

PROBLEMS IN INTERPRETING COMPETITION ACT - ARE VAGUE TERMS LEADING TO AMBIGUOUS DECISIONS?

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Introduction:

The objective of the competition policy is to promote healthy competitive business environment in the market. It prevents market from anti competitive activity and maximize welfare and increase efficiency in the market by stabilizing and creating competitive market, so that interest of the consumer are protected and assure them fair trade practices. Competition law in India come in to full force from the year 2009, since from that year to up to this date commission put itself in between the Indian market and become watchdog of the agreements of the big companies that their agreement and their acts does not create an anti competitive environment within Indian market.

Agreements:

It has generally seen that if any company wants to earn more profit or want to increase market share he has to do some agreements but this agreement firstly scan by the competition act if that agreement has negative impact or appreciable adverse effect on the India market or not. Section 3 of competition law deals with anti competitive agreements. Section 3(1)¹³⁴ has very wide concept it includes any agreement by the firm which has appreciable adverse effect on competition within India. Section 3(2)¹³⁵ says that any agreements under the provision of section 3(1) are void. In competition act the phrase “appreciable adverse effect within market of India” has been used, it means that firstly competition commission will look into the market is within India or not and then look if this agreement has an appreciable adverse effect. Adverse effect means has a negative impact on the competition of Indian market¹³⁶.

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¹³⁴ Section 3(1) “No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.”

¹³⁵ Section 3(2) “Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.”

¹³⁶ In the competition act market has been divided in three parts, competition will look in to this markets and then they will decide the firm has a dominant position in that market or not. In competition law market has been define as follows:

Section 2(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

2(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

2(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or

Further section 3 has become more precise by adding section 3(3)¹³⁷ and section 3(4). Section 3(3) deals with horizontal agreements and section 3(4) deals with vertical agreements.

Any agreement which comes under the section 3(3) is presumed anti competitive agreement and it is *per se* void. It means no firm or company can do horizontal agreement. Horizontal agreement means agreement between the competitors. If any kind of agreement made between the competitors then CCI (competition commission of India) will not look in to the reason why two firms have signed this kind of agreement.

Horizontal agreement may include following kind of agreements:

- 1) Fixing, directly or indirectly, purchase or selling price;
- 2) Limiting or controlling production and investments;
- 3) Market allocation and sharing;
- 4) Bid rigging and collusive trend ring;

If any competitor firms do any agreement with its competitors to do business and fix price and share market for themselves then it is known as cartel under competition act¹³⁸. Cartel is per se bad under section 3(3) and it is anti-competitive. Cartel is per se illegal because. Consumer has to suffer from price, quality and many other things, if you have not entering in to such agreement then at last consumer will be beneficial and for getting more consumer companies will increase their efficiency. That is the reason why any agreement under section 3(3) is per se void. CCI has caught one such cartel in India and it also famous for the penalty imposed by the CCI. That is cement cartel in India.

On June 2012 CCI has imposed penalty on leading 11 cement industry of 6300 crore for forming a cartel in India. The information of cartel was given by the Builders Association of India to the CCI on 26-7-2010¹³⁹. The CCI has investigated in the matter the main thing in the case was CCI mostly depend on the concert action of the companies, they have not made directly an implied contract but their action has been read by the CCI. For that

substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

¹³⁷ 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:

¹³⁸ Section 2(c) "'cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services"

¹³⁹ Case no 29 of 2010

CCI has done very deep study of the company's sales, size, transportation their production. They come to know that there are around 49 cement companies in India and they have 149 large cement plants so there should not be any scarcity of cement in India. They study the past record of cement price which gradually increase from 20 to 50%. The main thing is all the cement company has increased the price in the same manner even though there is different between their production, size and quality. They even come to know that they have divided the market for themselves so that artificial scarcity of cement can be established. The leading companies' price followed by the small companies and the big companies declare price of cement by the medium of media. Even their dispatches were so closely related with each other, without any meeting of mind it won't be possible. All this detail report was given by the DG in his report to the CCI. Depending on the report CCI has announced the judgement¹⁴⁰.

