

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 6

2022

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Inquiry, Investigation & Admissibility of Evidence under The Competition Act, 2002

CHARU SRIVASTAVA¹

ABSTRACT

Competition Commission is the market regulator responsible for the implementation of the Competition Act 2002, whose objective is to ensure that the market forces operate with transparency and fair play. It has several functions. It is primarily a regulatory body and keeps an eye on the activities which hamper or may hamper competition in the market and can inquire into such matters which are like activities enumerated under sections 3 (anti-competitive agreement), 4 (abuse of dominant position), & 5 (combinations). Under Section 18 Competition Commission must implement the objectives of the Act enumerated under the Preamble of the Act.

Hence it can be said that the Competition Commission is invested in inquisitorial, adjudicatory, and advisory jurisdictions as well in certain matters. Competition Commission has a power of inquiry under sections 19 & 20 in the matter of Sections 3, 4 & 5 respectively of the Act; however Central Government may appoint a director general for assisting Commission in an inquiry under section 16. Thereby, the Director General only can assist in inquiry and has no power to inquire similarly Director General is invested with the power of investigation and the commission has no power to investigate. Both are administrative functions and go simultaneously. Firstly Commission inquires whether there is a prima facie case and if it opines that yes there exists a prima facie case then it may direct Director General to investigate the matter and submit its report, (Under regulation 18 of the General Regulation 2009 it is provided that direction of investigation to Director general is deemed to be the commencement of inquiry u/s 26 of the Act.) and based on this report and other information submitted by informants the commission disposes of the case. This paper analyses various provisions of law that concern inquiry, investigation and admissibility of evidence under the Competition Act of 2002.

Keywords: *Anti-trust, Competition law, Cartel, Anti-competitive agreements, abuse of dominant position.*

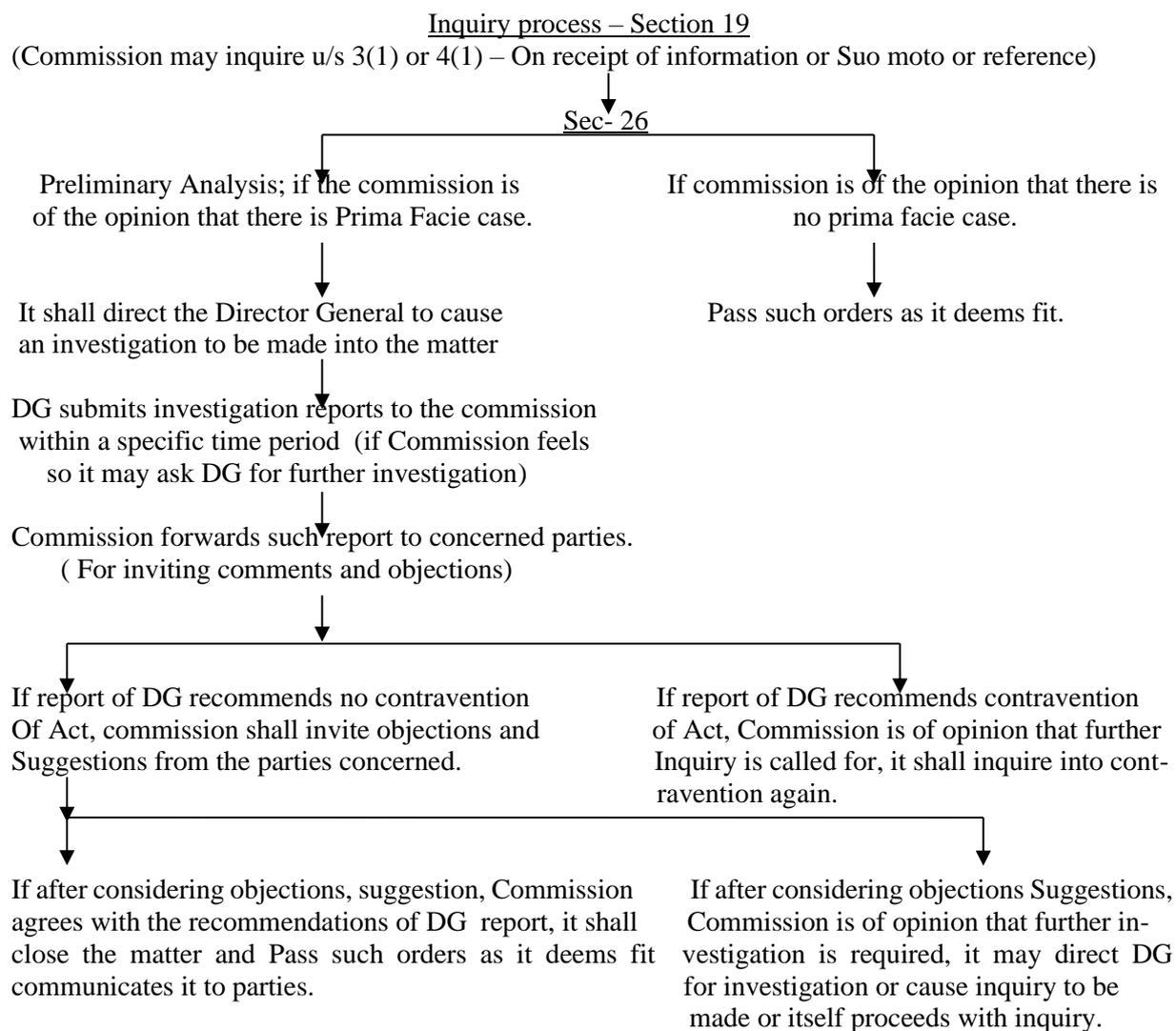
¹ Author is an Assistant Professor at UPES, Dehradun, India.

