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**STANDING COMMITTEE ON FINANCE
(2013-14)**

FIFTEENTH LOK SABHA

MINISTRY OF CORPORATE AFFAIRS

THE COMPETITION (AMENDMENT) BILL, 2012

EIGHTY-THIRD REPORT



**LOK SABHA SECRETARIAT
NEW DELHI**

February, 2014/ Magha, 1935 (Saka)

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THE COMPETITION (AMENDMENT) BILL, 2012

Laid in Rajya Sabha on 13 February, 2014

Presented to Lok Sabha on 17 February, 2014



**LOK SABHA SECRETARIAT
NEW DELHI**

February, 2014/ Magha, 1935 (Saka)

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COMPOSITION OF STANDING COMMITTEE ON FINANCE (2013-14)

Shri Yashwant Sinha - Chairman

MEMBERS

LOK SABHA

2. Shri Suwendu Adhikari
3. Dr. Baliram
4. Shri Sudip Bandyopadhyay
5. Shri Udayanraje Bhonsle
6. Shri Gurudas Dasgupta
7. Shri Nishikant Dubey
8. Shri Rahul Gandhi
9. Shri Deepender Singh Hooda
10. Shri Chandrakant Khaire
11. Shri Bhartruhari Mahtab
12. Dr. Chinta Mohan
13. Shri Sanjay Brijkishorlal Nirupam
14. Shri Prem Das Rai
15. Shri S.S. Ramasubbu
16. Adv. A. Sampath
17. Shri Thakur Anurag Singh
18. Shri Subodh Kant Sahai*
19. Dr. M. Thambidurai
20. Shri Shivkumar Udasi
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RAJYA SABHA

22. Shri Naresh Agrawal
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25. Shri Piyush Goyal
26. Shri Satish Chandra Misra
27. Dr. Mahendra Prasad
28. Shri Ravi Shankar Prasad
29. Shri P. Rajeeve
30. Shri Praveen Rashtrapal
31. Dr. Yogendra P. Trivedi

SECRETARIAT

1. Shri A.K. Singh - Joint Secretary
2. Shri Ramkumar Suryanarayanan - Additional Director
3. Shri Sanjay Sethi - Deputy Secretary

* Nominated as Member of the Standing Committee on Finance w.e.f 16th September, 2013

INTRODUCTION

I, the Chairman of the Standing Committee on Finance, having been authorized by the Committee, present this Eighty-third Report on the Competition (Amendment) Bill, 2012.

2. The Competition (Amendment) Bill, 2012 introduced in Lok Sabha on 10 December, 2012, was referred to the Committee on 21 December, 2012 for examination and report thereon, by the Speaker, Lok Sabha under rule 331E of the Rules of Procedure and Conduct of Business in Lok Sabha.

3. The Committee obtained written information on various provisions of the Bill from Ministry of Corporate Affairs and Competition Commission of India (CCI).

4. Written views/memoranda were received from Luthra & Luthra (Law Offices), Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Indian Industry (CII), Associated Chambers of Commerce and Industry (ASSOCHAM), Consumer Unity & Trust Society (CUTS) International and Shri Vinod Dhall, Consultant & Former Secretary, Ministry of Corporate Affairs and first Member & Acting Chairman of CCI.

5. The representatives of the Ministry of Corporate Affairs and CCI briefed the Committee at their sitting held on 1 February, 2013.

6. The Committee, at their sitting held on 19 July, 2013, heard the views of Shri Vinod Dhall, Consultant. The Committee, at their sitting held on 2 August, 2013, heard the views of representatives of CII, ASSOCHAM & CUTS International.

7. The Committee discussed the draft Report at their sitting(s) held on 31 January, 2014 and 11 February, 2014 and adopted the same at their sitting held on 11 February, 2014.

8. The Committee wish to express their thanks to the officials of the Ministry of Corporate Affairs and CCI for appearing before the Committee and furnishing the requisite material and information which were desired in connection with the examination of the Bill.

9. The Committee also wish to express their thanks to the representatives of CII, ASSOCHAM, CUTS International and Shri Vinod Dhall, Consultant for appearing before the Committee and placing before them their considered views on the provisions of the Bill.

10. The Committee also wish to express their thanks to Luthra & Luthra (Law Offices) & FICCI for placing before them their considered views on the provisions of the Bill in the form of memoranda.

11. For facility of reference, the observations/recommendations of the Committee have been printed in thick type in the body of the Report.

**New Delhi;
11 February, 2014
22 Magha, 1935 (Saka)**

**YASHWANT SINHA,
Chairman,
Standing Committee on Finance.**

REPORT

Introductory

1. The Competition Act, 2002 was enacted to provide for establishment of a Commission to prevent practices having adverse effect on Competition, to promote and sustain Competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants and markets, in India. It was subsequently amended in 2007 and 2009.

2. The Competition Commission of India (CCI) was established in 2003; it became fully functional in 2009 after certain amendments through the Competition (Amendment) Act, 2007. The Commission presently consists of the Chairperson and six Members. In pursuance of the discussion in the Parliamentary Standing Committee on Finance on the working of the Commission in May 2011, the Government constituted a High Level Committee under the Chairmanship of Shri Dhanendra Kumar (Former Chairman of CCI). The terms of reference of the said Committee *inter-alia* included recommending changes required in the Competition Act for fine tuning it.

3. The High Level Committee in its report submitted in February, 2012 recommended changes in the Competition Act, 2002. The amendments suggested were considered by the Ministry of Corporate Affairs in consultation with CCI keeping in mind the following principles:-

- (i) Exceptions in law should be avoided as far as possible;
- (ii) The proposed amendments should be in coherence with the proposed National Competition Policy (which is under active consideration);
- (iii) Competition Law should be dynamic and based on the realities of economic development and changes; and
- (iv) Wherever certain aspects could be taken care of by rules or regulations, these need not form part of legislation itself.

4. Accordingly, the Competition (Amendment) Bill, 2012 was prepared and referred to a Group of Ministers under the Chairmanship of Minister of Finance and comprising of Minister of Communications & Information Technology, Minister of Law &

Justice and Minister of Corporate Affairs. As per the approval of the Group of Ministers, revised Competition (Amendment) Bill was submitted to the Cabinet for its approval in October, 2012.

5. The Competition (Amendment) Bill, 2012 was introduced in Lok Sabha on 10 December, 2012. The Bill was referred to the Standing Committee on Finance by Hon'ble Speaker, Lok Sabha on 21 December, 2012 for detailed examination and report thereon.

6. As per the 'Statement of Objects and Reasons', the Competition (Amendment) Bill, 2012, *inter alia*, provides the following, namely:—

- “(a) to insert a new sub-clause (g) in clause (i) of sub-section (5) of section 3 so as to provide that anti-competitive agreements shall not restrict the matters regarding the protection of intellectual property rights for the purposes of clause (i) of subsection (5) of the said section;
- (b) to amend section 4 of the Act relating to abuse of dominant position so as to provide that no enterprise or group either jointly or singly shall abuse its dominant position;
- (c) to amend sub-clause (i) of clause (b) in the *Explanation* to section 5 so as to increase the percentage of voting rights from twenty-six per cent or more to fifty per cent or more for the purpose of regulation of combinations;
- (d) to insert a new section 5A in the Act so as to confer power upon the Central Government to specify, in consultation with the Commission, different value of assets and turnover for any class of enterprises for the purpose of section 5 of the Act;
- (e) the reference of issues by the Statutory Authority to the Commission and the Commission to the Statutory Authority are made mandatory;
- (f) to empower the Commission to decide the matter after hearing the concerned parties in cases where the Commission may not agree with Director General's investigation;
- (g) to make provision that no penalty shall be imposed by the Commission for contravention of the provisions of section 3 or section 4 without giving an opportunity of being heard to the concerned person;
- (h) to amend sub-section (11) of section 31 so as to reduce the period from two hundred and ten days to one hundred and eighty days within which

the Commission has to pass an order or issue direction on combinations and also to amend subsection (12) of the said section so as to increase the period from ninety working days to one hundred and eighty days to bring the time period on par with sub-section (11);

- (i) to amend section 51 of the Act so as to substitute the expression “the Secretary” in place of the “the Registrar” in clause (a) of sub-section (2) of the said section as there is no post of the Registrar in the Commission”.

7. The Committee note that the Competition Act, which was enacted in 2002 and notified in January, 2003 enables the Ministry/CCI to frame Regulations. The Committee find that even after the passage of more than 11 years, Regulations have not yet been framed till now in respect of a number of provisions of the Act. The Committee would urge upon the Ministry to frame these Regulations without further delay.

The National Competition Policy:

8. The Committee have been informed that the National Competition Policy to promote Competition Culture amongst all the stakeholders and to promote transparency, is under consideration. On being asked as to how this policy is going to have impact on the Competition Act or the amendments now proposed, the Ministry of Corporate Affairs in their written reply stated that:- “there is no incompatibility between the proposed policy and the provisions of the Competition Act or amendments thereunder which are now under consideration. The proposed national policy essentially deals with objects like Competition impact assessment and appraisal of competitiveness within existing Departmental regulations which do not find place in the legislation”.

9. The Committee note that the need for National Competition Policy was first highlighted in the 11th Five Year Plan Policy Document. The Committee also note that Section 49 of the Competition Act also envisages a policy on competition. The draft National Competition Policy was submitted by a Committee constituted for the purpose initially in July, 2011 and finally in February, 2012. Thereafter, the draft was given a final shape in the Ministry of Corporate Affairs and is presently under reference to Committee of Secretaries constituted under the

Chairmanship of Cabinet Secretary. The Committee would expect that the Government would finalise the National Competition Policy expeditiously keeping in view both the general and specific observations/recommendations of the Committee on the subject.

Filling up of vacancies in CCI

10. On being asked about manpower and steps taken/proposed to ensure adequate staffing for CCI in the discharge of its duties, the Ministry in their post evidence reply have stated as under:

“As against the sanctioned posts of 156 and 41 respectively for the Commission (CCI) and Office of Director General, the present strength is 84 and 19 respectively. As per the Recruitment Rules, all the posts in Office of the Director General are to be filled in by deputation while the posts in the Commission are to be filled in by a combination of methods viz., deputation, direct recruitment and promotion. During the last three years, three rounds of direct recruitment were carried out. Besides, adequate efforts were also made to fill up the posts earmarked for deputation. In addition to placing the advertisements in leading newspapers, various cadre controlling authorities have also been requested to circulate the posts amongst the eligible candidates. In spite of repeated attempts by the Commission to fill up the vacant posts, both in the Office of Commission and in O/o Director General, candidates possessing requisite qualification and experience could not be found and the Commission is working with 50 per cent of the sanctioned strength. However, it has been ensured that the shortage of manpower does not adversely affect the efficiency of the Commission by making the existing manpower to put extra efforts in an arduous manner and by engaging about 30 Experts/Professionals on short term basis (upto three years) to assist the Commission”.

11. **The Committee note that various posts are lying vacant for more than three years both in the office of CCI and in the office of Director-General. The Committee in their earlier reports relating to the Ministry of Corporate Affairs have time and again expressed concern over persistent shortage of manpower in the CCI and DG office and its adverse impact on their functioning. The primary reason for vacancies, as stated by the Ministry is non-availability of the candidates possessing requisite qualifications and experience. The Committee, therefore, urge upon the Government to undertake comprehensive review of recruitment rules for smooth functioning of the Commission. Efforts should be**

made to recruit/engage domain experts/professionals on contractual basis with a view to professionalizing the working of the Commission and its offices.

12. The Committee received written views/suggestions of experts and organizations viz Luthra & Luthra (Law Offices), Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Indian Industry (CII), Associated Chambers of Commerce and Industry (ASSOCHAM), Consumer Unity & Trust Society (CUTS) International and Shri Vinod Dhall, Consultant & Former Secretary, Ministry of Corporate Affairs and first Member & Acting Chairman of CCI. **After having considered the views of the representatives of the Ministry of Corporate Affairs, Competition Commission of India (CCI), organisations and experts, on the various provisions contained in the Bill, the Committee are of the view that certain provisions of the Bill may be recast to serve the intended objectives better as enumerated in the succeeding paragraphs. The Committee desire that consequential changes may be appropriately incorporated in the Bill/Act.**

Clause 2: Amendment of Section 2(y) (Definition of ‘Turnover’)

13. Section 2(y) of the Competition Act, 2002 reads as under:

“Turnover” includes value of sale of goods or services.

14. The Bill proposes to amend Section 2 to redefine “Turnover” as under:

“after the words ‘goods or services’, the words ‘excluding the taxes, if any, levied on sale of such goods or provision of services’ shall be substituted”.

15. The justification for the proposed amendment, as furnished by the Ministry in their Background note, is as under:

“Existing definition of turnover is ambiguous on the inclusion or exclusion of indirect taxes. This needs to be clarified since turnover has to be precisely determined for the purposes of :- (i) Levy of penalty; (ii) Calculating threshold for notifying the Combination under Section 6 (2) of the Act.”

