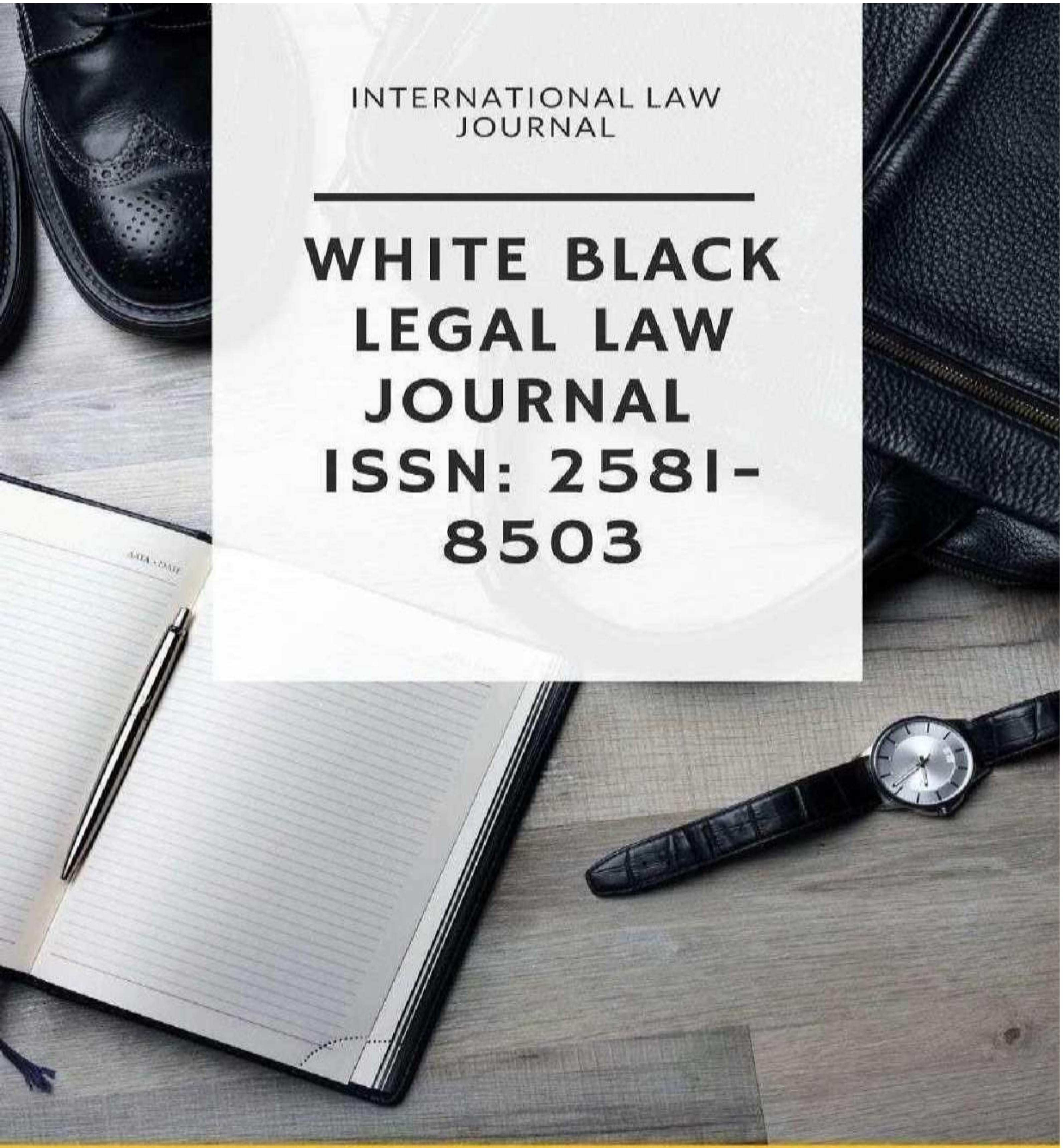

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

STUDY OF IMPLEMENTATION OF ANTI COMPETITIVE AGREEMENTS

AUTHORED BY - PRACHI DUA

ABSTRACT

This research paper examines the Competition Act of 2002's legal framework and enforcement issues pertaining to anti-competitive agreements in India. Anti-competitive agreements, which include practices like bid-rigging, price-fixing, and vertical constraints, have a substantial effect on consumer welfare and market competitiveness. The study delves into the historical progression of India's competition legislation. Additionally, it assesses the key provisions within Section 3 pertaining to anti-competitive conduct. Anti-competitive agreements are frequently used to safeguard a company's trade secrets, sensitive information, and other proprietary information. The judicial system is frequently used to enforce anti-competitive agreements.