I. INTRODUCTION

(A) Inquiry and Investigation under Sections 3 & 4

Under this part, the provisions relating to inquiry and investigation relating to section 3 and 4 i.e. anti-competitive agreements and abuse of dominant position has been dealt with. Firstly the provision in the form of a flow chart has been made to briefly describe and then in detail, they are discussed.

- **Flow Chart**



Sec 27: Orders by Commission

- Direct enterprise etc to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position.
- Impose a penalty which shall not be more than 10% of the average turnover for the last three preceding financial years, upon each of such persons or enterprises which are parties to such agreements or abuse.

- In case of the cartel, a penalty of up to three times its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.
- Direct modification of agreements.
- Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs.
- Pass any other order as it may deem fit.
- Sec 29: it may direct the division of enterprise enjoying a dominant position.

II. DETAILED PROVISIONS GOVERNING ANTI-COMPETITIVE AGREEMENTS

Under Section 19², CCI is empowered to inquire whether an agreement has caused or is likely to cause an appreciable adverse effect on competition. General Regulation 2009, under Regulations 10³ & 11⁴ provides for the contents of information and reference received under section 19 of the Act. Regulation 12⁵ provides for the procedure required for the filing of information or reference. It is the Secretary appointed under section 17⁶ who shall be presented with such information or references sent through post or courier however such information or reference can also be sent by mail in electronic form.⁷

Further Regulation 15⁸ provides for the scrutiny of information or reference. Secretary shall scrutinize to check whether there is any defect or not and shall ask parties to rectify it within a

² Sec 19 (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

³ The Competition Commission of India (General) Regulations, 2009 (No. 2 of 2009) Available at <http://www.cci.gov.in>

⁴ Ibid

⁵ Ibid

⁶ Sec 17 (1) The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act. (Powers and Functions of Secretary are provided under Regulation 14)

⁷ Regulation 13- Procedure for filing of information or reference in electronic form. – Subject to the provisions of regulation 12, information or a reference to the Commission may be sent by a person or an enterprise to the Secretary in an electronic form duly authenticated with digital signature by the subscriber as and when so desired by the Commission through a public notice.

Explanation – For the purpose of this regulation, –

(a) “digital signature” means the digital signature as defined under clause (p) of section 2 of the Information Technology Act, 2000 (21 Of 2000);

(b) "electronic form" with reference to an information or a document means the electronic form as defined under clause (r) of section 2 of the Information Technology Act, 2000 (21 Of 2000);

(c) “subscriber” means the subscriber as defined under clause (zg) of section 2 of the Information Technology Act, 2000 (21 of 2000).