16. In their written submission furnished to the Committee, Luthra & Luthra (Law Offices) have, among other things, stated:

“.....The exclusion of indirect taxes in calculating turnover is in tune with international practice. The combination Regulations as framed by the CCI provides that these indirect tax components need not be taken into account.

However, the law also needs to provide that the 'Sales rebates', 'grant' and/or 'subsidy', if any from State, should also be not reckoned for calculating 'turnover'.

The Bill also proposes to insert Section 5A that allows the Central Government, in consultation with the CCI, to specify different turnover for any class or classes of enterprises. There might be room to consider proposing a set of guidelines to calculate turnover as has been done in the European Commission (EC)."

17. On this issue, Shri Vinod Dhall, Consultant, in his written submission furnished to the Committee, has *inter alia* also suggested:

".....The amendment should make it obligatory for the CCI to formulate regulations setting out operational guidelines for this purpose."

18. The Ministry of Corporate Affairs in their written replies responded to the suggestion as follows:

"Further amendment in the definition of the term 'turnover' to exclude 'sales rebates', 'grants', 'subsidies' etc. is not desirable as indirect taxes cannot be equated with such largesses. Tax is a levy which is chargeable by operation of law. The proposal to draft guidelines on pattern of European Commission(EC) for calculating turnover will be considered by the CCI through regulations.

.....Section 64 of the Act already enables the CCI to frame necessary regulations, if so deemed fit by the CCI. Therefore, suggestion to create a separate regime in the Act making mandatory framing of regulations by the CCI for computation of turnover is not desirable.....".

19. The CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('Combination Regulations') already contain a provision to aid in the calculation of turnover which states that 'indirect taxes' must be excluded in the computation of turnover.

20. Further, turnover as defined under Article 5 of the Merger Regulation of European Commission (EC) means 'the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover'.

21. The Committee note that since the existing definition of the term "turnover" is stated to be unclear on inclusion or exclusion of indirect taxes, an amendment has been proposed to exclude the taxes levied on sale of goods and provision of

services. It has been submitted before the Committee by some stakeholders that the proposed definition, however, fails to meet the international norms of turnover, for example, Article 5 of the Merger Regulation of European Commission specifically excludes sales rebates. Although the Ministry have not accepted this suggestion, the Committee, would suggest that the Ministry may consider such exclusions from computation of Turnover with a view to aligning the law with analogous international norms/practices.

Clause 3: Amendment of Section 3 (Anti-competitive agreements)

22. Section 3 of the Competition Act, 2002 reads as under:

3. (1) *****

(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.

Explanation.—For the purposes of this sub-section,—

- (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the

prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(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—

23. The Bill proposes to amend Section 3 as under:

“In section 3 of the principal Act,—

(A) in sub-section (4), for the *Explanation*, the following *Explanation* shall be substituted, namely:—

‘*Explanation*.—For the purposes of this sub-section,—

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods or recipient of services, as a condition of such purchase or provision of such services, to purchase some other goods or availing of some other services;

(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser of goods or recipient of services in the course of his trade from acquiring or otherwise dealing in any goods or services other than those of the seller or service provider or any other person;

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or provision of services or allocate any area or market for the disposal or sale of the goods or provision of services;

(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or services are provided or from whom goods are bought or services are availed of;

(e) "resale price maintenance",—

(i) in case of goods includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

(ii) in case of services includes any agreement to provide services on condition that the prices to be charged on retailing of services by the recipient of services shall be the prices stipulated by the service provider unless it is clearly stated that prices lower than those prices may be charged;’;

(B) in sub-section (5), in clause (i) after sub-clause (f), the following sub-clause shall be inserted, namely:—

"(g) any other law for the time being in force relating to the protection of other intellectual property rights;".

24. The justification for the proposed amendment, as furnished by the Ministry in their Background note, is as under:

The words “or services” are missing in all the five explanatory clauses and have been added. The spirit of Act, requires that both goods and services are required to be covered to make the expression “goods and services”.

25. In their written submission furnished to the Committee, Luthra & Luthra (Law Offices) have stated:

“The definition of ‘tie-in arrangement’ still seems to be inconsistent with the conventional definition. Tie-in arrangement has been traditionally referred to situations where customers that purchase one product (the tying product) are required also to purchase another distinct product (the tied product) from the same supplier or someone designated by the latter. The definition of tie-in arrangement in the Act does not seem to necessitate that the two products are distinct [Explanation (a) of Section 3(4) of the Act defines a tie-in-arrangement requires a purchaser of goods, as a condition of such purchase to purchase some other goods]. Perhaps a more coherent and precise definition of the same could be considered. In the EC, there is a safe harbour rule regarding vertical agreements. As per the guidelines relating to vertical restraints, if the market share of the supplier and the buyer is less than 30%, the agreement is presumed not to have an Appreciable Adverse Effect on Competition (AAEC). There is no such safe harbour provision in the Act for vertical agreements. The CCI has quite often looked at the EC guidelines on vertical agreements for guidance. For instance, in *Automobile Dealers Association vs. Global Automobile Limited & Ors.* [Case No. 33/2011], the CCI cited the safe harbour rule of the EC guidelines on vertical restraints in support of its observation that in order for vertical agreements to cause an AAEC, there has to be a significant presence in the market. This highlights the need for further clarifications and guidance in case of vertical agreements”.

26. The Ministry of Corporate Affairs in their written replies have stated:

“The statement that ‘...*the definition of tie-in arrangement in the Act does not seem to necessitate that the two products are different*’ is not borne out from a plain reading of the definition of ‘tie-in arrangement’ as given in Explanation (a) to section 3 (4) of the Act which clearly requires purchasing or availing of some ‘other goods’ or ‘other services’.

The suggestion to incorporate “safe harbour provisions” from EC jurisdiction for vertical agreements in section 3(4) of the Act may not be necessary as the Act in section 19(3) provides for sufficient flexibility to the Commission to determine appreciable adverse effect on competition arising out of such vertical agreements.

It may be further noted that section 19(3) is robust enough to allow the Commission to balance the pro competitive and anti competitive effects of vertical agreements to determine appreciable adverse effect on competition arising out of such vertical agreements. Therefore, the safe harbour provisions as in vogue in the EU do not appear to be required in our context.

It may, however, be added that “safe harbour provisions” can be built into the Regulations of the Commission as and when required”.

27. The Committee have been informed that although Section 19(3) of the Competition Act, 2002 allows CCI to determine Appreciable Adverse Effect on Competition (AAEC), the CCI quite often had to rely on European Commission (EC) Regulations on “safe harbour provisions” in order to decide its case(s). As agreed to by the Ministry, necessary provisions in the CCI Regulations for “safe harbour provisions” may be incorporated under the Act.

Clause 4: Amendment of Section 4 (Abuse of Dominant Position)

28. Section 4 of the Act, reads as under:

“ (1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position 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.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

29. Section 19(4) of the Act, reads as under:

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

30. The Bill proposes to amend Section 4 as under:

“after the words ‘or group’, the words ‘jointly or singly’ shall be inserted”.

31. The Ministry in their Background note justified the proposed amendment on the following grounds :

“The present provision takes care of dominance by an individual company or a group company. It does not enable the CCI to look into cases of joint dominance of two different companies or by association cartels.”

32. In their written submission furnished to the Committee, Luthra & Luthra (Law Offices) have stated:

“.....Joint dominance may be inferred as collective dominance, a concept that is recognised in various jurisdictions including European Commission (EC). The main issue likely to arise is that collective dominance might cover cases that relate to collusion and cartelization proscribed under Section 3 of the Act. Since Section 4 of the Act, unlike Section 3, does not require the CCI (or the informant) to show an Appreciable Adverse Effect on Competition (AAEC), this might result in a situation where enterprises acting in concert but not causing AAEC, as is necessary to contravene Section 3 (1) of the Act, might fall under the ambit of Section 4 (1). Thus, to make the law a little more certain, a competitive impact, i.e. some sort of harm to competition should be made an essential parameter when assessing abuse of dominance.”

33. In their written submission furnished to the Committee FICCI and CII have stated:

FICCI

There is fear of abuse of this amendment which proposes to expand the applicability of Section 4 to cast its net over unrelated enterprises acting together and therefore potentially being ‘collectively dominant’. Practices that occur without any collusion or anti-competitive intent may come within the purview if undertaken by a large section of the market especially in certain industries that are hyper competitive or highly regulated due to the nature of the industry. Conduct sought to be seized by the proposed amendment can be dealt with under the present Section 3 of the Competition Act, 2002 (Anti-competitive agreements), which is wide enough to deal with any form of active or tacit collusion (including parallelism).

An Explanation (aa) below existing (a) below Section 4, may be added as under:

(aa) Joint or collective dominant position means a position of economic strength, jointly or collectively enjoyed by a group of independent enterprises, in the relevant market in India, which enables them to-

Charge excessively high and unfair price, as may be determined by the Commission by regulations, jointly or collectively and are able to control the relevant market independent of competitive forces prevailing in the relevant market, or integrate procurement, sale and after sales services independent of other competitors in the relevant market;

or

adversely affect the remaining competitors or the consumers or the relevant market in its favour.

Insert “or joint” between the words “dominant” and “position” in line second of sub-section (4) of section 19.

...the proposed amendment to present wording of Section 4 be completely avoided. If at all it needs to be retained, the following proposed wording should be added after section 4(2) (e) and before the 'Explanation':

“provided that it shall not be an abuse if the conduct of the dominant enterprise or group is objectively justified.”

CII:

The introduction of the concept of “joint” dominance under Section 4 (1) of the Competition Act raises several concerns, including:

(a) No definition of collective dominance:Although, the Competition Bill introduces the concept of joint dominance, there is no definition provided for same. The absence of any clarification in this regard would result in the CCI having unbridled discretionary powers to assess collective dominance by two or more enterprises.

(b) Risk of scrutiny under both Section 3 (3) and Section 4:..... In the absence of clear evidence on concerted action (which may be lacking in concentrated markets), it may be difficult for the CCI to establish a case under Section 3(3) of the Competition Act. In such an event, the CCI may with the proposed amendment, bring a case under section 4 (1) of the Competition Act, which does not require it to show the existence of an agreement or concerted action. Introduction of the concept of “joint” dominance is likely to blur the distinction between Section 3(3) and Section 4 of the Competition Act.

(c) Increased cost of compliance: The introduction of the concept of “joint” abuse of dominance would mean that an enterprise which was, on its own, not likely to be considered as dominant, may now become one. Consequently, its business practices which were permissible thus far may become problematic once the Competition Bill 2012 becomes the law. Firms which were traditionally not

concerned about compliance risks under Section 4 of the competition will now have to tread with caution and re-assess their business practices.

(d) Contradiction between Section 4(1) and Section 19(4): While the Government has introduced changes to the text of Section 4(1) of the Competition Act, there is no corresponding change in the language of Section 19(4) of the Competition Act which prescribes the factors that the CCI shall consider while assessing dominance.

In light of the above, and considering the fact that India's competition regime is at a nascent stage, the proposed amendment to include the concept of joint dominance in Section 4 of the Competition Act should be reconsidered by the Government".

34. ASSOCHAM, in their post evidence reply, have, however, stated that they do not support the proposed amendment to Section 4 on the following grounds:

"The concept is not very successful in matured jurisdictions and has been very sparingly used. India being a young jurisdiction, inserting this complex amendment may not be necessary at this stage since the principal law already captures this concept especially sub-section (3) of Section 3 of the Act."

35. Shri Vinod Dhall, Consultant, in his written submission furnished to the Committee, has also stated in this regard as follows:

"Collective dominance is a complex concept and is not widely used. In the European Union, it did not find place in the original legislation (The Treaty for the European Union or TFEU) but grew during the 1990s through certain decisions of the courts. It has taken the courts several cases to progressively develop and clarify the concept, yet it is not frequently resorted to even in the EU. The difficulty in invoking this concept arises from certain practical difficulties in enforcement of the concept:

How to distinguish a position of collective dominance under Section 4 (as proposed) from a cartel under Section 3(3) of the Act?

How to distinguish a position of collective dominance from a structure of oligopoly, which is economically well understood and wherein a few players perform are in a position of tacit cooperation?

In the EU there is a very strict burden of evidentiary proof for collective dominance. This requires sophisticated analysis by the competition authority. Competition law in India is still in a nascent stage and the capabilities of the CCI too are gradually progressing.

In view of the above, it is submitted that it would be quite premature to introduce the concept of collective dominance at this point in time. It could create confusion in the minds of the market players and would also be a challenge for the CCI to enforce the concept.