The study explores various forms and impacts of anti-competitive agreements, shedding light on significant cases handled by the Competition Commission of India (CCI) and legal interpretations that influence the enforcement of competition law.

Despite progressive legislation, enforcement of competition law faces challenges such as limited awareness among stakeholders, complex evidentiary requirements, and lengthy legal procedures.

INTRODUCTION

In response to evolving economic trends[1], India introduced a new competition law regime aimed at transforming economic policies, eliminating trade barriers, and promoting pro-trade reforms. To achieve this goal, it became essential to prevent trading entities Preventing engagement in agreements that may be deemed anti-competitive. This was crucial to foster a competitive market environment that supports consumer interests and facilitates smooth market operations.

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[1] Rebecca Furtado, *Anti-Competitive Agreements - iPleaders*, (July 25, 2016), https://blog.ipleaders.in/anti-competitive-agreements/.

The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and its replacement by the Competition Act ushered in a new framework for Indian competition law. This transition was influenced by the experiences of competition law in advanced jurisdictions such as the European Union, reflecting the evolving economic and business landscape in India. The Competition Act granted the Competition Commission of India (CCI) a more significant role and expanded its punitive powers in contrast to its predecessor, the Monopolies and Restrictive Trade Practices Commission. Additionally, there were notable differences in the substantive prohibitions between the MRTP Act and the Competition Ac.

ANTI COMPETITIVE AGREEMENTS

Any arrangement regarding products or services that harms competition in India is banned and labeled as an anti-competitive agreement. Such agreements, if made, are deemed invalid.

Section 3 (1) of the Act stipulates that: "No enterprise shall engage in any agreement concerning the production, supply, distribution, storage, procurement, or oversight of goods/services that results in or is likely to result in a significant adverse impact on competition within India."

LITERATURE REVIEW

- Anti-Competitive arrangements and misuse of Dominant market Position: In India, anti-competitive arrangements, including cartels, that limit competition, set prices, or divide markets are forbidden by Section 3 of the Competition Act.
- **Competition Commission of India:** The Competition Act also establishes the Competition Commission of India (CCI), which acts as the principal regulatory body tasked with executing and upholding the provisions of the Act. The CCI is empowered to investigate anti-competitive conduct, impose penalties, and provide remedies for violations of the Act.
- **Leniency Provisions:** The Competition Act incorporates leniency measures aimed at motivating companies to voluntarily disclose their participation in cartels and collaborate with the Competition Commission of India (CCI) during inquiries. Section 46 of the Act allows leniency to be granted to companies that reveal their involvement in a cartel and assist the CCI in its investigations. These provisions are essential for detecting cartels and facilitating the enforcement of competition law by encouraging

self-reporting and offering immunity or reduced penalties to cooperating companies.

- **Comparative Analysis:**[2] The Competition Act in India aligns with analogous legislation in various regions, like the Sherman Act in the United States, the Competition and Markets Authority (CMA) in the United Kingdom, the Treaty on the Functioning of the European Union (TFEU) and the European Commission (EC) in the European Union, and the Competition and Consumer Act alongside the Australian Competition and Consumer Commission (ACCC) in Australia. Although each jurisdiction has unique features, their primary aim is to promote competition and discourage anti-competitive practices.

RESEARCH QUESTIONS

1. What are the regulations concerning anti-competitive agreements outlined in Section 3 of the Competition Act?
2. What are the different types of anti competitive agreements and what are the exceptions to these agreements?
3. To what extent has the Competition Commission of India effectively implemented the provisions regarding anti-competitive agreements and what penalties have they imposed as a result?
4. What are some notable cases of anti competitive agreements in India?

PROVISIONS RELATED TO ANTI COMPETITIVE AGREEMENTS UNDER SECTION 3

Section 3 of the Competition Act, [3]2002, outlines regulations aimed at addressing anti-competitive agreements. This section bars agreements, regardless of their formality, if they significantly harm competition within India.