⁸ Supra Note 2

reasonable period. Such parties who referred to section 19 (1) (b), after receiving communications of defects shall make changes within 30 days and if they do not then such information shall be treated as invalid. But a fresh filling of information or reference shall be allowed by the Commission for consideration.⁹

Regulation 16 (1)¹⁰ provides that all such information or reference shall then be placed before the commission by the secretary to form a prima facie opinion as to whether the anti-competitive agreement or abuse of dominant position causes or is likely to cause AAEC.

If CCI comes to the conclusion that a prima facie case exists, then according to regulation 18¹¹ the secretary shall convey the direction of the Commission to the Director General (DG) to make an investigation into the matter. This direction of investigation shall be deemed under regulation 18 as the commencement of inquiry u/s 26. DG shall be provided with all documents necessary to conduct an investigation by the Secretary. If the CCI does not find a prima facie case, it will close the case, pass an appropriate Order and Secretary shall forward such order to the concerned persons. DG is required to submit a report on his findings to the CCI within the time as may be specified by the Order of the commission (but such period may be extended by the commission on the application by DG under Regulation 20)

Regulation 21 provides the procedure for the inquiry under section 26. On receipt of report of DG, the secretary shall lay down such report before the commission. If DG in its report recommends, that there is a contravention of the provisions of the Act, then the secretary shall invite objections and suggestions from the parties concerned. And considering such information if CCI believes that a further inquiry is required, it shall inquire into such contravention following the provisions of the Act i.e. again call for a meeting and Director General shall be informed accordingly of the parties and DG may appear in person or any of its officer in accordance with section 35¹² of the Act.

⁹ Sub regulation 3 of regulation 15- Provided that the Central Government or the State Government or the Statutory Authority or the concerned party shall be entitled to file fresh information, reference or application for consideration by the Commission together with applicable fees

¹⁰ The Secretary, after scrutiny and removal of defects, if any, in an information or reference, as the case may be, shall place the same before the Commission to form its opinion on existence of a *prima facie* case.

¹¹ Regulation 18. Issue of direction to cause investigation on prima facie case. –(1) Where the Commission is of the opinion that a prima facie case exists, the Secretary shall convey the directions of the Commission to the Director General to investigate the matter and furnish a report to the Commission on or before the date specified therein.

¹² Appearance before Commission -Sec 35. A [person or an enterprise] or the Director General may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

III. ORDERS THAT CCI CAN PASS: SECTION 27

After CCI, it finally concludes that there is an anti-competitive agreement, which has caused or is likely to cause an appreciable adverse effect on competition within India, it may pass all or any of the following orders:

- (a) Direct the parties to discontinue the said agreement and not to re-enter the such agreement
- (b) impose a such penalty, as it may deem fit which shall be not more than ten per cent. of the average of turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
- (c) If the anti-competitive agreement has been entered by a cartel, the CCI may impose upon each member of the cartel a penalty of up to three of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher;
- (d) Direct modification of the agreement; And pass such order as it deems fit.