If despite the above reservations, the concept of collective dominance is introduced in the Act, the definition of “dominant position” in the Explanation to Section 4 would also need to be amended and the words “jointly or singly” would need to be specifically included to ensure there are no ambiguities in the Act.”

36. On being asked to clarify the necessity of proposed amendment to Section 4 of the Competition Act, 2002, the Chairperson, CCI while tendering evidence before the Committee stated:

“.....if there are four or five entities in a oligopolistic market situation not structurally related to each other and they are not even forming a cartel because there is no evidence that there is a cartel, yet as economic entities they are acting in concert. If it becomes a law, then it will certainly strengthen the hands of the Competition Commission to look at the cases of this type in a market where there are a few players and there may be no clear evidence of cartelisation but there is a sort of *de jure* cartel which is operating”.

37. In this regard, the Ministry of Corporate Affairs have submitted a detailed written reply as follows:

“The provisions of Sections 3 and 4 of the Act are not mutually exclusive. Appreciable Adverse Effect on Competition (AAEC) is in-built in the very definition and factors of dominance as laid down in Section 19(4) which enables the Commission to consider a number of factors to assess whether an enterprise enjoys a dominant position including as per Section 19(4)(m) “*any other factor which the Commission may consider relevant for the inquiry*”. Therefore, separate AAEC is not required to be established in cases relating to abuse of dominant position.

Defining ‘joint or collective dominance’ may not be necessary. It may be noted that even in EU, the term ‘joint’ or ‘collective’ dominance is not defined, it is a concept that has been developed through the jurisprudence of the EU courts. Further, provisions that cover joint dominance are intended to address the concern that firms which operate in oligopolistic markets may interact in such a way as to result in higher prices and profits for those firms, but a welfare loss on account of consumers and left over competition. The provisions in this regard exist in jurisdictions like EU and Canada. Russia introduced it in year 2006.

The importance of collective dominance from the Commission’s perspective is that it would provide it with a tool against, say, oligopolists where explicit collusion cannot be proved.

The apprehension based on the abuse of the proposed amendment to Section 4 of the Act is misplaced. In fact, one of the purposes of bringing-in the concept of ‘joint dominance’ on the statute book is to deal with entities which are structurally unrelated but are otherwise jointly dominant.

The further suggestion to incorporate an explanation to Section 4 of the Act to provide for the defence in such cases based on objective justification may not be necessary as the scheme of Section 4(2) of the Act gives sufficient defence to the parties in breach to deny the abuse.

The suggestion for re-consideration of the proposed amendment to bring-in the concept of joint dominance does not appear to be correct. The grounds given for such suggestion *inter alia* include risk of scrutiny of a conduct under both Sections 3(3) and 4 of the Act. Such assumption is not well placed. Provisions of Sections 3 and 4 are not mutually exclusive. Hence, the apprehension of scrutiny under both the provisions is based upon a mistaken assumption that both the provisions cannot be applied to examine an act/ conduct.

The objection based on increased cost of compliance is also misplaced.

The CCI through its advocacy initiatives encourages enterprises to adopt competition compliance programmes. CCI has also prepared a booklet on the subject for ready reference by the enterprises.

The difficulties pointed out do not make out a case for not factoring in the possibility of two or more entities joining hands to gain dominance with a view to abuse that dominant position.

The plea with regard to difficulty in distinguishing between 'cartels' and 'joint dominance' appears to be untenable. Cartels have been used in the context of 'anti-competitive agreements' which connote a situation (in Section 3) where agreements, express or implied, are apparent. Abuse of dominance (in Section 4) operates in the general course of conducting business as evident from sub-clauses (a) to (e) of sub-section 1 of Section 4.

38. The Ministry have, therefore, stated that the explanation (a) in Section 4, could, however, be suitably revised to include the cases of joint dominance as below:

Abuse of dominant position.....

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group **jointly or singly**:-

(a) directly or indirectly, imposes unfair or discriminatory-.....

Explanation.—For the purposes of this section, the expression:-

(a) "dominant position" means a position of strength, enjoyed by an enterprise or a group **either jointly or singly**, in the relevant market, in India, which enables it **or them** to:-

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its **or their** competitors or consumers or the relevant market in its **or their** favour.

39. Subsequently, the Ministry have stated in their written replies as under:

The proposed addition of the words 'jointly' or 'singly' in explanation (a) below Section 4 does not appear to be necessary as the amendment proposed in

Section 4(1) is of an explanatory nature; It does not alter the ingredients of the concept of 'dominant position'."

40. The Ministry have agreed that Section 19(4) of the Act needs consequential changes arising out of proposed concept of joint dominance in Section 4 of the Act and the proposed draft amendment is as under:

"(4)The Commission shall, while inquiring whether an enterprise or a group either jointly or singly enjoys a dominant position or not....."

41. **The Committee note that the Bill proposes to amend Section 4(1) of the Competition Act, 2002 to provide that no enterprise or group 'jointly or singly' shall abuse its dominant position. However, corresponding/consequential changes in Section 4(2), Explanation(a) in Section 4 and Section 19(4) have not been proposed. On being pointed out, the Ministry have furnished divergent views on amending Section 4. Initially, the Ministry agreed to amend the aforesaid explanation, however, subsequently held the view that addition of words 'jointly or singly' in Explanation(a) below Section 4 was not necessary as the proposed amendment in Section 4(1) does not alter the ingredients of the concept of 'dominant position'. The Committee would expect the Ministry to reconcile this divergent position and bring in suitable amendments in the above Section so that there are no ambiguities in the proposed legislation. It is expected that the above amendments will help the CCI in dealing effectively with "collective dominance" cases, especially when firms operate in oligopolistic markets, interacting in a manner resulting in unusually higher prices and profits to the detriment of consumers.**

Clause 5: Amendment of Section 5 (Definition of Group)

42. Explanation under Clause(b) of Section 5 of the Act reads as under:

"Group" means two or more enterprises which, directly or indirectly, are in a position to –

- (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
- (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(ii) control the management or affairs of the other enterprise;

43. The Bill proposes to amend Section 5, as under:

“...in the *Explanation*, in clause (b), in sub-clause (i), for the words ‘twenty-six per cent’, the words ‘fifty per cent’ shall be substituted.”

44. The justification for the proposed amendment as furnished by the Ministry in their Background note, is as under:

“Ownership of a company is not considered to be explicit unless more than 50% shares are owned by an entity. Merger and combination cases with only 26% control by a group company were included for compulsory notification. This was objected to by the industry, therefore, groups falling between twenty six and fifty percent shares were exempted under Section 54. It is now proposed through this amendment to build this provision in the Act.”

45. In their written submission furnished to the Committee, Luthra & Luthra (Law Offices), FICCI and ASSOCHAM have stated:

Luthra & Luthra (Law Offices):

“.....One effect that is likely to arise from this amendment is a divergence between the notification requirement under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 (Takeover Code), which mandates an acquirer to make an open offer when the acquisition results into entitlement of 25% or more voting rights in the target company [Regulation 3(1) of the Takeover Code]. Additionally, the Bill seems to have overlooked Schedule I Entry I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination regulations). Schedule I Entry I of the combination Regulations states that transactions comprising of acquisition less than 25% of voting rights need not notify. If the definition of group is altered as per the Bill, the Combination Regulations would need to be synchronized with the changes introduced through the Bill. Lastly, the increase in the limit of voting rights to 50% might present a situation where an acquirer that has 49% voting rights in one enterprise acquires 49% voting rights in its direct competitor. This is likely to impact competition yet keep the scenario out of the purview of Section 6 of the Act [Section 6(1) of the Act prohibits an enterprise from entering into a transaction that may cause an AAEC.]. This shows that changing voting rights from 26% to 50% when defining a group might be a bad law as it is not likely to prevent the AAEC the particular transaction is probably going to cause”.

FICCI:

“The amendment also brings the definition of “group” in line with what constitutes a “subsidiary” under the Companies Act, 1956 – not clear what the distinction between ‘enterprise’ and ‘group’ remains as a result, since enterprise includes subsidiaries.

Further, Para 8 of the Exemption Schedule exempts an acquisition of control / shares / voting rights or assets by one person or enterprise of another person or enterprise within the same Group. A clarification regarding the applicability of Para 8 of the Exemption Schedule to intra- Group combinations, notwithstanding the provisions of Para 2 of the said Schedule would be in order”.

ASSOCHAM:

“Such an insertion may lead to regulatory uncertainty and as such is not recommended to be inserted at this stage. The existing provisions of Section 4 read with Section 28 of the Act and Statutory Regulations of the CCI would cover instances of abuse by entities falling below the threshold. Also, the existing provisions of Section 54 enable the Government to exempt certain class of enterprises from the purview of the Act.”

46. On being asked to respond to the objection stated to have been raised by the industry on shareholding pattern and ownership of Companies, the Ministry of Corporate Affairs in their post-evidence reply have stated:

“In terms of sub-clause (iii) of clause (b) under explanation to section 5 of the Act, a ‘group’ can be determined on the basis of the extent of voting rights, ability to appoint a majority of the members of the Board or by control of the management of affairs of the enterprise. Thus, the extent of voting rights is only one of the three limbs that determines ‘group’.

By the proposed amendment, only those enterprises will be affected where the extent of voting rights is between 26% and 50%. However, the other two limbs of the ‘group’ explanation as expressed above could still be used to determine whether it is a group enterprise.

This amendment is also in line with the notification dated 4th March 2011 issued by the Government of India, whereby the Central Government, in public interest, had exempted the ‘Group’ exercising less than 50% of voting rights in the other enterprise from the provisions of Section 5 of the Act for a period of five years.

47. In their written submission furnished to the Committee, CUTS have stated:

“As same definition of ‘group’ is applicable to Sections 4, 5 and 27 (and Sections 4 and 27 make reference to definition under Section 5), it is preferable to define ‘group’ under Section 2.”

48. The Ministry of Corporate Affairs while accepting the said suggestion have stated in their written replies as follows:

“The consequential changes in explanation C of Section 4, explanation C of Section 5, explanation D of Section 5 and sub-section (g) of Section 27 may also be required.”

49. It has been suggested that as the same definition of ‘group’ with regard to enterprises operating in the market is applicable to all the relevant Sections in the Act, namely, Sections 4, 5 and 27, it would be preferable to define the term at the outset under Section 2 of the Act. The Committee desire that such basic definitions should not be dispersed in different provisions of the Act but under the definition section of the Act itself.

Clause 6: Insertion of new Section 5A (Power to specify different value of assets and turnover)

50. Clause 6 reads as under:

“After Section 5 of the principal Act, the following section shall be inserted, namely:—

"5A. Notwithstanding anything contained in Section 5, the Central Government may, in consultation with the Commission, by notification, specify different value of assets and turnover for any class or classes of enterprise for the purpose of Section 5".

51. Section 20(3) of the Competition Act, 2002 reads as under:

(3) Notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover, for the purposes of that section.

52. Section 54 of the Competition Act, 2002 reads as under:

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 relating to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relating to the sovereign functions.

53. The Ministry of Corporate Affairs in their Background note, justified the proposed amendment as stated below:

“To enable different thresholds of value of assets and turnover for different classes of enterprises for the purpose of bringing them more closely under the Competition Commission in the event of acquisitions, mergers and amalgamations. This was considered necessary to address specific sectors with implications or public interest (which may otherwise escape scrutiny because of high thresholds under Section 5).”

54. The Ministry have further added that:

“The background for this proposed amendment was that the Government of India, as part of its public policy paradigm, wanted to oversee the brownfield mergers and acquisitions in the pharmaceutical sectors as there was a rising concern that MNCs were coming into India and taking over the Indian pharmaceutical sector which may be to the detriment of the Indian consumers/ patients/ health care.

A Committee was set up to look into this aspect and the committee recommended that brownfield acquisitions should be overseen and this aspect could be given to CCI. Taking this as a starting point, when CCI looked into the pharma sector, it was pointed out that unless the threshold are lowered, it may not be possible for CCI to look into this issue. Therefore, in order for CCI to fulfill its mandate, and taking into account the special characteristics of Indian industries which impact public interest, such as pharma, this proposal is important. The proposed amendment simply empowers the Government to only raise or lower the thresholds.

It may be pointed out that *vide* the proposed amendments the legislature would be conferring/ delegating the power upon the Government (which is to be exercised in consultation with CCI). Such conferment of power by the legislature in favour of executive on the grounds of expediency should not be construed as detracting the power of the legislature. The legislature always retains its supreme authority and the executive would always be accountable for its actions to the legislature.

In this context, it may be mentioned here that in select market situations, relative weight of a transaction, which may be much below the prescribed thresholds, may necessitate scrutiny on account of public good. Such *ex ante* scrutiny may prove to be better than *ex post facto* remedial action under Section 4. Further, the need for clarity in case of vertical/ conglomerate mergers can be addressed in the notification.”

