



COMPETITION ACT, 2002: EXTENTS, COMMENCEMENTS AND IMPORTANT DEFINITIONS

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COMMENCEMENT OF THE COMPETITION ACT 2002

- The Competition Act, 2002 was passed by the Legislature on 13th January, 2003.
- The Act was to come into force from the date to be notified by the Central Government in the Official Gazette. Accordingly, the notification was issued by the Central Government wherein 31st March, 2003 was specified as the appointed date.
- However, vide this notification, some of the provisions of the Act, and not all the provisions, were enforced. Many other provisions came into force vide notification dated 19th June, 2003 and thereafter by notification dated 20th December, 2007, some more provisions were notified.

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- The Competition Commission of India was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Supreme Court.
- While disposing of the Writ petition on the 20th January, 2005, the apex court held that if an expert body is to be created by the Union Government, it might be appropriate for the government to consider the creation of two separate bodies, one with expertise for the advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognized by the Constitution of India. Keeping in view the judgment of the Hon'ble Supreme Court, the Competition (Amendment) Act

2007 was enacted in 2007.

➤ The Competition (Amendment) Act, 2007, provided, among other things, for the following:

- a. The commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices and it would also have advisory and advocacy functions in its role as a regulator.
- b. For mandatory notice of merger or combination by a person or enterprise to the commission within 30 days and to empower the commission for imposing a penalty on a person or enterprises which fails to give the same.

(Continue)

- c. For establishment of the Competition Appellate Tribunal which shall be a quasi judicial body to hear and dispose of appeals against any direction issued or decision made or order passed by the commission.
- d. For adjudication by the Competition Appellate Tribunal of claims on compensation and passing of order for the recovery of compensation from any enterprises for any loss or damage suffered as a result of any contravention of the provisions of the Act.
- e. For implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court.

(Continue)

- f. For filing of appeal against the order of the Competition Appellate Tribunal to the Supreme Court of India.
 - g. For imposition of a penalty by the commission for contravention of its orders and in certain cases of continued contraventions a penalty.
- The bill also aimed at continuation of the Monopolies and Restrictive Trade Practices Commission (MRTPC) till two years after constitution of Competitive Commission, for trying pending cases under MRTP Act 1969, after which it would stand dissolved. According to Bill, the MRTPC would not entertain new cases after the duty establishment of Competition Commission. Cases still remaining pending after this two year period would be transferred to the Competition Appellate Tribunal or the

National Commission under the Consumer Protection Act 1986, depending upon the nature of the cases.

➤ For almost six years, the CCI did not take up any cases and was engaged only in advocacy works. A seven member panel as Commission members was finally appointed in May, 2009. Sections dealing with anti-Competitive agreements (Section 3) and abuse of dominance (Section 4) were notified in May, 2009. It was 2011 when the provisions related to combinations came into force. The Competition Commission of India (procedure in regard to the transaction of business relating to combination) Regulation, 2011 came into

force on June 1st, 2011. And with the notification of section 43A and section 44, the competition Act, 2002 was fully notified from June 1st, 2011.

IMPORTANT DEFINITIONS

1. **Acquisition:** [Section 2(a)]:

Acquisition means, directly or indirectly, acquiring or agreeing to acquire—

(i) *shares, voting rights or assets of any enterprise; or*

(ii) Control over management or control over assets of any enterprise.

- Acquisition ordinarily means obtaining ownership and possession from another, whether it is ownership or other rights. In the context of enterprises it means acquiring control, direct or indirect. It could be done by acquiring control over the management or assets or by acquiring shares, voting rights or assets of that enterprise.

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- One enterprise can be said to have been acquired by another if the latter exercises or is able to exercise control over it. Both enterprises are associated by the bond of common interest. So far as interest is concerned, a person is said to have interest if he has a direct or indirect interest in any share capital, voting rights or assets of the enterprise, or if he has control alone or with others.
- Acquisition can be done in **two ways**; one, by acquiring something tangible such as the enterprise itself (shares or voting rights) or its assets; the other, acquiring control over its management or over assets. The assets in question, which could be brands or licenses, must constitute business to which a

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market turnover can be clearly attributed.

- Acquisition can be done by active participation by an enterprise in the management, control or capital of another enterprise, or not of such active participation but of the existence of some kind of relationship (economic, executive, financial, business or mutual interest) between the two when such participation is possible.
- Acquisition may be direct or indirect; direct when the enterprise acquires itself; and indirect when it does through an intermediary. It is direct when it is readily discernible (ए द्रष्टुं ह्युद्भवन् नृ इष्टं अग्र) or there is direct evidence of such acquisition. It is indirect when it is not direct, but can reasonably be inferred from the facts and circumstances.