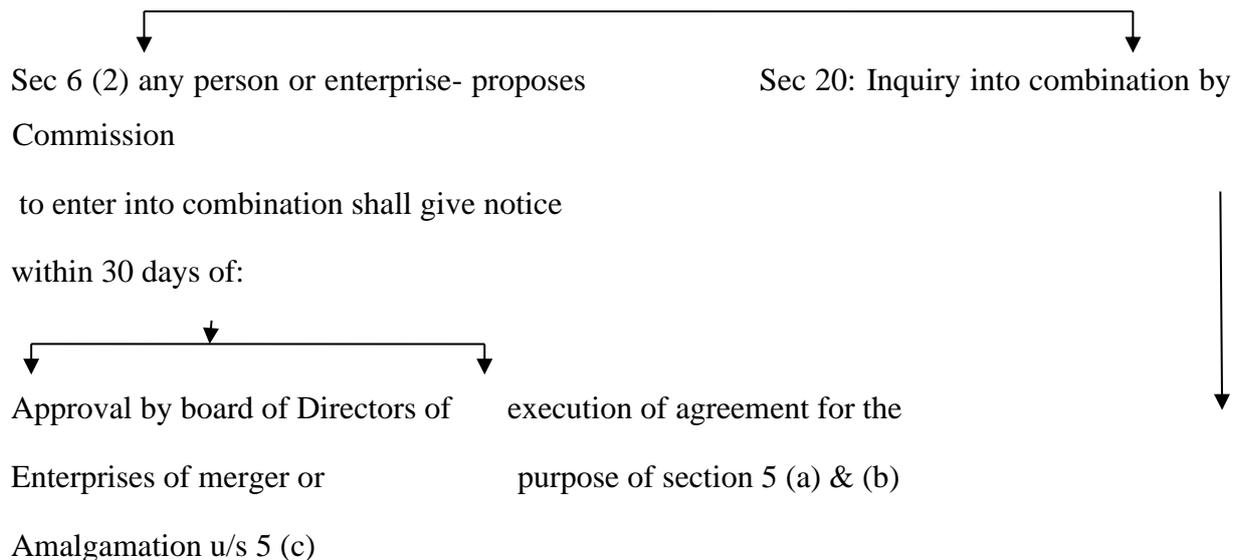
IV. DIVISION OF ENTERPRISE SECTION 28

The Order directing the division of an enterprise may provide for all or any of the following matters:

- (a) The transfer or vesting of property, rights, liabilities or obligations;
- (b) The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- (c) The creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) The formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- (e) The extent to which, and the circumstances in which, provisions of the Order affecting an enterprise may be altered by the enterprise and the registration there.

V. INQUIRY AND INVESTIGATION FOR THE PURPOSE OF SECTION 5 & 6

- **Flow Chart**



Commission may upon its own knowledge or information for the purpose of section 5 (a), (b) & (c), inquire whether the combination has caused or is likely to cause AAEC on competition in India.(But shall not initiate any inquiry after the expiry of one year from the date on which such combination has taken effect.)

Sec 29: Procedure for investigation of combination

If commission is of opinion that prima facie case exist then it may issue show cause notice to parties to respond within 30 days.

After receiving response from parties the Commission may ask Director General to submit its report within a specified time period.

Commission shall within 7 working days from the date of receipt of response of parties or receipt of report of director general (which ever is later), direct parties to publish details of combination within 10 working days for bringing it to the knowledge of public.

Objections by people affected or likely to be affected, within 15 working days of publication.

Commission may call for additional information within another 15 working days.

Parties have to furnish such additional information within another 15 working days.

After considering all information the commission shall within another 45 working days proceed with the case in accordance with section 31.

If Commission opines that it does not or is not likely to have AAEC, it shall approve the combination

If Commission opines that it does or likely to cause AAEC it shall direct that the combination shall not take effect.

Commission if opines that such AAEC can be eliminated it may propose modifications to the combinations.

Parties who accept the modification shall carry out modification within time specified. But if accepts and fails to modify within the time specifies, it shall be deemed to have AAEC and shall be dealt according to Act.

If parties do not accept modifications then the parties may within 30 working days after the proposed modification, apply for amendments to modifications.

If commission agrees with the amendments the then the combination stands approved.

If the commission does not accept amendments, then the parties are given further 30 days to accept the modifications proposed by the commission initially.

If the parties fail to accept then it shall be deemed to have AAEC and shall be dealt accordingly.

Without prejudice to any penalty which may be imposed or any prosecution which may be

initiated under this Act, the Commission may order that the acquisition or control or merger or amalgamation u/s 5 (a), (b) & (c) shall not be given effect.