55. When questioned about the need to give wide discretionary powers to the Government under the newly proposed Section 5 A, the Ministry in their post evidence reply stated as under:

- “(i) The provisions of the Competition Act, 2002 relating to the combinations have been in force with effect from 1st June, 2011. The parties to a transaction are required to seek the Commission’s approval only if they (the parties to such transaction) exceed the quantitative asset or turnover thresholds mentioned in the Act. These asset/turnover thresholds are uniform across all industry sectors. It is noticed that these thresholds are so high as to minimize many cases of proposed combination coming within the purview of the Competition Commission. Indeed, so far not a single case has been dealt with by the CCI.
- (ii) Further, it has been the experience of the Commission during the implementation of the combination provisions in the Act over the last 20 months (since 1st June 2011), that different kinds of industry sectors have different relationship between assets and thresholds, and that sometimes, certain important transactions may escape a mandatory filing with the Commission either due to the extremely high asset/turnover thresholds specified in the Act, or due to the ‘target company exemption’ notification issued by the Ministry of Corporate Affairs on 4th March, 2011. It is therefore essential to bridge this gap and bring relevant transactions in certain important sectors like the pharmaceuticals industry, within the purview of the Commission’s mandate, for which the Government of India has suggested an amendment to bring the new section 5A.
- (iii) It may also be stated that Section 54 of the Act already empowers the Central Government to exempt classes of enterprises from the application of the Act, if such exemption is necessary in the interest of security of the State or public interest. The proposed amendment is only to enable the Government to raise or lower the threshold.
- (iv) this aspect engaged the attention of the Government primarily in the context of apprehensions that combinations in the Pharmaceutical Sector may have adverse effect on prices of certain drugs owing to possible reduction in number of sources of supplying of a particular medicine, which will not only impinge on competition but will also have deleterious consequences for public health.

Keeping in view such factors it is urged that an enabling power needs to be acquired to ensure that sectors where combinations at lower thresholds of turnover or asset values are likely to adversely affect public interest the scrutiny of CCI could be brought into play.”

56. In their written submission furnished to the Committee, Luthra & Luthra (Law Offices), ASSOCHAM, FICCI, CII, CUTS and Shri Vinod Dhall, Consultant have suggested:

Luthra & Luthra(Law Offices):

“The power given to the Central Government to change the threshold limit for any enterprise might defeat the purpose of making notification mandatory for all sectors. This provision might be seen providing the government with very wide and discretionary powers.

ASSOCHAM and FICCI:

The following may be added below the proposed insertion:

Provided that prior to issuance of the notification, the Commission shall make a public announcement of the proposed different value of assets and turnover as above with economic and commercial justifications in its official website and by any other modes of communication with a direction to any person and/or enterprise directly or indirectly affected by such changes in assets and turnover to express its/their views in writing within a period of 30 calendar days from the date of publication of public notice. Provided further that the Commission, after receipt of the written views of the person and/or enterprises as above, shall announce the revised assets and turnover and the reasons therefore after considering all the views within a reasonable period of time but not exceeding 60 calendar days from the date of closure of the receipt of the views from persons and/or enterprises.

CII:-

.....Considering that the provisions relating to merger control in most jurisdictions apply uniformly across all industries sectors, and the fact that India's, merger control regime is still at a nascent stage, it is imperative that the Central Government reconsiders the idea of introducing sector specific thresholds or in the alternative introduce strict quantifiable criteria which must be satisfied before the Central Government/CCI may prescribe different thresholds for a class of enterprises.

CUTS:-

In order to provide broad principles on the basis of which the Central Government may be guided to specify thresholds other than those provided under Section 5 (and to prevent thresholds being determined by other considerations), it is proposed to add the words “keeping in mind objectives of this Act, after the words ‘the Central Government may’.”

Shri Vinod Dhall:-

.....if the proposed amendment is to be accepted, it is necessary to so circumscribe it that it can be used only in exceptional cases, and for very compelling reasons only.

It is also suggested that the issue of how a revised set of thresholds would apply in case of a vertical or a conglomerate merger; where say a pharmaceutical major is acquiring a beverage company or a non-pharmaceutical company is acquiring a pharmaceutical company would need to be clarified”.

57. The representatives of CII and ASSOCHAM while deposing before the Committee added further as under:

CII:

“.....The CII believes that the pharmaceuticals sector example should not now result in giving the blanket ability for the Commission to now regulate each sector. What we feel this will do is, it will allow for multiple notifications for multiple sectors with multiple changes at multiple times, it will cause uncertainty, it will seek to capture low value transactions which, from the philosophy of the Competition Act, were not intended to be captured because that is why Section 5 was enacted. We can give you a set of countries where this is done. But most countries do not have sector specific exemptions. So, India would be in a clear minority if it also took that approach.

We are still at the early stages of Competition Law. We still have to settle down. It has been two years since combination and merger regulations have taken effect. Therefore, our submission is that this may be a little too much; too soon and a concern in the pharmaceuticals sector should not lend itself to a blanket re-opening of Section 5.

ASSOCHAM:

“In Section 5 (A), there is a proposal to vest with the Government the power to issue notifications and reduce thresholds. will bring in uncertainty. You will have notifications like you have in the Income Tax Act. Every six months, you will have a notification after notification.merger may never happen. The intent of competition bringing strengths together may not happen and that will be again contrary to mergers of strengths of people for the ultimate benefit of the public. So, we have to be very careful, Sir, because we are going to hand over to the Government a power that can be used at any time without control and they can bring down the thresholds.....to the regulator,It is far too early; it is contrary to our requirement of size and the need for us to grow. We have had a blow. The entire economy of the world is reeling under the 2008 recession. Our chance to grow now is going to happen. If at this stage, we are dealt with another blow which examines even smaller companies, then our dream of growing big in the global place will be defeated and, therefore, that requires serious consideration.

In the event, however, the hon. Committee feels that there is a need for us to provide or there must be adequate safeguards, there must be consultations.

Each time the Commission wants to go ahead and recommend something, it must hold consultations with the stakeholders..... Today it is the pharma sector; tomorrow somebody may say even grocers. In the EU, people have been targeting and saying that people who manufacture eggs, poultry farmers, are subjected to this kind of a control because they are so dominant and they are so large. That may happen here also. We cannot fathom which sectors may be. But there is already a provision that the Parliament, in its wisdom, had already enacted, which is Section 54..... you can exempt certain sectors for certain periods from the purview of the Act. That is adequate protection.Therefore, there is no need to duplicate or bring out something which is contrary to the Act.”

58. The Ministry of Corporate Affairs in their written replies have informed the Committee that the argument advanced against introducing an enabling provision to prescribe a different threshold for a specific sector (or sectors) is based on apprehensions, which are patently unfounded for the following reasons: -

- “(i) Leaving aside lack of evidence about ‘indiscriminate use of such carve out in any jurisdiction the power to carry out scrutiny of a proposed combination will continue to be with the same regulator which will have to determine if a proposed combination has Appreciable Adverse Effect on Competition (AAEC).
- (ii) The timeliness prescribed in the Act for completion of the process of scrutiny in case of combinations are quite reasonable. A sector with different threshold is thus not at a disadvantage vis-à-vis other sectors merely for the reason that a case of combination in a specified sector will put that sector at a disadvantage vis-à-vis other sector.”

59. The Committee note that an amendment has been proposed to introduce a new Section 5A in the Competition Act, 2002, enabling the Central Government to lay down, in consultation with the CCI, different thresholds of values of assets and turnover for different classes of enterprises for the purposes of examining notifiable combinations keeping in view industry specific market requirements. The Committee desire that necessary safeguards may be built in Section 5A viz. quantifiable criteria and mandatory consultation with stakeholders. The Committee would also suggest that this provision may be used in a pragmatic manner that does not hamper the processes of consolidation and rationalization in industry.

Clause 7: Amendment of Section 9 (Insertion of sub-section 1A to include Chairperson, CCI in the selection Committee for selection of members)

60. Section 9 of the Competition Act, 2002 reads as under:

“Selection Committee for Chairperson and Members of Commission-

9(1) The Chairperson and other members of the Commission shall be appointed by the Central Government, from a panel of names recommended by a Selection Committee consisting of

- a) the Chief Justice of India or his nominee ---- Chairperson;
- b) the Secretary in the Ministry of Corporate Affairs ---- Member;
- c) the Secretary in the Ministry of Law and Justice ---- Member;
- d) two experts of repute who have special knowledge ---- Members.

of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy

9(2) the term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.”

61. The Bill proposes to amend Section 9 as under:

“In section 9 of the principal Act,—

(a) in sub-section (1), the words "and other Members" shall be omitted;

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

(1A)The Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of—

- (a) the Chief Justice of India or his nominee — Chairperson;
- (b) the Secretary in the Ministry of Corporate Affairs — Member;
- (c) the Secretary in the Ministry of Law and Justice — Member;
- (d) the Chairperson of the Commission — Member;
- (e) one expert of repute who has special knowledge of, and professional experience in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy — Member. ”

62. The requirement and justification for the proposed amendment, as furnished by the Ministry in their Background note, is as under:

“To enable the Selection Committee to use the expertise of Chairperson, CCI for selection of Member as is the case for the selection of Members of the Company Law Board (CLB), where Chairperson, CLB is also a Member of the Selection Committee for selection of Member, CLB.”

63. In their written submission furnished to the Committee, ASSOCHAM and Shri Vinod Dhall, Consultant have stated:

ASSOCHAM :

“The proposal should not affect the performance of the Commission and adversely impact the industry and other stakeholders *a la* SEBI, PNGRB (Petroleum and Natural Gas Regulatory Board) etc. as such as suitable safeguard may be inserted either in the substantive law or Rules made in terms of section 63 of the Act.”

Shri Vinod Dhall:

..... This would enrich the proceedings of the Selection Committee as it would enable the Chairman, CCI to bring to the proceedings of the Selection Committee a perspective based on the actual functioning of CCI and the need to keep in mind any particular skills, background or experiences the selected candidate should have that would be most beneficial to the deliberations of the CCI.

64. ASSOCHAM in their post evidence reply have, however, stated as under:

“Inclusion of Chairperson as one of the Members of the Selection Committee for other Members may disturb the equilibrium already existing. The Chairman is only the first amongst equals. Chairperson can always be called by the Selection Committee for his/her expert views. It is thus recommended to drop the proposed amendment.”

65. The Chairperson, CCI while deposing before the Committee during oral evidence stated on the proposed Selection Committee as under:

“ The idea is that what particular skill is needed to be added or what is required in the Commission that input comes in. If the input is there, I am sure the process of selection is going to be equally good. So, that again is something which is proposed as an institutional improvement”

66. In this regard, the Ministry in their replies inter alia added as under:

“..... While the fact of the Committee being presided over by the Chief Justice of India or a sitting judge of the Supreme Court itself ensures fair play on part of the Committee, building further safeguards in Rules could be considered at an appropriate stage.

67. When asked to explain the proposal for inclusion of the Chairperson as a member of the Selection Committee and whether similar provisions exist in other regulatory bodies, the Ministry in a post-evidence reply stated as under:

“The primary consideration is to bring in the perspective of the Commission itself while selecting members. It may be pointed out that similar procedure exists for the appointment of Members of SEBI and Company Law Board.”

68. According to the Ministry, the Bill proposes to include Chairperson, CCI as one of the Members of Selection Committee so as to use his expertise in selection of Members of the Commission in order to achieve institutional improvement. The Committee have been informed that similar provisions exist for the selection of Members of Securities and Exchange Board of India (SEBI) and Company Law Board (CLB). In response to a suggestion of one of the stakeholders with regard to providing suitable safeguards, the Ministry of Corporate Affairs have stated that incorporating safeguards in Rules could be considered at an appropriate stage. As the Ministry have, in principle, agreed to the suggestion, the Committee recommend that it would be in the fitness of things if the requisite safeguards are provided in the Rules straightaway.

69. The Committee further note that the Bill proposes to have two distinct Selection Committees- one for the ‘Selection of Chairperson’ and another for the ‘Selection of Members’. However, no change has been proposed in heading of Section 9 which reads as “Selection Committee for Chairperson and Members of the Commission”. Similarly, no change has been proposed in Section 9(2) which reads as “the term of the Selection Committee and the manner of selection of panel of names shall be as such as may be prescribed”. The Committee, therefore, suggest that in the heading of Section 9, for the words ‘Selection Committee’, the words ‘Selection Committee(s)’ be substituted. Further, a sub-heading viz ‘Selection Committee for Chairperson’ be inserted above Section 9(1). Similarly, after Section 9(1) and before the proposed Section 9 (1A) another sub-heading viz “Selection Committee for Members” be inserted. Consequential changes in other relevant Sections/Rules may also be made so as to avoid any ambiguity on this aspect.