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- Acquisition is direct when the acquirer has it himself, and it is indirect when he makes it with any other person acting in concert with him. If one provides the fund and the other acquires the shares in his name, it must be held that they have acted in concert to acquire the shares. [Shrish Finance and Investment (P) Ltd versus M Sreenivasulu Reddy (Bom, 2002)]. The indirect control may not be visible. No direct evidence or overt act or concert between the members of the group having control over the voting rights is always available. Whether, two or more persons have acted in concert has to be considered having regard to their relation etc., their conduct and their common interest, and on the basis of such evidence, one may infer that they must have acted in concert because evidence of actual concerted action is

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normally difficult to obtain and is not insisted upon.

Acquisition also implies 'Agreeing to acquire'. Thus, agreeing to acquire shares, voting rights or assets or control over management or assets, also means acquisition. Such a kind of acquisition is also an acquisition for all purposes, complete in all aspects excepting the legal formalities.

The expression "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an enterprise through the ownership of the voting securities or otherwise the relationship whereby one enterprise possesses the power to choose at best a

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majority of the members of the board of directors of another enterprises.

- Control is direct when the enterprise controls the composition of its board of directors; it is indirect when it is in a position to influence the boards' decision by dominating the meeting.
- Thus, control refers very broadly to majority voting control, the power of a person to secure by means of shares or voting power that the affairs of the company are conducted in accordance with his wishes. It means the ability to determine the constitution of the board of directors.

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- Control is acquired where an enterprise gain the ability to affect the strategic decisions of another. It shall be constituted by rights or contract or any other means which confer:
 - (1) decisive influence on decisions of the enterprises or,
 - (2) the possibility of exercising decisive influence by ownership or the rights to use all or part of assets of the enterprise.
- The one is controlled over the management which means participation in the management (i.e., administration, controls of an enterprises), and the another is control over the assets.

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- Economic dependence may sometime lead to control on a de facto basis where, for example, very long term supply agreements or credits provided by suppliers or customers, coupled with structural **links**, confer decisive influences.

It is the link between parties that facilitate collusion, tacit or explicit, between them. It does not matter whether the links are purely economic and provided by—

- i. the market structures or structural provided by contracts or licenses between the undertakings, or
- ii. Shareholdings which one of the undertakings has in the other.

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2. Agreement: [Section 2(b)]:

Agreement includes any arrangement or understanding or action in concert—

- (i) Whether or not, such arrangement, understanding or action is formal or in writing; or*
 - (ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.*
- The competition Act, 2002 prohibits any agreement in respect of production, supply, distribution, shortage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition within India.

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- But before one examines whether there is any agreement between the parties in contravention of section 3, it is necessary to ascertain whether there is any agreement between the parties. The definition of “Agreement” under section 2(b) of the Act is an inclusive definition and is wider than the definition provided under Indian Contract Act, 1872. It includes any ‘arrangement’, ‘understanding’ and ‘action in concert’. And as per section 2(b), agreements in question need not be formal or in writing and no express sanction or enforcement measures are required to be involved. In other word, there is no need for an explicit agreement and the existence of the agreement can be inferred from the intention and objectives of the parties

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This is because, in case of conspiracy, proof of formal agreement may not be available and may be established by circumstantial evidence only. The concurrence of parties and the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.

- Agreement is said to exist when the parties have reached consensus, even in broad terms, as to the lines of their mutual action, or abstention from action in the market. It may involve joint decision making and commitment to common scheme. Proof of consensus between the parties concerned or meeting of minds or 'concurrence of will' is enough to conclude the existence of an agreement and the form in which such concurrence is

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manifested is unimportant. The expression of joint intention by the undertakings in question to conduct themselves in the market in a particular way is enough to constitute an “agreement”. In national Society of Professional Engineers Versus USA (435 us 679) it was held that a canon of ethics by an association for its members to follow was agreement among them. Agreement can also be said to exist where one party manifests its wish to achieve an anti-competitive goal and the other party tacitly accepts that. The burden of proof however to prove the existence of an agreement will always be on the commission. The commission has to prove agreement, understanding, arrangement or concerted action between parties on the basis of direct or circumstantial evidences. Circumstantial evidence relied by

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authority includes behaviour of participants in the market, market trends (increase or decrease in prices) and evidence of communication among the participants. A Physical meeting is not a must for an agreement to be reached and instances like exchange of letters or telephone calls may suffice if a consensus is arrived at as to the action each party will, or will not take place.

- **ARRANGEMENT:** The term arrangement is meant to cover common course of action with a prior meeting of minds. Some form of communication between parties leads to an understanding of common behaviour or the knowledge

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that others will behave in a certain manner. An arrangement may include “mutual representation by conduct. Mutuality forms the basis of any arrangement. If it can be proven that any party did not accept mutual rights and obligations, no conclusion of arrangement can be made.