Section 3(1) prohibits any entity or group, whether businesses or individuals, Preventing engagement in agreements pertaining to the manufacturing, provision, distribution, storage, procurement, or oversight of goods or services that could significantly harm competition within India, either presently or in the future.

[2] *A Comparative Analysis Of The Competition Act In India And Other Jurisdictions' Competition Laws: Assessing Frameworks, Similarities, And Best Practices*, https://www.legalserviceindia.com/legal/article-12130-a-comparative-analysis-of-the-competition-act-in-india-and-other-jurisdictions-competition-laws-assessing-frameworks-similarities-and-best-practices.html.

[3] *Section 3: Anti competitive agreements*, The Competition Act, 2002 https://kanoongpt.in/bare-acts/the-competition-act-2002/section-3.

Sec 3 (2) Any agreement contravening the provisions outlined in subsection (1) shall be deemed invalid or nullified.

Section 3 (3) covers the horizontal agreements any agreement among enterprises or individuals that:

- Establishing set purchase or sale prices, • Limiting or controlling production, • distribution, markets, technological progress, investments, or services, • Partitioning markets, production origins, or clientele, • Participating in bid rigging or colluding in bidding.

Section 3 (4) pertains to vertical agreements, which encompass any arrangements between businesses or individuals regarding the manufacture, provision, distribution, sale, or pricing of goods/services. Such agreements can be deemed anti-competitive if they result in, or are likely to result in, a substantial adverse impact on competition within India.

Section 3 (5) covers that ensures that certain agreements related to intellectual property rights and export activities are not constrained by the regulations outlined in the Competition Act. Specifically:

1. **Protection of Intellectual Property Rights**
2. **Export Activities**

TYPES OF ANTI COMPETITIVE AGREEMENTS

HORIZONTAL AGREEMENTS

Horizontal agreements [4]are formed among competitors operating at the same tier of the supply chain, aiming to restrict competition. Such agreements are generally viewed as more detrimental to competition since they entail direct collusion among competitors.

Types of Horizontal Agreements

- **Price-Fixing:** Competitors reach an agreement to establish a predetermined price for their products or services, thereby eliminating competition based on pricing.

For example, if several manufacturers of a particular electronic product agree to sell it at a specified price, they effectively eliminate price competition in the market.

- **Bid-Rigging:** Competitors coordinate their bids on contracts or tenders to manipulate the bidding process unfairly. For instance, if several construction companies agree in

[4] Bushra Tungekar, *Horizontal agreements under the Competition Act, 2002 - iPleaders*, IPleaders (July 4, 2021), https://blog.ipleaders.in/horizontal-agreements-under-the-competition-act-2002/.

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advance on who will win a government contract and submit inflated bids to make sure the chosen company wins, it undermines the competitive bidding process.

- **Market Allocation:** Competitors divide markets or customers among themselves, restricting entry and competition in specific areas. For example, if two major airlines agree not to compete on certain routes and instead allocate specific routes exclusively to each other, it limits consumer choice and prevents new entrants from competing.

VERTICAL AGREEMENTS

Vertical agreements [5]involve entities operating at various tiers of the supply chain, such as manufacturers, distributors, and retailers. While these agreements may not involve direct collusion among competitors, they can still have anti-competitive effects

Types of Vertical Agreements

- **Resale Price Maintenance (RPM**: Manufacturers or suppliers enforce limitations on the prices at which retailers can resell their products. This practice constrains price competition among retailers and may result in elevated prices for consumers. For instance, a manufacturer of electronic gadgets may require retailers to sell its products at a minimum resale price.
- **Exclusive Distribution Agreements:** Manufacturers grant exclusive rights to distributors or retailers to sell their products in specific territories. This restricts access for other distributors and limits consumer choice. For example, a popular clothing brand may enter into an exclusive distribution agreement with a single retailer, preventing other retailers from selling its products in that region.
- **Tying and Bundling:** Manufacturers require buyers to purchase one product (tying) in order to purchase another (tied product), or bundle products together. This practice can limit consumer choice and competition. For instance, a software company may bundle its operating system with its office suite, making it difficult for consumers to choose alternative products.

