http://www.fieldfisher.com/pdf/EU-competition-law-articles-101-102.pdf

[67] Article 9 of Regulation 1/2003

			important investigative tool
6	*De minimis* conditions	Not required	recognised and enforced for agreements
7	Nature of exceptions	Static	Dynamic
8	Exceptions	Statutorily provided	All are not provided on the TFEU e.g. BER

4. Conclusion

It is a common affair for the India system to always blame the legislature, executive or judiciary for any flaws in the country. The first step to improvement is in the realisation that improvement has to start from home. An analysis of the 2002 Competition Act will reveal that it is a beautifully drafted piece of legislation which is not only comprehensive but adequately explanatory in nature. A comparison of the various provision will reveal that, though we lack identical provisions when compared to US, UK or EU, the essence of those provisions have been captured by out statute.

As an example, EU has a *de minimis* notification, while India does not have one for agreements. This may be sighted by some as a defect of the Indian system. But the fact is, in India an agreement is anti-competitive only if it produces an AAEC, which directly implies that if the effect of the agreement is not significant it will not be taken cognizance of by the concerned authority. This is exactly what the *de minimis* notification does in EU.

To better understand, one must be willing to look at the law objectively. The Indian position of Competition Law is still young and in its growing stage. Despite that fact, it has still managed to dissect and provide clarity into the many vagaries of completion in the market place. It can only be expected to grow in the future.

5. Acknowledgement

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LIST OF ABBREVIATIONS

1.	AAEC	:	Appreciable Adverse Effect on Competition
2.	AIR	:	All India Reporter
3.	CAT	:	Competition Appellate Tribunal
4.	CCI	:	Competition Commission of India
5.	CMLR	:	Common Market Law Review
6.	Co.	:	Company
7.	EC	:	European Commission
8.	Edn.	:	Edition
9.	EU	:	European Union
10.	DG	:	Director General
11.	F.d	:	Federal Reporter
12.	FTC	:	Federal Trade Commission
13.	Rly	:	Railway
14.	RPM	:	Resale Price Maintenance
15.	SC	:	Supreme Court
16.	SCC	:	Supreme Court Cases
17.	Sh Act	:	Sherman Act, 1890
18.	US	:	United States

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e. Prints India v. Springer India Private Limited & Ors