- **UNDERSTANDING:** The term ‘understanding’ signified common conduct through some sort of behavioural communication. “Where a party makes a representation as to his own future conduct with the expectation and intention that such conduct on his part will operate as an inducement to another to act in a particular way, such representation as regards his own

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conduct operates as an inducement to the other party to act in the particular way; whether it is sufficient to constitute an agreement or not in the ordinary sense, it certainly operates as an 'understanding' even though the parties never actually contacted each other.

ACTION IN CONCERT: When two or more persons join together with a 'shared common objective and purpose', they can be deemed to be acting in concert. The relationship can come into being, only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose to act in particular manner. Therefore, conduct which may not be

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attributable to an agreement can still be brought within the definition. The European Court of Justice in *Dyestuffs Case* had noted that the objective of including 'concerted practice' within Article 101 was 'to prohibit a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The consensus can be achieved either verbally or direct or indirect contract between parties. Information exchange can constitute a concerted practice if it reduce strategic uncertainty in the market thereby facilitating collusion,

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that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data (future plans, current or past financial data) between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete. Concerted action can be proved if there is a reciprocal cooperation or a joint intention to conduct in a particular manner, disclosed though direct or indirect conduct, designed to influence the conduct of an actual or potential competitor or to reveal to them the course of conduct that will or may be adopted on the market. Since, the concerned practice can take

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multiple forms, courts have been hesitant to define or limit the extent of meaning of concerted practice. The nature of acting in concert requires that the definition be drawn in deliberately wide terms.

In the Jute Mills Case [*Indian Sugar Mills Association versus Indian Jute Mills Association*, (2015) 129 SCL, 289 (CCI)], the exchange of Information was through the publication of daily price bulletin. The Gunny Traders Association used to collect sales price data everyday and published daily price bulletin. The commission noted that the price of actual transactions in the market were taking place close to the price published in daily price

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bulletin. Hence, it was held that the act of publishing the daily price bulletin was meant to decide and control the price through a tacit agreement. The commission also noted that in the absence of such price indications in the form of daily price bulletin, the competition would have been fair, market driven, where the consumer would have had more space to negotiate.

Important Definitions (Continue): CARTEL

CARTEL [SECTION 2(C)]

“Cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions of services.

In an oligopoly characterize by few producers/sellers, there are some players with large market share to an extent that their actions on output impacts market price. These sellers can sometimes also act like a monopolist.

In that situation, sellers can co-ordinate their actions or in other words collude in a manner that they operate like a single enterprise. The seller

Important Definitions (Continue): CARTEL

then do not compete with each other or make free decisions on price and output. This phenomenon is called 'Cartel'. Members of the cartel then sell at the same price and each firm of the cartel would agree to a certain produce volume (to have the same marginal cost). Oligopolistic firms enter the cartel arrangement to increase their market power. The profit maximizing decision of the cartel is similar to that of a monopolist.

Important Definitions (Continue): CARTEL

Defining Cartel

The word 'cartel' derives its origin from a latin term '*carta*', which literally means 'a paper' or 'letter'. As to its uses, the term 'cartel' can be traced back to 19th century and was understood to mean "a written notice or letter." it began to be used to denote alliances of firms in the 1800s. Its meaning changed from being used to refer to trade associations or unions to even trade agreements in early 20th century.

Cartel today has a negative connotation and is frowned upon by law. It is seen an agreement to restrain trade for the 'mutual benefit' of the parties

Important Definitions (Continue): CARTEL

entering it. Cartel in its simple meaning is an “arrangement between independent business units with common interests to agree to market variables like price, output, technical expertise, knowledge etc.” The law across the globe treat co-ordination on some of these variables as ‘hard core’ and makes them illegal.

The U S Anti –trust law does not provide a definition of cartel and it so covered withing the wide amplitude of Section 1 of Sherman Act, 1890. And Hard Core cartel has been treated as per se illegal by the US Supreme Court.

The European Union has a more comprehensive definition of ‘cartels’ and an

Important Definitions (Continue): CARTEL

it encompasses the element of it being entered between competing firms with objective to maximize profits at the cost of consumers. The governing law, i.e., the Treat on the Functioning of the European Union (TFEU) contains a general prohibition on “any agreement or concerted practice between undertakings, or decisions of an association of undertakings, which has its object or effect the preventing, restriction or distortion of competition, and which has an effect on trade between European Union Member States” [Article 101(1)] Certain agreement are considered illegal and are not likely to be granted the benefit of exemption under article 101 (3)

Important Definitions (Continue): CARTEL

of TFEU. These agreements are price fixing, output restrictions, division of market and discriminatory “treatment to equivalent transactions and making the conclusion of contracts subject to acceptance by other parties of irrelevant supplementary obligation”. However, arrangements which have positive effects of the nature mentioned in 101 (3) are allowed.