[5] *Vertical agreements in Indian competition law*, Shardul Amarchand Mangaldas & Co https://www.amsshardul.com/insight/vertical-agreements-in-indian-competition-law/.

EXCEPTIONS OF ANTI COMPETITIVE AGREEMENTS

Exceptions are as [6]follows-

1. **Efficiency Enhancing Agreements:** Permissible if they result in cost savings or improve production without harming competition.
2. **Joint Ventures:** Allowed if they don't restrict competition significantly and are for specific projects.
3. **Research and Development Agreements**: Exempt if they foster innovation and don't unduly limit competition.
4. **Specialization Agreements**: Permissible if they lead to efficiency gains without harming competition.
5. **Franchise Agreements:** Lawful if restrictions are reasonable and necessary to protect the brand.

ENFORCEMENT MECHANISM

The enforcement procedures concerning the Competition Commission of India (CCI) in upholding competition law encompass investigative authority, methods for detecting cartels, leniency initiatives, and the imposition of penalties.

ROLE OF COMPETITION COMMISSION OF INDIA

The main responsibilities of the CCI in enforcing competition law include-

- **Investigation and Enforcement:** The CCI conducts inquiries into suspected anti-competitive behaviors, which encompass activities like collusion, abuse of market dominance
- **Competition Advocacy**: The CCI actively advocates for competition by raising awareness about competition law and its advantages among businesses, consumers, and other relevant parties.
- **Adjudication:** The CCI possesses the power to make judgments on cases pertaining to anti-competitive conduct and levy fines on offenders as a deterrent against engaging in such practices.

[6] *UNCTAD/DITC/Misc.25*, (Nov. 29, 2002), https://unctad.org/system/files/official-document/ditcclpmisc25_en.pdf.

COMPETITION COMMISSION OF INDIA'S APPROACH TO CARTEL DETENTIONS

Cartels are one of the most serious forms of anti-competitive agreements. CCI employs various approaches to detect and prosecute cartels, including:

1. **Market Monitoring and Intelligence Gathering:** CCI monitors markets and collects intelligence to identify suspicious price behavior or collusive activities.
2. **Whistleblower Complaints:** CCI encourages whistleblowers to report cartel activities and offers confidentiality protections.
3. **Leniency Program:** CCI's leniency program incentivizes cartel members to come forward and disclose cartel behavior in exchange for lenient treatment.

PENALTIES

Authority to Impose Penalties:

The CCI is empowered to levy penalties on businesses or individuals found to have participated in anti-competitive behaviors, which include anti-competitive agreements. The imposition of penalties is a crucial enforcement measure to deter anti-competitive behavior and ensure compliance with competition law.

IMPORTANT CASES

CASES ON HORIZONTAL AGREEMENTS

- In the case of **Express Industry Council of India v. Jet Airways, Indigo Airways, & Spice Jet Airways (2018),** The airlines were discovered to have jointly established a standard fuel surcharge rate of INR 5/kg for the transportation of cargo, which formed a component of the air cargo pricing. Even with fluctuations in fuel prices, the airlines maintained an unaltered fuel surcharge, which was subsequently raised simultaneously by all airlines. While the investigation led by the Director-General did not uncover explicit evidence of collusion among the airlines, it highlighted that their actions were not consistent with fair competition principles.
- In the case of **Builders Association of India v. Cement Manufacturers and Ors.[7] ,** which involved allegations of cartelization among cement manufacturers producing Asbestos Cement Sheets (ACS), as overseen by the Competition Commission of India (CCI) initiated an investigation following a complaint referred by the Enforcement

[7] 2012 CompLR 629 (CCI)

Directorate. The investigation revealed the following key aspects that include Fluctuations in Price and lack of Consistent Price etc

- In the **Aluminium Phosphide Tablets Manufacturers case (2012)[8],** it was established that bid-rigging occurs when all bidders conspire to coordinate their responses to a tender, typically seen in government procurement. Instead of competing with each other, participants in the bidding process secretly collude to support a specific bidder for a particular tender, thereby affecting the pricing. Subsequently, they might agree to split a portion of the commission or profits, or conspire to bid in alignment with their undisclosed agreement on future occasions.