VI. INQUIRY INTO COMBINATION BY COMMISSION

Section 5 provides for the threshold limit which is to be exceeded by the combinations in order to fall within the purview of section 5. Prima facie causation of appreciable adverse effect on competition in the relevant product and geographic market within India. Factors relating to ascertaining appreciable adverse effect on competition has been statutorily provided in the law thereby, minimizing arbitrariness and giving a direction to the competition commission.¹³

(A) Appeal to Appellate Tribunal

Under Section 53A the central government has established an appellate tribunal to hear and dispose of cases against the order or decision of the commission. Any party aggrieved by the decision, or order of commission may prefer an appeal to AT under section 53B within a period of 60 days of delivery of a copy of the decision or order in such form and fee as may be prescribed. The parties will be given a hearing opportunity and pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against. Further, it provides no limited duration within which the case shall be disposed off it only provides that the tribunal shall endeavour to dispose off the case within 6 months. Section 53O provides that AT shall not be bound by the provisions of the Civil Procedure Code but have the same power as that of a civil court under CPC and be guided by the principle of natural justice. Every order of AT shall be executed in the same manner as if the decree of a civil court.

¹³ Section 20(4) of The Competition Act 2002 -, the Act casts an obligation to have due regard for all or any of the following factors while determining whether a combination has appreciable adverse effect on competition in the relevant market:

- (a) Actual and potential level of competition through imports in the market;
- (b) Extent of barriers to entry into the market;
- (c) Level of combination in the market;
- (d) Degree of countervailing power in the market;
- (e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- (f) Extent of effective competition likely to sustain in a market;
- (g) Extent to which substitutes are available or are likely to be available in the market;
- (h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- (i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- (j) Nature and extent of vertical integration in the market;
- (k) Possibility of a failing business;
- (l) Nature and extent of innovation;
- (m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- (n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

(B) Admissibility of Evidence

Under the Competition Act, there is pre-existing evidence like Information which is filled under section 19 (1) for anti-competitive agreement or abuse of dominant position and u/s 6 (2) & 20 (1) the information filled for combination can be used by the commission for inquiry and investigation. Certain information existing in the public domain also helps the commission & Director General. Further provision for compulsory request based on an inquiry under section 36 (2), where a commission is given the power of the civil court in discharging its function i.e. commission can summon and enforce the attendance of the person and call for documents etc. such power is also given to DG u/s 41(2) it is provided that DG shall have all power that is given to commission under section 36 (2).

The second form of evidence is extracted from the experts. Section 36 (3) provides that the commission may call for an expert to assist in inquiry, therefore the information provided by him will have weightage since he is an expert in that field. Section 36 (4) & (5) provides for the evidence from persons, commission may direct any person to present before the DG any documents or information relating to trade which is present under his custody or control. Further section 41 (3) provides for search and seizure, it says that Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act.

For the purpose of the competition act, the researcher has deduced certain categories of evidence for the competition act, firstly documentary evidence like written submissions, affidavits, photos, books of a/c, and printed material. Secondly, Oral evidence includes statements of parties and witnesses. Thirdly economic evidence: Market assessment, demand & supply, cost & sale pricing. Fourthly Financial evidence like FSA, data analysis. And lastly electronic evidence like audio, videos, telephony & emails

(C) Drawbacks

In this part, the researcher has attempted to throw light upon the loopholes of law relating to the inquiry, and investigation, The abovementioned inquiry, and investigation are burdensome involving several requirements to be fulfilled, filling high fees, and procedural formalities, which does not dispose of the matter speedily and hampers competition.

Another problem arises about determining at what point of time the inquiry begins and whether should parties be given an opportunity of being heard before the commission forms an opinion of prima facie opinion. And further, regarding whether the commission is required to give

reasons for its opinion, these issues were raised in the Jindal case. However it is contended that forming an opinion is not any decision or inquiry, it is only an opinion which gives the commission a direction as to whether they should direct the director general to investigate or not, it is not a decision. So if at this stage parties are given a hearing opportunity then there will be a number of parties asking for a hearing opportunity and will cause unnecessary delay. Moreover, it is not that parties are not given the hearing opportunity, they are allowed to present their case after the commission opines that there exists a prima facie case to investigate. Another issue what whether the commission should record its reason in forming a prima facie opinion, it is contended that it is implied that when some authority forms an opinion those opinions are based on facts and evidence and hence the reasons are bound to occur, the principle of natural justice requires reasoned decisions.

Another issue is related to the withdrawal of notice and refund of fees, what will be the position if after filling merger notice under section 6 (2), the parties found that they do not want to merge or they drop the idea of merging, or due to unavoidable circumstances they are unable to the merger, what happens in such situation will the parties be allowed to refund their fees and withdraw the notice. Since the Act is silent about it there is ambiguity over this issue.