Clause(s) 9, 10 & 11: Amendment of Section 21(Reference by statutory authority), Section 21A (Reference by CCI) and Section 27 (Orders by Commission after inquiry into agreements or abuse of dominant position)

70. Section 21 of the Competition Act, 2002 reads as under:

“(1) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission:

Provided that any statutory authority, may, *suo motu*, make such a reference to the Commission.

(2) On receipt of a reference under sub-section (1), the Commission shall give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of the Commission and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion.”

71. The Bill proposes to amend Section 21 as under:

“In section 21 of the principal Act, in sub-section (1),—

(a) for the words "is raised by any party", the word "arises" shall be substituted;

(b) for the words "authority may", the words "authority shall" shall be substituted;

(c) the proviso shall be omitted.”

72. Section 21A of the Competition Act, 2002 reads as under:

“(1)Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a reference in respect of such issue to the statutory authority:

Provided that the Commission, may, *suo motu*, make such a reference to the statutory authority.

(2)On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion”.

73. The Bill proposes to amend Section 21A as under:

“In section 21A of the principal Act, in sub-section (1),—
(a) for the words "is raised by any party", the word "arises" shall be substituted;
(b) for the words "this Act", the words "any Act" shall be substituted;
(c) for the words "Commission may", the words "Commission shall" shall be substituted;
(d) the proviso shall be omitted.”

74. The Bill also proposes to amend Section 27 as under:

“in clause (g), after the proviso, the following proviso shall be inserted, namely:—

‘Provided further that while passing orders under this section, the Commission shall give due regard to the opinion given by the statutory authority, where such opinion has been obtained under the provisions of sub-section (1) of Section 21A of this Act.’

75. In their written submission furnished to the Committee Shri Vinod Dhall, ASSOCHAM and FICCI have stated :

Shri Vinod Dhall:

“It is difficult to visualise situations where any proposed order of the CCI would violate provisions of any Act or vice versa for other statutory authority. It is unclear how such an issue will be identified or what will be the basis to determine that such an issue has arisen (and at what stage of the proceeding) so as to obligate CCI or the statutory authority to make a reference. The mandatory nature of the provision also narrows the scope of application for such consultation process.

There may also be apprehension that such mandatory consultations will inordinately delay the process of decision making especially in a combination case, where a time limit is set out by the Act.

Therefore, it is suggested that both Sections 21 and 21A may be replaced by a separate provision whereby the CCI or the statutory authority should have the ability to consult each other if either is of the view that such consultation will assist in the decision making process.

ASSOCHAM:

“Deletion of the words “is raised by any party” and replacing the same by the word “arises” will give rise to a situation where the authorities (i.e. CCI and the Statutory Authority) will have exclusive jurisdictions to decide as to whether or not a cross reference to each other is necessary in cases of overlap of jurisdictions. The intention may be good, but the consequences could be, at times, very complex and may lead to protracted litigations. If this power of cross referencing is given to the authorities with a mandate to compulsorily refer to

each other, the party/parties not agreeable or affected adversely by such cross referencing will have no opportunity to ventilate its grievances unless a remedy by way of an appeal is inserted in section 53A of the Act. The Amendment Bill has already considered a suitable amendment in section 27 (g) to take into consideration of this insertion as such addition of this in appeal provision will be in order. Therefore, following sections may be inserted in section 53A;

“In Section 53A(a) insert section 21, 21A before Section 26”

FICCI :

The proposed amendment to Section 27 states that due regard must be given to the opinion of the Statutory Authority sought through this process. It may be helpful to move this amendment here, so that it applies to orders passed under Section 26 as well”. Section 21A may be amended to include the following after the existing section:

While passing any orders under the provisions of this Act, the Commission shall give due regard to the opinion given by such statutory authority.”

76. When asked as to how the mandatory consultation between CCI and sectoral regulators is proposed to be achieved and in the event of a disagreement, who will prevail, Chairperson, CCI while deposing before the Committee submitted as under:

“...The other point which hon. Members had raised was sectoral regulators and CCI, and whether CCI is the super regulator, etc. CCI is purely a market regulator; it is nothing more than that – it is no less, no more; it is not a super regulator. The sectoral regulators have their functions to do, which relate to technical aspects, licensing conditions, maybe, tariffs, and so on and so forth. They tell that segment of industry what to do; the CCI will oversee what their behaviour is, what they should not do and if they are doing something which they should not be doing, as laid down in the Act, and then to penalize them.

The provision for consultation is voluntary. There have been 1-2 instances where it has not worked. So, it was felt that a stipulation of mandatory consultation would perhaps make things work more efficiently because these are the initial years where this process of regulation and the way the regulators function has to stabilize. As to the question, who will prevail? If it is the sectoral regulator’s domain, we will consult them, and they will take the decision. If the sectoral regulator consults us, and it falls in the domain of the CCI, then CCI will take the final decision. The amendment Bill says that due regard will be had to the opinion of the sectoral regulator.”

77. In this regard, the Ministry of Corporate Affairs in their written replies have stated the following:

- “ (i) The amendment has been proposed as conflict of jurisdiction between regulators operating in different sectors or different facets of economy would of necessity arise as a degree of over-lap in the functioning of competition regulator and sectoral regulators in areas like Power, Telecommunication and Civil Aviation etc. In a few cases, the process of voluntary consultation was not found to have worked. Therefore, it has been felt that stipulation of mandatory consultation would make the entire process, work more efficiently and in harmony, instead of uncertainty and unpredictability associated with a voluntary process.
- (ii) The suggestion to move the proposed proviso to section 27 of the Act (which mandates the Commission to have due regard to the opinion of the statutory authority) to section 21 A itself is agreed to.
- (iii) The suggestion to make orders making references to the sectoral regulator and *vice versa* appealable is fraught with dangerous consequences as it will lead to multiplicity of litigation and prolonging matters”.

78. On further being asked about the position with regard to the jurisdiction of the Competition Commission of India vis-à-vis other sectoral regulators compared to the position in other countries of the world, the Ministry in their post evidence reply stated as under:

“Most of the regulatory authorities have been created under Acts of Parliament to serve specific tasks. Most of the sector specific regulators are tasked with (a) market development or entry regulation (b) tariff determination; (c) sector specific technical matters; (d) consumer issues etc. The role of such regulators in creating the market which supports competition is well articulated in the relevant law. It would be, therefore, reasonable to say that in general the jurisdiction of sectoral regulators arises *ex ante*. On the other hand, the jurisdiction of Competition Commission arises *ex post facto* or after the commission of an overt act with implications on competition although there is a preventive jurisdiction also in a few cases. Various countries have now gained experiences to deal with the interface between sectoral regulatory authorities and the competition authority. Countries, with a longer exposure to competition regulator such as, those in the EU, Japan, USA and Australia and even some of the 'recent arrivals' such as, Pakistan, Indonesia, South Africa, South Korea, etc, have largely moved in the direction of allowing the competition authority to monitor and regulate the competition matters across all sectors of an economy. This indicates a policy position, taken by different countries, that regulation of competition matters require technical and sophisticated analysis, which can best be provided by a specialized regulator. Very rare exemptions (limited to select activity within a sector and granted for limited duration) have been carved to meet peculiar economic conditions in a sector. Overall, a globally accepted method to sort out the issues between sectoral regulatory authorities and competition authority seems to be to encourage the regulators to enter into memorandum of

understanding (MOU) to foster mutual consultation and uniformity of approach to competition matters. From the analysis of various international jurisdictions, it is clear that Competition Commission should continue to be the sole regulator to take care of issues related to competition. The sectoral regulators however, can continue to have limited jurisdiction for fair market practices and to promote efficiency in respective sector.”

79. The Committee note that the existing provision for consultation between statutory authorities and CCI in respect of matters falling within their respective jurisdiction is voluntary. The Bill proposes to amend Section 21 to make it mandatory for statutory authorities to make a reference to CCI if the decision taken or proposed to be taken by statutory authority is or would be contrary to any of the provisions of the Competition Act. Similarly, the Bill proposes to amend Section 21 A to make it mandatory for CCI to make a reference to a statutory authority if the decision taken or proposed to be taken by CCI is or would be contrary to any provision of the Act, whose implementation is entrusted to that statutory authority. The Bill also proposes to amend Section 27 to provide that the Commission shall give due regard to the opinion given by the statutory authority. While welcoming these amendments as steps to bring about synergy and coordination amongst different statutory/regulatory bodies, the Committee desire that it may also be statutorily mandated upon both CCI as well as other regulators to state categorically the reasons for disagreement whenever instances of divergence of opinion arise during the consultation process.

Clause 11: Amendment of Section 26 (Empowerment of the CCI to decide a matter where the CCI does not agree with Director-General’s investigation)

80. Section 26 of the Competition Act, 2002 reads as under:

“(1)On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall

invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

- (6) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.
- (7) If, after consideration of the objections or suggestions referred to in sub section(5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.
- (8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.”

81. The Bill proposes to amend Sub-sections 7 and 8 of Section 26 as under:

“In section 26 of the principal Act,—

(a) in sub-section (7), after the words ‘in accordance with the provisions of this Act’, the words ‘and make appropriate orders thereon after hearing the concerned parties’ shall be inserted;

(b) in sub-section (8), after the words "in accordance with the provisions of this Act", the words "and make appropriate orders thereon after hearing the concerned parties" shall be inserted”.

82. The requirement and justification for the proposed amendment, as furnished by the Ministry in their Background note, is as under:

“The inability of the Commission to pass order under Section 26 when it does not agree with the DG’s finding of contravention has been removed by adding the words “and after the said inquiry, pass such orders as it deems fit”.

83. In their written submission furnished to the Committee, ASSOCHAM, CUTS and Shri Vinod Dhall, Consultant have stated:

ASSOCHAM:

“The amended law will be prospective and enforceable only when notified by the Government. Therefore, all past cases and parties affected by such closure orders passed by the Commission thereof will continue to suffer. As such, since the law has only come into effect on 20th May, 2009, all parties affected by a few “closure” orders of the CCI may be allowed to get a relief of appeal within 60 days from the date of notification of this amended section.

CUTS:

Under section 26(5), the Commission invites suggestions from relevant stakeholders in case the report of Director General recommends absence of contravention. Similar procedure must be implemented even if cases when the report of Director-General recommends contravention of provisions of the Act, specifically when the Commission is being given the power to make appropriate orders.

Shri Vinod Dhall:

Sub-sections (5) to (7) of Section 26 deal with situations where the DG after investigation finds no contravention under the Act. The CCI is then required to invite objections from the parties concerned. If after consideration the CCI agrees with the DG it passes appropriate orders. In the event that it does not agree with recommendations of the DG, it may direct the DG for further investigations; or proceed itself with further inquiry.

Sub-section (8) of Section 26 which deals with situations where the DG finds a violation under the Act does not lay down the procedure as set out in Sub-sections (5) to (7) of Section 26.

It is submitted that the CCI should have similar powers in both situations, that is where the DG report finds no violation [Sub-sections (5), (6) and (7)] and where it finds a violation [Sub-section (8)]. On the basis of principles of statutory interpretation the difference in wordings may be construed to mean that the legislative intent in the two situations was different. Therefore, to remove any ambiguities in the Act it would be advisable to amend the clauses to make the language consistent. In either case, CCI should have the power after due process to: agree with the DG, or disagree with the DG, or order or undertake further inquiry”.

84. The Chairperson, CCI during oral evidence before the Committee stated as under:

“.....the reason for that amendment is that the way the law is worded, there is something which falls between the cracks and gives an impression that if the DG gives a report saying that some company is in violation and the Commission in its judicial process comes to the conclusion that there is no violation, then the Commission cannot disagree with the Director-General. I am sure that certainly cannot be the scheme which the legislature gives because the investigator cannot be the judge. Since that aspect was missing, that is being brought in. Otherwise, the lawyers are certainly very intelligent to pick on loopholes. They are going in appeal and saying that the Commission has no powers to go against the report of the DG.”

85. The Ministry of Corporate Affairs in their written replies have *inter alia* stated:

“As the affected parties had opportunity to approach the High Courts under Articles 226/ 227 of the Constitution, it cannot be said that a legal vacuum existed for such parties. Retrospective effect will lead to re-opening of settled issues.

The Commission is guided by the principles of natural justice while conducting inquiry, hence there is no need to make the suggested amendments.

The suggestion seeks to provide clarity to the proposed amendments to Section 26 of the Act. However, as the proposed amendment is self-explanatory and comprehensive, no further amendment is required.”

86. When asked about the criteria for over ruling the findings of the Director-General and the cases over ruled by the Commission, the Ministry in their post evidence reply stated as under:

“The findings of the Director-General are examined by the Commission in the light of the replies/objections filed by the parties thereto. The findings of the Director-General may be rejected by the Commission if, after considering the entire material available on record, contravention of the provisions of the Act is not established.”