If we see the above case we can say that CCI is very harsh if companies have made any horizontal agreement between them. But in another case of pre payment charges in retail home loans CCI has contrary in its decision. The case filed by the Niraj Malhotra¹⁴¹ against leading Indian banks. The case has been filed under section 19(1)(a)¹⁴² against banking and non banking financial companies. The decision of CCI held by majority of 4:2 and holding that the pre payment charges levied on retail home loans by banks are neither anti competitive nor amount to abuse of dominant position. CCI in its majority held that there was no agreement or any action in concert which led to levy of PPC (pre payment charges). They told that they are not in any kind of agreement, there was a lack of evidence which tells that they have formed the cartel and their market share is also not led to give them dominant position in the market.

But on the contrary dissenting opinion was also there. They trace back the history of PPC in the banking sector, then they come to know that before 1993 HDFC (Housing Development and Finance Corporation) is the sole bank or sole player in the market and has a major market share in the home loan and never charge PPC before 1993 but after that LIC also enter in the same market and gives loan on low rate. After that HDFC has started to charge PPC rate after that from 2003 most of the banks have started to charge PPC charges on home loans. They also investigated that on 28-8-2003 there was a meeting of the Indian Banks Association, wherein it was noted that they have decided that PPC in the range of 0.5% to 1% would be reasonable and left the matter to be fully decided by the banks themselves. Immediately thereafter, all the banks have started to charge PPC at the rate of 1% to 2%. The dissenting opinion said that they have uniformly decided this rate and this act also becomes the

¹⁴⁰ Source of the information available on <http://www.cci.gov.in>

¹⁴¹ Case no 5 of 2009

¹⁴² Section 19(1)(a) "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;

barrier for the new entry in the market and also there is a cartel¹⁴³.

In business, agreements are very common agreement between wholesaler and retailer and distributor. The agreements between them are called as vertical agreement, and vertical agreements deal under the section 3(4)¹⁴⁴ of the act. The main difference between horizontal and vertical agreement is that, horizontal agreements are per se void and vertical agreement are not prima facie anti-competitive and therefore rule of reason applied in such kind of agreements. If their agreements have an appreciable adverse effect on market after analysis rule of reason then CCI can take action against their agreement. Vertical agreement include following agreement:

- 1) Tie-in agreement
- 2) Exclusive supply agreement
- 3) Exclusive distribution agreement
- 4) Refusal to deal
- 5) Resale price maintenance

These agreements are considered as void if they have an appreciable adverse effect on competition in Indian market. In vertical agreement is not very easy to prove that an agreement has an adverse effect on market, the burden of prove lies on the informant. In vertical agreement generally CCI will look in to the agreement, relevant market and dominance of the company, and it is not easy to prove for the informant party because vertical agreements are not per se void. In one of the case filed by Ajay Devgn films¹⁴⁵ (herein after called as informant party) against Yash Raj films group (herein after called as opposite party) in the year 2012. The allegations made by the informant party that the opposite party has made agreements which are contravention to section 3(4)(a)¹⁴⁶, 3(4)(b)¹⁴⁷, 3(4)(d)¹⁴⁸ and 4(2)(a)¹⁴⁹. The informant grievances are that the opposite party has released its mega starrer film Ek Tha Tiger on 15th august 2012. At that time the said party also has a plan to release other mega star

¹⁴³ Source of the information available on <http://www.supremecourtcase.com>

¹⁴⁴ Section 3(4) “Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

¹⁴⁵ Case no 66 of 2012

¹⁴⁶ 3(4)(a) tie in agreement

¹⁴⁷ 3(4)(b) exclusive supply agreement

¹⁴⁸ 3(4)(d) refusal to deal

¹⁴⁹ Section 4(2)(a) “[1]No enterprise or group] shall abuse its dominant position.] (2) There shall be an abuse of dominant position 4[under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

film on Diwali. The opposite party had put unfair conditions to single screen theaters that if they want to screen Ek Tha Tiger simultaneously they have to agree to exhibit the other film Jab Tak Hain Jaan (JTHJ) on Diwali. Moreover they additionally put that if any single screen theater would not agree to this condition, it would not get the right to screen any single movie. Some has denied entering in to such agreement and some of them were entered in to agreement because of the name of the company, these allegations have been made by the informant party.