CASES ON VERTICAL AGREEMENTS

- In the case of **Shri Ghanshyam Dass Vij vs. M/S Bajaj Corp. Ltd. & Ors. (2015)[9],** The Competition Commission of India (CCI) referenced a previous case involving Hiranandani Hospital as an analogy. In this instance, accusations were leveled against a Fast-moving Consumer Goods (FMCG) corporation for enforcing vertical limitations on the retail of hair oil. However, the analysis in this instance faced criticism for its limited examination, particularly in evaluating the competitive standing of the accused company in comparison to other brands was emphasized that there was inadequate delineation of the pertinent market and evaluation of the market shares of the involved parties at both supply and distribution levels. As a result, the investigation led to a limited conclusion regarding the Anti-Competitive Effects (AAEC) of the agreement within the specific relevant market for the company's product.
- In the case of **Shri Shamsher Kataria vs. Honda Siel Cars India Ltd. & Ors. (2014),** [10]The informant alleged that the opposing Original Equipment Manufacturers (OEMs) engaged in unjust and anti-competitive arrangements to obstruct aftermarket companies from offering supplementary goods or services, leveraging their dominant position in the aftermarket. In particular, the agreements OEMs made with overseas suppliers, Original Equipment Suppliers (OES), local equipment suppliers, and authorized dealers were examined for potential anti-competitive conduct Under Sections 3(4)(c) and 4 of the Competition Act, while scrutinizing agreements with foreign suppliers, the

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8 *Clbnewsletternov13*, https://www.manupatrafast.in/NewsletterArchives%5Clisting%5CCNB%20Vaish%5C2013/August-November,%202013.pdf.

9 ., [2015] CCI 155

10 https://www.barelaw.in/case-brief-on-shri-shamsher-kataria-v-honda-siel/.

Competition Commission of India (CCI) failed to confirm the existence of anti-competitive agreements between Original Equipment Manufacturers (OEMs) and overseas suppliers due to a lack of adequate evidence. The commission referred to US laws and legal precedents, stressing the necessity for direct or circumstantial evidence that reasonably demonstrates unlawful intentions, which were absent in this instance.

RESEARCH METHODOLOGY

- **Legal Analysis:** Analyzed the relevant laws and regulations related to anti-competitive agreements in India, including the Competition Act, 2002, and the Competition Commission of India's (CCI) regulations and guidelines.
- **Case Study Analysis:** Selected notable cases of anti-competitive agreements in India, such as the CCI's orders and decisions, and analyze the facts, findings, and implications of these cases.
- **Comparative Analysis:** Compared the regulatory framework and enforcement practices related to anti-competitive agreements in India with those in other countries, such as the United States or the European Union.
- **Conclusion and Recommendations:** Drawn conclusions based on the findings and make recommendations for improving the regulatory framework and enforcement practices related to anti-competitive agreements in India.

CONCLUSION

The implementation of the Competition Act represents a notable departure from the scope and regulations outlined in the MRTP Act. In contrast to the MRTP Act, which provided limited safeguards against dominance, cartels, and unfair trade practices, the Competition Act prioritizes Encouraging competition and deterring anti-competitive behaviors and transactions.

Within this revised legal structure the Competition Commission of India (CCI) has played a key role in improving comprehension of competition law in India, particularly through the imposition of substantial fines on entities found to have breached the Competition Act.

There are areas where the CCI's effectiveness could be improved. Specifically, there is a requirement for clearer explanations in the CCI's rulings and reasons for dismissing parties' contentions. Such clarity is crucial not just for the individual cases in question but also for encouraging a broader understanding of the legal framework among the general public.

Furthermore, it would be beneficial for the CCI to publish guidance on significant topics such as principles governing fine imposition, de minimis thresholds, and comprehensive counsel regarding commercial arrangements. These guidelines would offer stakeholders clearer insights and foster uniformity in decision-making. It is expected that the CCI will develop and

SUGGESTIONS

1. **Compliance Programs:** Implement robust compliance programs to educate employees about anti-competitive agreements and the consequences of non-compliance.
2. **Risk Evaluation:** Regularly assess risks to identify potential instances of anti-competitive behavior.
3. **Audit and Monitoring:** Regularly audit and monitor business practices to detect and prevent anti-competitive agreements Competition Law
4. **Compliance Certifications:** Obtain certifications like the Competition Law Compliance Certification (CLCC) to demonstrate commitment to competition law compliance.

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