87. On being questioned as to why the discretionary powers of the Chairperson, CCI are increasing, the Ministry in their post evidence reply stated as under:

“The purpose of this amendment is to address lacunae which are present in the Act which is that once the DG provides the investigation report stating that there is a contravention and CCI does not agree with, a reading of the Act suggests that there is no provision under which CCI can disagree with the DG, which goes against the intention of the Legislature.

The proposal seeks to fill the procedural voids in the scheme of Section 26 of the Act which currently does not explicitly provide for CCI to pass orders to close the case if the DG finds contravention and *vice versa* in the matters.”

88. When specifically asked whether CCI is satisfied with their performance during last three years especially with reference to the cases investigated by Director General upheld and the cases investigated by Director General reversed, the Ministry in their post evidence reply have stated as under:

“Since its inception, CCI received information on 333 matters and passed final orders in more than 251 cases. Matters concerning the important sectors of the economy like infrastructure, finance, entertainment, information technology, telecom, civil aviation, energy, insurance, travel, automobile manufacturing, real estate and pharmaceuticals were received in the Commission.

So far, Commission has referred 156 cases to Director General for investigation out of which report on 127 matters have been received and reports on 29 cases are pending. In 45 cases, reports of Director General were accepted and orders were passed under Section 27 of the Competition Act, 2002. 58 cases were closed after the receipt of report of Director General. In 42 cases, the findings of the Director General were reversed by the Commission.”

89. In a news item dated 31 January 2013, it was reported that:-

“Experts have batted for relief for companies that have virtually lost the 'right to appeal' in several cases where the Competition Commission of India (CCI) has overruled the report filed by its investigation arm, which found the firms violating the Competition Act. Terming it as a 'lacunae' in the existing Competition Act, legal experts said the government and the CCI should look at providing 'retrospective' relief in cases that have already been affected as the proposed amendments to the competition laws may correct the situation only with prospective effect....

In these cases and a few others, the complaints about companies indulging in cartelisation/abuse of dominance got verified and endorsed by the CCI's director general (DG) of investigations. However, in its final order, the CCI overruled the DG's report but did not specify the section of the Competition Act under which the complaints were dismissed.

Although in many cases the complainants approached the Competition Appellate Tribunal (COMPAT) against the CCI rulings, the appellate panel sought to know under which section of the Act was the CCI order challenged. So, the question is whether CCI has the power to close a case where its rulings is contrary to the DG's findings”.

90. The Committee have been informed that since the existing provisions do not explicitly provide for CCI to pass orders if the Director-General finds contravention of any of the provisions of the Act or otherwise, the proposed amendment seeks to address this lacunae by providing enabling power to CCI under Section 26(7) and 26(8) to pass an appropriate order after hearing the concerned parties.

91. The Committee, however, take serious view of the fact that the findings of the Director-General, in as many as 42 cases, have already been reversed by CCI even though there are no explicit provisions in the Act to this effect at present. The Committee also take cognizance of the news item dated 31st January, 2013 which reported that there were instances where the complaints about companies indulging in cartelization/abuse of dominance were got verified and endorsed by the Director General, however, the CCI finally overruled the Director General's report without specifying the Section under which the complaints were dismissed. When the affected parties approached the Competition Appellate Tribunal (COMPAT) against the CCI rulings, the appellate panel sought to know under which Section of the Act was the CCI order challenged. The Committee are of the view that as a principle of natural justice, all such cases be allowed to get a relief of appeal within 60 days from the date of notification of this amended section. Necessary procedures may be put in place to make appropriate orders under the proposed amendment.

Clause 12: Amendment of Section 27 (Providing an opportunity to party concerned, of being heard by the Commission before imposing penalty)

92. Section 27 of the Competition Act, 2002 reads as under:

“27. Where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may pass all or any of the following orders, namely:—

(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:

Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times 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.

(g) pass such other order or issue such directions as it may deem fit:

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to Section 3 or Section 4 of the Act is a member of a group as defined in clause(b) of the Explanation to Section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group”.

93. The Bill proposes to amend Section 27 to provide an opportunity to party concerned, of being heard by the Commission before imposing penalty as under :

In section 27 of the principal Act,—

(i) in clause (b), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that no such penalty shall be imposed by the Commission under this section without giving an opportunity of being heard to the producer, seller, distributor, trader or service provider, as the case may be".

(ii) in clause (g), after the proviso, the following proviso shall be inserted, namely:—

"Provided further that while passing orders under this section, the Commission shall give due regard to the opinion given by the statutory authority, where such opinion has been obtained under the provisions of sub-section (1) of Section 21A of this Act."

94. In their written submission furnished to the Committee, Luthra & Luthra (Law Offices) ASSOCHAM, FICCI, and Shri Vinod Dhall, Consultant have stated:

Luthra & Luthra (Law Offices):

- (i) The Bill does not seem to address the ambiguities that surround imposition of penalty. The CCI has often calculated fines on the total turnover or profits of the enterprise without taking into account the level of trade and commerce affected. This has been a problem especially in relation to cartel cases. Thus, it might be beneficial if a more precise methodology was provided to calculate fines.

In the DLF order (Case No.19/2010), CCI imposed a fine of Rs.630 crores (approx.) that was based on its total turnover not its turnover from residential units. Similarly, in the Cement cartel case (Case No.29/2010), a fine of Rs.6300 crores (approx.) was imposed on eleven cement manufacturers. The penalty was calculated on the total turnover of the enterprises without even considering the proportion of business of the particular enterprise that manufactured cement or the turnover of the enterprise from manufacturing of cement.

ASSOCHAM/FICCI:

- (ii) The mitigating factors in relation to penalties may be further clarified i.e. in case of group companies with multiple businesses, the penalty should only be attributable to the business to which the inquiry relates and not of the entire group.

.....The Bill seeks to introduce the aforesaid requirement only while imposing a penalty on cartels and not other kinds of 'anti-competitive agreements.' The Bill should incorporate the personal hearing process before penalizing any of the anti-competitive practices.

On the lines of the UK Competition Act, the CCI should be required to issue/publish Guidance as to the appropriate amount of penalty.

FICCI:

- (iii)The Competition Bill, 2012 should incorporate the existence of a Corporate Competition Law Compliance programme as a defence or a mitigating factor for enterprises when faced with proceedings for a competition law violation.

Shri Vinod Dhall:

- (iv) It is suggested that for the purpose of calculating penalty to be imposed, the Act must continue to provide for a cap on the penalty as currently provided in the Act. However, due regard must also be given to the relevant turnover of the enterprise in the relevant product/service in which the offence was committed. The amendment should, therefore, make it obligatory for the CCI to formulate Regulations setting out clear guidelines on imposition of penalty.”

95. The representative of ASSOCHAM while deposing before the Committee during oral evidence stated as under:

“The proposal is..... limited only to the producer, seller, distributor, trader or service provider, as the case may be..... This may be amended only till the opportunity of being heard, whoever is affected, and not to certain classes only.....If the intent is to provide penalty to the affected person, let it not be limited and, therefore, there should be an end after the opportunity of being heard so that I do not waste the time of the hon. Commission.

96. The Ministry of Corporate Affairs in their written replies have submitted as under:

- (i) Section 27(b) provides adequate leeway to the Commission to determine the quantum of penalty. As such, it would not be consistent with the legislative intent to take away the discretion conferred upon the Commission to impose penalty. As per the *extant* practise, the Commission before imposition of penalty considered various factors besides weighing aggravating and mitigating circumstances/ factors. Also given the current scenario it is also not always possible to determine or quantify the level of trade affected.

It may be added that in EU and other jurisdictions where level of trade and commerce affected is taken into account while imposing penalty the upper cap of 10% is linked to the worldwide turnover of the enterprises.

- (ii) It is agreed that the proposed proviso to section 27 of the Act could be suitably modified to extend its scope to all the entities upon whom the penalty is proposed to be imposed.

- (iii) There is no need to insert the suggested provision in the statute as the same can be achieved by making regulation or issuing guidelines by the CCI at appropriate stage.

(iv) It is submitted that proposed amendment does not envisage a separate hearing on the quantum of penalty. It only says that penalty shall not be imposed without giving an opportunity of being heard, which is nothing but explicitly providing that the principles of natural justice are required to be followed. Therefore, the CCI can frame suitable guidelines through regulations at appropriate stage and a specific provision in the Act making mandatory framing of regulations by CCI for computation of penalties not required.

(v) Further, while imposing fine the Commission can always take into the consideration the turnover related to the product or service involved in the anticompetitive conduct of the enterprise”.

97. On being asked about the criteria to impose penalty; the total amount of penalty imposed; stayed at appellate level and credited to the Consolidated Fund of India, the Ministry in their post evidence reply have stated as under:

“The Commission has so far imposed a penalty of Rs.8015.03 crore out of which Rs.65.19 lacs has been realized and credited to Consolidated Fund of India. Levy of Rs.84.00 lacs penalty has been dismissed by Competition Appellate Tribunal (COMPAT)/High Court. Penalty of Rs.7959.47 Crore has been stayed by the Order of COMPAT and a sum of Rs.54.06 crores has neither been paid nor stayed/dismissed by the Courts”.

98. The Committee note that Section 27(b) of the Act empowers the CCI to impose penalty for contravention of the provisions of Section 3 pertaining to “anti-competitive agreements” or Section 4 pertaining to “abuse of dominant position”. The Committee, however, find that the Bill seeks to amend the proviso to Section 27 (b) so as to make it mandatory for CCI to give an opportunity of hearing to party concerned prior to imposition of penalty on cartels only; but not in the case of other kinds of “anti-competitive agreements”. When suggested that the Bill should incorporate the personal hearing process before penalizing any of the anti competitive practices, the Ministry of Corporate Affairs, while agreeing to the suggestion stated that the proposed proviso to Section 27(b) of the Act could be suitably modified to extend its scope to all the entities upon whom the penalty is proposed to be imposed. The Committee, therefore, desire the Government to carry out necessary changes while bringing in the revised amendment Bill.

99. The Committee note that despite the Act empowering CCI to frame Regulations, the criteria for determination of penalty by the CCI has been a cause of concern as no specific Regulations in this regard exist at present. Although the Ministry of Corporate Affairs have stated that as per extant practice, the CCI, before imposition of penalty, considers various factors besides weighing aggravating and mitigating circumstances/factors, the imposition of penalty in the absence of Regulations is not appropriate. The Committee recommend the Government to ensure that suitable guidelines for imposition of penalty are framed as agreed to by the Ministry in a time bound manner.

100. The Committee further note that the Commission has so far imposed a penalty of Rs.8015.03 crore out of which Rs.65.19 lacs only has been realized and credited to Consolidated Fund of India. While levy of Rs.84.00 lacs penalty has been dismissed by Competition Appellate Tribunal (COMPAT)/High Court, penalty of Rs.7959.47 crore has been stayed by the Order of COMPAT and a sum of Rs.54.06 crores has neither been paid nor stayed/dismissed by the Courts. The Committee are constrained to observe that these figures poorly reflect upon the effectiveness of the existing mechanism in realization of penalty. The very purpose of imposition of penalty is defeated if the amount is not realized for one reason or the other. Suitable regulations may, therefore, be made for this purpose. The Committee, also, urge upon the CCI to make diligent efforts to get the stay vacated and recover the amount of penalty imposed in all cases at the earliest.

Clause 13: Amendment of Section 31 (reduction in overall time limit of deciding a case related to combinations to 180 days instead of existing 210 days)

101. Sub sections 11 & 12 of Section 31 of the Act read as under:

“11) If the Commission does not, on the expiry of a period of [two hundred and ten days from the date of notice given to the Commission under sub section(2) of section 6], pass an order or issue direction in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (7), the combination shall be deemed to have been approved by the Commission.

Explanation:- For the purposes of determining the period of [two hundred and ten] days specified in this subsection, the period of thirty working days specified in sub-section (6) and a further period of thirty working days specified in sub-section (8) shall be excluded.

12) Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties.”

102. The Bill proposes to amend Section 31 to reduce the overall time limit of deciding a case related to combinations to 180 days, instead of existing 210 days, as under:

“In section 31 of the principal Act,—

(a) in sub-section (11), for the words "two hundred and ten days", at both the places where they occur, the words "one hundred and eighty days" shall be substituted;

(b) in sub-section (12), for the words "ninety working days" the words "one hundred and eighty days" shall be substituted.”

103. The Ministry in their Background note have stated that in Section 31(12), the words “ninety working days”, appeared inadvertently instead of 210 days which is now being reduced to 180 days.

104. Sub section 2A of Section 6 of the Act read as under:

“No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.”