A further issue is related to the staff of the competition commission. Why do we need retired judges or acting judges in the competition commission, it is a regulatory body we need a regulator and not a judge. Had a judge been required then why do we need a separate commission, we already have a high court and Supreme Court where judges decide cases. Hence it should be ensured that it does not become a parking lot of retirees from the government or judiciary, but those persons should be appointed who has a mind of regulators, and who has capabilities, and competence.

Another issue related to the independence of the commission is a crucial part because there are specific sector regulators, because of which often conflict arises between the two as to who will have jurisdiction to deal with the matter. Such overlapping needs to be resolved permanently so that the integrity of our economic growth is not hampered. Further, presently the law allows explicit and implicit governmental control in terms of several functions, including staff appointments and other matter example section 54 lays down that government has the power to exempt a sector from the jurisdiction of the commission. Such powers restrict the power of the commission.

Further, we do not have a guideline for fining as exist in other countries. To improve high fines it is necessary to look at the economic and econometric models of certain products otherwise it

would be very unfair.

A further issue related to section 3(3) lay down that in such and such circumstances appreciable adverse effect shall be presumed, therefore it implies that we need not refer to section 19 (3) where factors for determining appreciable adverse effect are given. Whereas for section 3(4), the commission shall refer to section 19(3), since under section 3(4) presumption is not made. This is point of ambiguity, because section 19 (3) mentions “shall have regard” whereas section 3(3) mentions it shall be presumed that it has an appreciable adverse effect.

VII. POSITION IN THE US

The difference between Indian law and US law is that the US law is more strict and progressive, applied rigorously and more effectively. The deterrence objectives in their laws can be seen from the fact that they have criminal sanctions, high fines imposition as well as extradition of individuals found guilty of formation of a cartel. In US two agencies are operating for the enforcement of anti-trust laws. Federal Trade Commission established under Federal Trade Commission Act 1914 and the Department of justice are complementary to each other they do not conflict with each other. Over a long period, they have divided the areas into which they will look. For example, FTC looks into health care, pharmaceuticals, food energy etc. DOJ also has sole anti-trust jurisdiction in certain matters such as telecom, banks, railroads, airlines etc. Before opening, investigation agencies consult each other to avoid duplicating efforts. In mergers, they also have requirements of premerger notification like India. Firstly filing a notice of the proposed merger is required which will be cleared and passed to one agency to look into the matter, then there will be a preliminary review of premerger filing and a decision accordingly. They may either approve the merger or if there is any violation of law then they may enter into a negotiation agreement or seek to stop the entire transaction by filing injunctive relief in federal court. In some cases, FTC may directly go to the federal court to obtain an injunction. However, in case the FTC finds that there exists any activity which has violated their laws they have an option of obtaining voluntary compliance by entering into negotiation with the parties before imposing a penalty. A company that signs a consent order need not admit that it violated laws but it must agree to stop the disputed practices outlined in the complaint however if it fails to comply with the agreement or it can not be reached then FTC may issue an administrative complaint or seek injunctive relief in federal courts.

In US individual parties can also bring suit to enforce the anti-trust laws seeking damages for violation of the Sherman and Clayton act. Private parties can also seek a court order preventing anti-competitive conduct or bring suit under state anti-trust laws. State Attorney general may

also bring suit in federal court on behalf of an individual or state.

Moreover in case of conflict between sector-specific regulators and FTC, they both sit together and decide who is in a better position to decide the matter, unlike India, where there is no coordination between the two.

VIII. CONCLUSION

Since competition is seen as critical to economic development, competition law seeks to protect this competitiveness in the economy. The underlying theory behind competition law is the positive effect of competition in an economy's market, acting as a safeguard against misuse of economic power. Thus, competition law is a complex creation of law-makers which the Indian Government and the Competition Commission should take time to understand in light of the special needs and requirements of the Indian economy and implement it accordingly. Further, there are certain grey areas as discussed in this paper which is to be analyzed and are to be amended effectively to improve competition in the market.