DG (deputy general) has enquired whether the opposite party has made agreements which are contravention to section 3(4). For that he studied the agreements made by the opposite party, he concluded that the agreements were vertical in nature. The allegations were made by informant that they have tie in agreement and these agreements are not per se void said by the DG. It is depend on its actual or likely to cause appreciable adverse effect within Indian market. To study that DG has looked in to the guiding principles given under section 19(3)¹⁵⁰. On view of the section 19(3) commission conclude that opposite party has not contravened the section 3(4) because their agreement does not lead to anti competitive environment in Indian market. The agreement has neither created entry barriers for new entrance nor drove out existing competitions out of the market and also have not nor appreciable adverse effect in market. They also put that the single screen has only 35% market in India so it would not contribute much revenue to the opposite party¹⁵¹.

Abuse of dominant position:

If any corporate entity has made any agreement under section 3(3) and 3(4), the agreements made by them are seen by the CCI, if they have any adverse effect on competition then they can take action against these agreements whether that corporate entity has a dominance position in Indian the market or not. Dominant position is not per se void in the competition act but to use its dominant position in Section 4¹⁵² of the act deal only with abuse of

¹⁵⁰ Section 19(3) “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.”

¹⁵¹ Source of the case information available on <http://www.cci.gov.in>

¹⁵² Section 4[(1)No enterprise or group] shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 4[under sub-section (1), if an enterprise or a group].—

- (a) directly or indirectly, imposes unfair or discriminatory—
 - (i) condition in purchase or sale of goods or service; or
 - (ii) price in purchase or sale (including predatory price) of goods or service.
- (b) limits or restricts—
 - (i) production of goods or provision of services or market therefor; or
 - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

the dominant position. Mainly CCI look into the agreement of the dominant company that they would not use their dominance in the market and drove out the small player from the market. In competition law dominance is not nor per se void but to abuse his dominant position is void. The competition act states that a firm is likely to hold a dominant position if it is able to behave independently of competitive constraints imposed by competitors, suppliers and consumers¹⁵³. Section 4(1) says that no firm and enterprise should abuse its dominant position. Section 4(2) provides list of the acts by the firms which may constitute to abuse of dominant position. If any company, who has dominance in the market within India, has put unfair condition, fix selling or purchase of goods limits the production etc has violate section 4(2) of the act.

Generally commission first look in the firm does have dominance in the market. For that commission would look in to relevant product market¹⁵⁴ and relevant geographical market¹⁵⁵. They will also analysis related variable like market share, strength of the competitors, market power etc. to explain this I would like to discuss one of the famous case of CCI that is Belair owner's association v. DLF limited¹⁵⁶. In this case CCI has imposed the penalty of 630 crore on DLF for against its dominant position, under the provisions of Section 4 of the competition act. Commission in its order dated 12th august 2012, has given decision that DLF has a dominant position in the Gurgaon. It has also abuse its dominant position and violated the provision of section 4 of the competition act. The case information has been given by the Sanjay Bhasin who himself is one of the allottees in the complex. The informant alleged that DLF has abuse its dominant position and imposed highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the housing complex. They also alleged that DLF has violated the provision of various statues including Haryana Apartment Ownership Act 1983, restriction of unregulated development act 1963 and Haryana Development and Regulation of Urban Area rules, 1976. According to informant each building was consist of 19 floors which was increased to 29 numbers without information.

According to the allegation was made by the informant DG had stated his investigation in the matter. He studied that DLF is the biggest real estate player in terms of size and resources. He also study that DLF has more market

(c) indulges in practice or practices resulting in denial of market access 5[in any manner]; or

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

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

¹⁵³ Article on "corporate communication and Indian corporate law: do not speak more than you can handle" by *bose avirup* available in competition law reports of manupatra pg no. b-214 published in September 2013 volume 2 part 4

¹⁵⁴ Section 2(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

¹⁵⁵ section 2(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

¹⁵⁶ Case no: 19/2010

share and size in the Gurgaon than its competitors so it has been seen that it has a dominant position in the Gurgaon. For determining the dominant position and relevant market DG read section 4 with section 2(r), 19(6)¹⁵⁷, 19(7)¹⁵⁸. After study them they come to conclusion that DLF is the most favourable choice in Gurgaon. Further conditions put by DLF are arbitrary in nature and also restricting the new entry in the market. It also contended in his report that impunged of such condition to meet competition is also not acceptable. Finally commission conclude that he has violated section 4(2)(a) of act and order them remove and modify the condition in its agreement under section 27(a)¹⁵⁹ and also imposed penalty using power under section 27(b)¹⁶⁰ which comes to around 630 crore.