105. In their written submission furnished to the Committee, ASSOCHAM, FICCI, CUTS and Shri Vinod Dhall, Consultant have stated:

ASSOCHAM and FICCI:

“Without making changes in sub-section 2A of Section 6 to 180 days, the suggested amendment in this clause may come in conflict with the substantive provision of Section 6(2A). The following may, therefore, be inserted in sub-section 2A of Section 6:

“replace two hundred ten days by one hundred and eighty days in line one”

CUTS:

“The provision of passing a *prima facie* opinion within 30 days has been incorporated. Currently, this is in the regulations. CCI can require the parties to suggest modifications in addition to the existing provision of suggesting itself. Maximum period for approval has been restricted to 180 days instead of 210 days (as proposed under the Competition (Amendment) Bill, 2012. All references to working days appearing in sub-sections 6, 8, 9, 11 & 12 have been amended so as to mean calendar days”.

Shri Vinod Dhall:

“At present, the Act allows the CCI up to 210 days to decide on a combination; this period is too long by international standards. It is suggested that the period for a combination inquiry be further reduced to 150 days instead of reducing it to 180 days. For any additional information that the CCI requires from the parties, it has the power to seek such additional information, and meanwhile the clock stops; thus the time taken for seeking additional information does not count towards the time limit of 210 days. In fact, the CCI has been using its power to stop the clock during its inquiry into mergers. Thus, a shorter period of 150 days should suffice for the CCI to complete its internal processes and form an opinion about approving or not approving the combination. It needs to be kept in mind that mergers are a part of the normal transactions taking place in the market, and it is desirable that the CCI process for analysing the merger is as expeditious as possible.

The Amendment Bill does not provide for the corresponding amendment to Section 6 (2A), which states that no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the CCI or orders have been passed under Section 31 of the Act”.

106. The Ministry of Corporate Affairs, in their written replies have stated:

“In light of the provisions contained in Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, there is no need to provide for passing of *prima facie* opinion within 30 days in the Act itself.

The official Bill already reduces the period for approval of combinations to 180 days.

The suggestion to provide consequential changes in section 6(2A) of the Act in light of the amendments effected in Section 31 of the Act (replacing the time period from 210 days to 180 days), is agreed to.

The suggestion to further reduce the time period to decide on a combination (from the proposed 180 days to 150 days) is not practicable keeping in view the fact that complex merger cases having far reaching implications on the competition in the market require in-depth analysis and also due to the limited resources and experience of CCI.”

107. When asked as to whether this time-limit can be reduced further in today’s world of very fast communication devices, the Ministry in their post evidence reply stated as under:

“The Act presently has a time period of 210 days within which the Commission has to make its final determination regarding any appreciable adverse effect on competition (AAEC) in the relevant market in India that may be caused due to the

proposed combination, or else the combination shall be deemed to have been approved by the Commission.

The Commission, being sensitive to the requirements of the industry which seeks an expeditious decision on the combination notices, through its Regulations, has put in place, shorter, self-imposed time periods of 30 days for a prima facie determination of AAEC , and of 180 days for a final determination of AAEC in the relevant market in India. So far, all the notices have been decided at the prima facie stage, i.e. within a period of 30 days.

It has also been the experience of the Commission that the corresponding time periods for review of combination notices in various other mature jurisdictions are of a comparable duration or longer. Therefore, the proposed amendment to reduce the mandatory period of clearance from 210 days to 180 days is in keeping with the self-imposed time limit prescribed by the Commission and compares favourably with the corresponding time periods in similar jurisdictions worldwide.”

108. The Committee note that under Section 6(2) of the Act, any person or enterprise, who or which proposes to enter into a combination is required to give notice to the CCI. If the CCI does not pass an order or issue direction within a period of 210 days from the date of notice, the combination is deemed to have been approved by the CCI under Section 31(11) of the Act. The Bill proposes to reduce the time limit to 180 days. The Ministry of Corporate Affairs have stated that the proposed amendment to reduce the mandatory period of clearance is in keeping with self imposed time limit prescribed by the Commission and the corresponding time periods in similar jurisdictions worldwide. The Committee, however, note that the Bill does not provide for the corresponding/consequential amendment to Section 6(2A) which states that no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under Section 31, whichever is earlier. The Committee, therefore, recommend that in the light of amendments proposed to be effected in Section 31, consequential changes in Section 6(2A) of the Act may also be carried out and the words “two hundred and ten days” be replaced by the words “one hundred and eighty days”.

Clause 14: Amendment of Section 41: Substitution of Sub-section (3) [Empowerment of Chairperson, CCI to approve search and seizure]

109. Section 41 of the Act reads as under:

41.(1) *****

(3) 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.

Explanation.—For the purposes of this section, --

(a) the words “the Central Government” under section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as “the Commission”;

(b) the word “Magistrate” under section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as “the Chief Metropolitan Magistrate, Delhi”.

110. The Bill proposes to amend Section 41 as under:

In section 41 of the principal Act,—

(a) for sub-section (3), the following sub-sections shall be substituted, namely:—

"(3) Where in the course of investigation, the Director General has reason to believe that any person or enterprise, to whom a notice under sub-section (2) has been issued,—

(a) has omitted or failed to provide the information or produce documents as required notice; or

(b) would not provide the information or produce documents which will be useful for, or relevant to, the investigation; or

(c) would destroy, mutilate, alter, falsify or secrete the information or documents useful for, or relevant to, the investigation, then, he may, after obtaining the authorisation from the Chairperson of the Commission,—

(i) enter, with such assistance and force, as may be required, the place or places where such information or documents are expected to be kept;

(ii) search such place or places, as the case may be;

(iii) seize documents and take copies of information, including electronic mail, hard disk of computer and such other media;

(iv) record on oath statements of persons having knowledge of the information or documents referred to in sub-clause (iii).

(4) The provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (3).";

(b) the Explanation shall be omitted."

111. The justification for the proposed amendment as furnished by the Ministry in their Background note, is given below:

“Provisions for search and seizure by Director General, CCI with the approval of Chief Metropolitan Magistrate, Delhi already exist as derived under Section 240 and 240A of Companies Act. The revision is proposed:

- a) To remove cross-reference to Companies Act; and
- b) To empower Chairperson, CCI to approve search and seizure in place of the Chief Metropolitan Magistrate, Delhi who does not have all India Jurisdiction. Similar issues exist in certain laws like Income Tax Act.”

112. In their written submission furnished to the Committee, ASSOCHAM, FICCI, CII , and Shri Vinod Dhall, Consultant have stated:

ASSOCHAM:

Authorization by the Chairperson of the Commission for an unannounced raid at the premises of any enterprise suspected to be in breach of any provision of the Act may be considered an expeditious solution but simultaneously may at times also be challenged by any party aggrieved by such authorization on the grounds that the Commission has become judge of its own cause. Therefore, an independent authority viz. Chief Metropolitan Magistrate New Delhi may be considered to be retained.

FICCI:

Lack of checks and balances – CCI can't be an investigator and adjudicator of the same cause – prejudice.

The power to authorize search and seizure should continue to vest with the Magistrate.

CII:

.....the absence of a check and balance system, the amendment to the provisions on DG's powers to conduct “search and seizure” where the Chairperson is empowered to sanction raids may potentially result in greater ingress on the right to privacy. Therefore, it is suggested that the Govt/Commission may consider: (i) introducing specific guidelines and best practices to be followed by the DG while conducting raids (e.g. clear, valid and reasoned orders should be issued for undertaking dawn raids, scope of a dawn raid should be spelt out in the order and list of information seized by the officer should be prepared and provided to the concerned entity and (ii) provide a provision for appeal before the Competition Appellate Tribunal to challenge the decision of the Commission to conduct dawn raids, (in cases including not limited

to if the parties believe that there as no cogent reason or purpose for conducting such dawn raids on the enterprise).

Shri Vinod Dhall:

It may be clarified that the DG must have “evidence to support” his belief that a search and seizure order should be issued;

Proposed Sub-clause (a) may be modified to state that the party receiving the notice has failed “without reasonable cause” to produce the evidence. Otherwise, this section could be open to abuse by the DG issuing an unreasonable request or timeline and then immediately seeking search and seizure order because it has not been met;

Limiting the scope of search and seizure to information that is relevant (and deleting “useful”). The whole process should be aimed at obtaining relevant information and if it meets that test it must be useful. However, if a distinction is made the courts would logically read “useful” as extending beyond information that is “relevant” which could justify a fishing expedition;

The DG may be required to make the request in writing specifying the provisions of the law and the facts relied on and the same obligation on the Chairman, CCI. This will ensure that there is no issue of the DG or Chairman not applying their minds to the facts before they make a decision; and

It may also be considered whether the decision instead of resting with the Chairman, CCI may be entrusted to the Commission as a whole. This will ensure a wider application of mind before permitting a search and seizure operation.”

113. In this regard, the representatives of CII and ASSOCHAM while deposing before the Committee during oral evidence stated further as under:

CII:

“First, there is no further guideline or rationale on the basis of which any such dawn raid could be started by the Chairman. The Chairman is the authority under whose permission an inquiry starts and only if he says so, it proceeds. Therefore, there is an inherent conflict of interest between assuming that you can allow an inquiry to start and then again objectively say that there should be no search and seizure.”

ASSOCHAM:

“They want to say that the Chairperson may simply sign off and go ahead and carry on the search and seizure. I respectfully submit that, that would be an

uncanalised power not required plus, and most important, in the last two years of the existence of this Commission, not a single instance has been brought before this Committee or before anybody to show that such a power was tried to be exercised and it resulted in failure.Therefore, to say that the Parliament must reconsider and amend its provision which was already there after much consideration earlier is of no consequence. I respectfully commend, therefore, without any basis, there is no need to vest the single individual, who has possibly a conflict of interest because he is initiating in the first instance.”

114. In this regard, the Secretary, Ministry of Corporate Affairs and the Chairperson, CCI while tendering evidence before the Committee stated:

Secretary, Ministry of Corporate Affairs:

There is a Commission with considerable responsibility of adjudication and investigation. Probably to that extent it is a *sui generis* regulator. So, possibly some of the enforcement powers are required. We do take on board the reservations or I would say certain doubts as to the possibility of misuse etc., and we will definitely be considering whether any safeguards etc., would be necessary.

I would only like to crave your indulgence to point out similar provisions in the let us, say, Income Tax Act and Customs Act. Officials who would be hierarchy wise much less than the Chairman of Competition Commission and whose direct interest in the outcome of the case, in the interest of revenue I am not saying personal direct interest, would be much more than that of the Chairman, are vested with the power of issuing search and seizure warrant. But certainly I think the issue of safeguards needs to be seriously looked into.

Chairperson, CCI:

“.....the Act already provides for search and seizures..... The reason why the process of getting a warrant is being shifted from the judicial side to the institution of the Commission is that in such cases, there has to be an element of speed and confidentiality. But what safeguards should be built in, whether the Chairman is competent to do this, it rests in your hand.”

115. On being asked to clarify as to whether the proposed provision is necessary as the Competition Act, 2002 is a civil and not a criminal law, the Ministry in their post evidence reply stated as under:

..... Provisions relating to search and seizure also exist in Income Tax Act, 1961 as well as the Central Excise Act, 1944 and the Narcotics Drugs and Psychotropic Substances Act, which are also Civil Acts in nature.

The purpose of this amendment is to ensure that there is a speedy and confidential process of collecting relevant evidence, which may get

misplaced/hidden/lost in case action is not taken on an urgent basis, and which will impact the efficacy of enforcement by the Commission.

Further, the bill *inter alia* provides certain conditions to be fulfilled and further it also provides that search and seizure shall be subject to the provisions of CrPC, 1973 and as such sufficient safeguard exist in the proposal. It could, however, be considered if, reasons for permitting such action could also be given while issuing such orders.

116. The Ministry have further added that there is no provision in any law providing for appeal against search warrants and the suggestion to provide the powers to the Commission instead of Chairperson is also not agreeable for the reasons of expediency and secrecy.

117. The Committee note that with a view to ensuring speedy and confidential process of collecting information, the Government proposes to amend Section 41 of the Competition Act, 2002 to empower Chairperson, CCI to approve search and seizure and to replace the existing provisions whereby Director-General has to approach the Chief Metropolitan Magistrate, Delhi for the purpose. The Bill also provides that search and seizure shall be subject to the provisions of Code of Criminal Procedure, 1973. The Committee are of the view that the existing provisions lay down adequate checks and balances with regard to search and seizure operations. The Committee also find that the Ministry have not cited any instance where the powers of search and seizure, whenever exercised, resulted in delay or leakage of confidential information. As a matter of fact, the Committee have been informed that the CCI, since its inception has not used these powers to obtain information. Considering these aspects and also the fact that the CCI is still in a stage of infancy, the Committee desire the Government to maintain *status quo* in the matter for the present.

118. In conclusion, the Committee would like to urge upon the Ministry of Corporate Affairs and the Competition Commission of India to consider the following issues relating to the evolving Competition law in the country and its practice that have arisen in recent times and have engaged attention of the Committee. Necessary amendments may accordingly be brought in the statute and the regulations.

- (i) whether the Commission should be a body comprising of only retired persons or it should be a smaller multi-disciplinary body consisting of domain experts;
- (ii) whether more substantive amendments are required to enable the CCI to play a more vibrant and meaningful role in the economic development of the country like creation of robust data-base and formulation of coherent norms/principles in prevention/detection of cartels, price-manipulation/rigging and other market practices inimical to competition and orderly functioning of markets;
- (iii) whether the CCI should enhance its capacity to take cognizance of emerging trends and developments in industry relating to “unfair dominance” or “monopolistic practices”, such as cross-holdings in media ownership.
- (iv) protection of consumer interest through periodical studies/surveys on trends of consumer prices in different sectors.
- (v) whether the law should be designed in a manner that is unduly restrictive with rigid thresholds or should it be a facilitator for growth of business and industry while promoting fair play and freedom in competition and reasonable prices for consumers.

New Delhi;
11 February, 2014
22 Magha, 1935 (Saka)

YASHWANT SINHA,
Chairman,
Standing Committee on Finance.

MINUTES OF THE TENTH SITTING OF THE STANDING COMMITTEE ON FINANCE (2012-13)

The Committee sat on Friday, the 1st February, 2013 from 1130 hrs to 1315 hrs.

PRESENT

Shri Yashwant Sinha – **Chairman**

MEMBERS

LOK SABHA

2. Shri Sudip Bandyopadhyay
3. Shri Nishikant Dubey
4. Shri Gurudas Dasgupta
5. Shri Rahul Gandhi
6. Shri Bhartruhari Mahtab
7. Shri Sanjay Brijkishorlal Nirupam
8. Shri Prem Das Rai
9. Shri Adv. A. Sampath
10. Shri Thakur Anurag Singh
11. Shri Shivkumar Udasi

RAJYA SABHA

12. Shri Naresh Agrawal
13. Smt. Renuka Chowdhury
14. Shri Piyush Goyal
15. Dr. Mahendra Prasad
16. Shri P. Rajeeve
17. Shri Praveen Rashtrapal

SECRETARIAT

1. Shri P.C. Tripathy – Director
2. Shri Ramkumar Suryanarayanan – Additional Director
3. Shri Sanjay Sethi – Under Secretary
4. Shri Kulmohan Singh Arora – Under Secretary

WITNESSES

Ministry of Corporate Affairs (MCA)

1. Shri Naved Masood, Secretary
2. Shri Ashok Chawla, Chairperson, Competition Commission of India (CCI)
3. Shri Manoj Kumar, Joint Secretary, Ministry of Corporate Affairs

2. The representatives of Ministry of Corporate Affairs and Competition Commission of India (CCI) briefed the Committee in connection with examination of 'the Competition (Amendment) Bill, 2012'. The major issues discussed during the sitting broadly related to provisions contained in the Bill regarding inclusion of Chairperson, CCI in the Selection Committee for Selection of Members, empowering Commission to decide matters where Commission does not agree with Director General's Investigation, empowering Chairperson, CCI to approve search & seizure, reducing the overall time limit of deciding a case related to combination and seeking comments of experts on the proposed amendments; empowerment of CCI, fasttrack disposal of cases by CCI, filling up of vacant posts, role of CCI to prevent practices having adverse effect on competition and to protect interest of consumers; status of National Competition Policy; cartelisation and monopolistic practices in cement, steel, oil, insurance, jute, pharmaceutical, airlines sectors; other monopolistic practices harmful to interest of consumer; reported abuse of dominant position by railways, oil marketing companies, banks, insurance companies, ports, airlines; amount of penalty imposed by CCI and credited to Consolidated Fund of India; etc. The Chairman then directed the representatives of the Ministry of Corporate Affairs / Competition Commission of India (CCI) to furnish replies to the points raised by the Members during the discussion within fifteen days.

A verbatim record of the proceedings was kept.

The witnesses then withdrew.

The Committee then adjourned.

MINUTES OF THE TWENTIETH SITTING OF THE STANDING COMMITTEE ON FINANCE (2012-13)

The Committee sat on Friday, the 19th July, 2013 from 1100 hrs to 1330 hrs.

PRESENT

Shri Yashwant Sinha – **Chairman**

LOK SABHA

2. Shri Nishikant Dubey
3. Shri Gurudas Dasgupta
4. Shri Deepender Singh Hooda
5. Shri Chandrakant Khaire
6. Shri Bhartruhari Mahtab
7. Shri Sanjay Brijkishorlal Nirupam
8. Shri S.S. Ramasubbu
9. Shri Adv. A. Sampath
10. Dr. M. Thambidurai
11. Shri Shivkumar Udasi

RAJYA SABHA

12. Shri Naresh Agrawal
13. Smt. Renuka Chowdhury
14. Shri Piyush Goyal
15. Shri Satish Chandra Misra
16. Dr. Mahendra Prasad
17. Shri Ravi Shankar Prasad
18. Shri P. Rajeeve

SECRETARIAT

1. Shri A.K. Singh – Joint Secretary
2. Shri Ramkumar Suryanarayanan – Additional Director
3. Shri Sanjay Sethi – Deputy Secretary

2. XXX XXX XXX XXX

3. XXX XXX XXX XXX

WITNESS

Shri Vinod Dhall, Consultant & Former Secretary, Ministry of Corporate Affairs

4. Thereafter, the Committee heard the views of Shri Vinod Dhall, Consultant & Former Secretary, Ministry of Corporate Affairs on the 'Competition (Amendment) Bill, 2012'. The major issues discussed included among other things, definition of turnover; need to formulate regulations to determine turnover for the purpose of imposing penalty or deciding a merger; concept of collective dominance in India vis-à-vis European Union; need to reduce number of days from 180 to 150 to decide cases of merger; necessity to grant search & seizure powers to Chairman, Competition Commission of India (CCI); functioning of CCI and justification for its existence; existence of many regulators in the Country, etc. The Chairman then directed the witness to furnish replies to the queries raised by the Members at the earliest.

A verbatim record of the proceedings was kept.

The witness then withdrew.

The Committee then adjourned.

MINUTES OF THE TWENTY-SECOND SITTING OF THE STANDING COMMITTEE ON FINANCE (2012-13)

The Committee sat on Friday, the 2nd August, 2013 from 1100 hrs to 1420 hrs.

PRESENT

Shri Yashwant Sinha – **Chairman**

LOK SABHA

2. Dr. Baliram
3. Shri Sudip Bandyopadhyay
4. Shri Nishikant Dubey
5. Shri Gurudas Dasgupta
6. Shri Deepender Singh Hooda
7. Shri Bhartruhari Mahtab
8. Shri Sanjay Brijkishorlal Nirupam
9. Shri Prem Das Rai
10. Shri S.S. Ramasubbu
11. Shri Adv. A. Sampath
12. Dr. M. Thambidurai
13. Shri Shivkumar Udasi

RAJYA SABHA

14. Shri Naresh Agrawal
15. Shri Piyush Goyal
16. Dr. Mahendra Prasad
17. Shri Ravi Shankar Prasad
18. Shri P. Rajeeve

SECRETARIAT

- | | | |
|---------------------------------|---|---------------------|
| 1. Shri A.K. Singh | – | Joint Secretary |
| 2. Shri Ramkumar Suryanarayanan | – | Additional Director |
| 3. Shri Sanjay Sethi | – | Deputy Secretary |
| 4. Shri Kulmohan Singh Arora | – | Under Secretary |

WITNESSES

CONFEDERATION OF INDIAN INDUSTRY (CII)

1. Ms. Zia Mody, Managing Partner, AZB & Partners
2. Mr. Arjun Uppal, Vice President-Corporate Affairs, DCM Shriram Consolidated Limited
3. Mr. Samir R Gandhi, Partner, AZB & Partners

4. Mr. Marut Sen Gupta, Deputy Director General, Confederation of Indian Industry

CONSUMER UNITY & TRUST SOCIETY (CUTS International)

1. Pradeep S. Mehta, Secretary General, CUTS International and Chairman, CUTS Institute for Regulation & Competition
2. Udai S. Mehta, Associate Director, CUTS International & Centre Head, CUTS Centre for Competition, Investment & Economic Regulation (CUTS CCIER)

ASSOCIATED CHAMBERS OF COMMERCE AND INDUSTRY OF INDIA (ASSOCHAM)

1. Mr. Ramji Srinivasan, Chairperson, ASSOCHAM National Council for Competition Law & Senior Advocate, Supreme Court of India
2. Mr. Manas Kumar Chaudhuri, Co-chairperson, ASSOCHAM National Council for Competition Law & Partner, Khaitan & Co.
3. Mr. G.R. Bhatia, Member, ASSOCHAM National Council for Competition Law & Advocate, Supreme Court of India

2. The representatives of the Confederation of Indian Industry (CII), the Associated Chambers of Commerce and Industry (ASSOCHAM), and Consumer Unity and Trust Society (CUTS International) briefed the Committee in connection with examination of 'the Competition (Amendment) Bill, 2012' and issues related therewith. The major issues discussed during the sitting broadly related to merits of the amendments, measures to strengthen the Amendment Bill, threshold above which mandatory filing is required, concept of collective and joint dominance, cartelization, abuse of dominance, anti-competitive agreements, power of search and seizure and procedure thereof, danger of leakage of information during judicial process, international experiences regarding competition laws, overall functioning of the Competition Commission, concerns of the industry, protection of Intellectual Property Rights (IPR), list of exemptions, penalties on 'affected turnover', composition and strength of Competition Commission, composition of selection committee of members, provision of compensation in case of class action litigation and above all, requirement of striking a balance between the need of economic growth and need to exist with a fair competition. The Chairman directed the representatives of Confederation of Indian Industry (CII), the Associated Chambers of Commerce and Industry (ASSOCHAM), and

Consumer Unity and Trust Society (CUTS International) to furnish written replies to the points raised by the Members during the discussion within a period of ten days.

A verbatim record of the proceedings was kept.

The witness then withdrew.

The Committee then adjourned.

MINUTES OF THE ELEVENTH SITTING OF THE STANDING COMMITTEE ON FINANCE (2013-14)

The Committee sat on Friday, the 31th January, 2014 from 1500 hrs to 1530 hrs.

PRESENT

Shri Yashwant Sinha – **Chairman**

MEMBERS

LOK SABHA

2. Shri Gurudas Dasgupta
3. Shri Nishikant Dubey
4. Adv. A. Sampath
5. Shri Thakur Anurag Singh
6. Shri Subodh Kant Sahai
7. Dr. M. Thambi durai

RAJYA SABHA

8. Shri Naresh Agrawal
9. Smt. Renuka Chowdhury
10. Shri Piyush Goyal
11. Shri P. Rajeeve

SECRETARIAT

1. Shri A.K. Singh – Joint Secretary
2. Shri Ramkumar Suryanarayanan – Additional Director
3. Shri Sanjay Sethi – Deputy Secretary
4. Shri Kulmohan Singh Arora – Under Secretary

2. The Committee took up the following draft Reports for consideration and adoption:-

- (i) The Competition (Amendment) Bill, 2012;
- (ii) XXX XXX XXX XXX;
- (iii) XXX XXX XXX XXX.

3. As some Members sought more time to consider and formulate their views on the above draft reports, the Committee decided to postpone the adoption of the draft reports to their next sitting.

The Committee then adjourned.

MINUTES OF THE TWELFTH SITTING OF THE STANDING COMMITTEE ON FINANCE (2013-14)

The Committee sat on Tuesday, the 11th February, 2014 from 1520 hrs to 1615 hrs.

PRESENT

Shri Yashwant Sinha – **Chairman**

MEMBERS

LOK SABHA

2. Dr. Baliram
3. Shri Gurudas Dasgupta
4. Shri Nishikant Dubey
5. Shri Chandrakant Khaire
6. Shri Bhartruhari Mahtab
7. Shri Sanjay Brijkishorlal Nirupam
8. Shri Prem Das Rai
9. Shri S.S. Ramasubbu
10. Adv. A. Sampath
11. Dr. M. Thambidurai
12. Shri Shivkumar Udasi

RAJYA SABHA

13. Shri Rajeev Chandrasekhar
14. Smt. Renuka Chowdhury
15. Shri Piyush Goyal
16. Dr. Mahendra Prasad
17. Shri Ravi Shankar Prasad
18. Shri Praveen Rashtrapal

SECRETARIAT

1. Shri Ramkumar Suryanarayanan – Additional Director
2. Shri Sanjay Sethi – Deputy Secretary
3. Shri Kulmohan Singh Arora – Under Secretary

2. XXX XXX XXX XXX

3. The Committee thereafter, took up the following draft Reports for consideration and adoption:-

(i) The Competition (Amendment) Bill, 2012; and

(ii) XXX XXX XXX XXX

4. The Committee adopted the above draft Reports without any modifications/amendments and authorised the Chairman to present the same to Parliament.

The Committee then adjourned.