Section 4 prohibits a dominant enterprise or group from eliminating a competitor and strengthens its position in the market by using its resources. Dominance position means where a firm has a market share, market power and most importantly it can change the price of goods according to its requirement, price fixing also includes predatory pricing. Predatory pricing¹⁶¹ is illegal under the law and it has a adverse effect on a market. Competition act does not forbid the big firms but if they using their power to abuse the consumers and competition in the market then CCI has to take steps against these activities.

In another case of Jagmohan Chhabra¹⁶² which is similar to the DLF case but the decision of the CCI has been

¹⁵⁷ The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.

¹⁵⁸The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers;
- (f) classification of industrial products.

¹⁵⁹ Section 27(a) "direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;"

¹⁶⁰ section 27(b) "impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse"

¹⁶¹ Predatory pricing means when a firm has a power in terms of resources and money so that it can decide the price of its good lower than its cost price just to eliminating the competitors in the market, and when they drove out from the market it again raise the price of its goods to collect the loss.

¹⁶² Case no 27 of 2011

contradict to the DLF and it has also dissenting opinions. It has also raised a question against researcher and academicians to examine the provisions of the competition act. The informant has filed complaint against Unitech Ltd who is real estate firm and situated in Gurgaon. They alleged that opposite party has violated the provisions of section 4(1) of the act. In their complaint they alleged that the opposite party has a dominant position in the Gurgaon and they put unfair and unreasonable conditions in their agreement and they with malafide intention use the money of their consumer.

On this case firstly CCI find that whether the opposite party has a dominant position in the Gurgaon or not, and on depending on their study that in Gurgaon already DLF has a dominance so other competitor has a market power like DLF, so opposite party is not a dominant. So commission conclude that there is not a prima facie case of abuse of dominant position as it hasn't such position so under section 26(2)¹⁶³ DG close the proceeding of the case¹⁶⁴.

But in contravention to this order, there is a dissenting opinion also in this case, which is very important because it has raised many questions towards the researchers and academicians. In dissenting opinion it has been sad that it a case of investigation under section 26(1) because the conditions put by the opposite are so arbitrary in nature so a consumer cannot go to the other builder means it restricts the new entry in the market more over when we talk about relevant market the building in which the consumer is interested to purchase it is become relevant market because once money has been paid by the consumer means he don't want to purchase any other house. In Gurgaon it has been seen that such conditions in the real estate agreement are common, in the DLF we have saw the similar conditions so it may happen there is an action in concert and they have horizontal agreement between them¹⁶⁵.

Section 4(2) includes acts of the firm which are said to be abuse of its dominant position like, impose unfair conditions, limits production of goods or services in the market, use dominant position to enter in to another market. If a firms has a dominant position in the market then it can reduce the supply of its goods or services and may arise artificial scarcity and increase the price of goods. Sometimes firms use its dominant position to enter in to another market by way of tie in arrangement or predatory pricing because they have such kind of resources and money that they can bare a loss for some time period.

¹⁶³ Section 26(2) "Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

¹⁶⁴ Case information available on <http://www.indiakanoon.org> (main order)

¹⁶⁵ Case information available on <http://www.cci.gov.in>(dissenting opinion)

In the case of MCX stock exchange ltd v National stock exchange¹⁶⁶, CCI has restricted a firm to use its dominance position to enter in to other market, but their judgment has also oppositions. The case was filed by the MCX Stock Exchange ltd India under section 19(1)(a) of the competition act against National Stock Exchange India. Allegations made by the informant that the opposite party behave in anti competitive manner, it try to eliminating competition from the CD (currency derivative) market, discouraging potential entrance from entering into relevant market for stock exchange services and also tried to foreclose of competition in the stock exchange market. It was submitted by the informant that both informant and opposition are providing currency future exchange services. The opposition through its circular dated 26-8-2008 announced a transaction fee waiver in respect of all currency future trades executed in this platform. In that respect opposition also not collecting membership fee, annual subscription charges, and an advance minimum transaction charges.

In this case DG conducted an in depth investigation of various allegations made in the information. According to DG report the entire stock exchange market service is a single relevant market. To determine the dominant position of NSE, whether it has or not, DG taken in to consideration market share of both the firms. According investigation made by DG, NSE had a market share of 47-48% in CD segment as against MCX has 52-53% market share. Further in his study he compare the growth of NSE in this segment which rise from 5 % to 92% from 1993 to 2009 according to this report he come to conclusion that NSE is a dominant player.

Commission had ordered NSE In exercise of powers under section 27

(a) of the Competition Act, NSE is directed to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other market/s to protect the relevant C.D. market with immediate effect.

(b) Further, in exercise of the powers under section 27(g)¹⁶⁷ of the Act, NSE is directed to maintain separate accounts for each segment with effect from 01.04.2012.

(c) In exercise of powers under section 27(g) of the Act, NSE is directed to modify its zero price policy in the relevant market and ensure that the appropriate transaction costs are levied. In exercise of powers, under section 27(b)¹⁶⁸ NSE is directed to pay penalty of Rs. 55.5 crores within 30 days of the date of receipt of the order which is 5% of the average of its 3 years' annual turnover¹⁶⁹.

¹⁶⁶ Case no 13 of 2009

¹⁶⁷ Section 27(g) commission may pass such other [order or issue such directions] as it may deem fit.

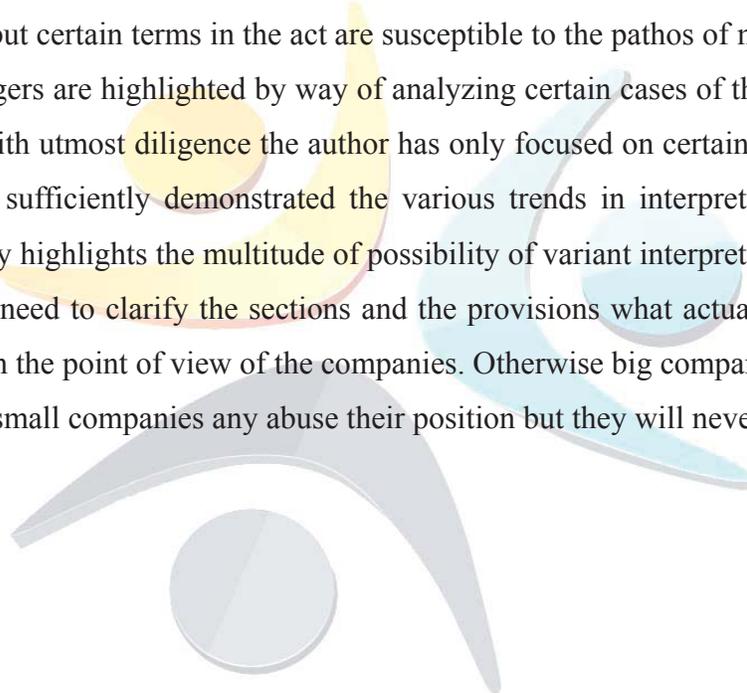
¹⁶⁸ Section 27(b) commission may impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse

¹⁶⁹ Case information available on <http://www.cci.gov.in>

Conclusion:

The objective of the CCI is to keep economic development of the country. The establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.¹⁷⁰To promote competition in the market and ensure fair trade practices to the consumers. The act is very well framed and has given wide powers to the commission to perform its duty.

The prohibitions in the act include all the major activity which may lead adverse effect on market. Though the act is very well drafted act but certain terms in the act are susceptible to the pathos of multiple interpretation. In the present article such dangers are highlighted by way of analyzing certain cases of the CCI. Though the effort is to underscore the issue with utmost diligence the author has only focused on certain limited number of cases. However these cases have sufficiently demonstrated the various trends in interpreting the act by CCI. The dissenting opinion especially highlights the multitude of possibility of variant interpretation. Hence the author is of the opinion that there is need to clarify the sections and the provisions what actually they want, when they study any case. This must on the point of view of the companies. Otherwise big companies will be always on the target point of the CCI and small companies any abuse their position but they will never caught up by the CCI.



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¹⁷⁰ Objective of the establishment of competition commission of India given in competition act 2002