The Organization for Economic Co-operation and Development (OECD) categorizes horizontal agreements into two parts, general horizontal agreements and ‘hard core cartel’. OECD recognizes that some horizontal agreements like agreements between competitors on research and development,

Important Definitions (Continue): CARTEL

marketing, production, sharing of technology etc. are actually beneficial for consumers and have beneficial effects. The 1998 recommendations exclude certain agreement that “are reasonably related to the lawful realization of cost reducing or output-enhancing efficiencies” from the ambit of hard core cartels. Therefore, these agreements need not be dealt on a *per se* basis and the anti-competitive effects, if any has to be seen in light of the pro-competitive effect. In other words, a reasoned assessment needs to be done. ‘Hard core cartels’ on the other hand will not have any pro-competitive effects and are considered *per se* illegal. They are seen as the most serious

Important Definitions (Continue): CARTEL

form of violation of competition law and the OECD treats the prosecution of hard core cartels as a priority policy objective.

While there is more or less consensus on the definition of 'cartel' across international organizations, it has also been noted that the definition as such does not provide the direction of enforcement and implementation of anti-cartel law. Thus, there is difference in approach in the detailing of anti-cartel provisions across jurisdictions. While some jurisdiction, like India, prefer to lay down illustratively the list of kind of actions prohibited in clear unambiguous terms, other have a more generalized versions that puts an

Important Definitions (Continue): CARTEL

overarching rule to not indulge in arrangements that will prevent them from competing with competitors. Whether then a particular conduct falls within the ambit of cartel prohibition will be decided by the enforcement agencies. In the long run, these jurisdictions will develop a list of prohibited conducts that are condemned on a repeated basis and then these act as a reference point. While the first approach provides clarity and is neat, the second approach leaves a elbow room for the enforcement agencies in the competition assessment as it allows them to define and punish an activity that may not easily fit in the pre-determined category.

Important Definitions (Continue): CARTEL

The second level of divergence in the anti-cartel laws is seen in terms of exemptions. These exemptions on one hand are guided by the general economic understanding of certain benefit generating horizontal agreements and **on the other** by larger policy calls of the country. Therefore, while exemptions for efficiency enhancing joint ventures and research and development agreements is common, extension of exemptions to agricultural cooperatives, small and medium enterprises is also seen. The third level of divergence occurs on the basis of assessment. Most of the jurisdiction across the world treat hard core cartel as a *per se* violation. There are

Important Definitions (Continue): CARTEL

however jurisdictions where an effect test is used which means that the enforcement agencies will have to prove that the cartel has lessened the competition in the market. Despite the differences, there is common consensus with respect to dealing with hard core cartel.

Important Definitions (Continue): Consumer

CONSUMER [Section 2(f)]

“Consumer” means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

Important Definitions (Continue): Consumer

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use”.

Important Definitions (Continue): Consumer

Under the Competition of India, CCI is duty bound to eliminate practices having adverse effects on competition and protect the interest of consumer. A consumer therefore is eligible to file information to the CCI on which CCI may conduct an inquiry for any contravention of section 3(1) or 4(1) of the Act.

Accrual of benefit to consumers is one of the factors which is taken into accounts by the CCI to determine whether an agreement has an appreciable adverse effect on competition.

Further while delineating relevant market and determining whether an enterprise enjoys a dominant position in the relevant market, the CCI takes

Important Definitions (Continue): Consumer

into account consumer preferences and dependence of consumers on the enterprise respectively.

Section 2(f) defines a consumer to mean a person who buys and goods for a consideration or hires or avails of any service for a consideration. This definition is wider than the definition of consumer provided in Consumer Protection Act 1986 (or 2019). This is because this definition includes not only end consumers but also intermediate consumers, i.e., those who buy goods or avail services for any commercial purpose. For example, a trader buying coal in E-auction is a consumer.

Important Definitions (Continue): Consumer

The CCI in *Confederation of Real Estate Developers Association [2018 Comp LR 495 CCI]*, noted that the Department of Town and Country Planning, Government of Haryana and Haryana Urban Development Authority were engaged in provision of commercial/economic services, which was being availed by the developers on payment of requisite fee and charges levied on them. The developers were held to be covered within the definition of 'Consumer' under the Act.

Also, the government can be a consumer under section 2(f) of the Act. The product which the government proposes to purchase is the same as would be

Important Definitions (Continue): Consumer

purchased by a private person. In public procurements, the government acts as a consumer and has a right to deal with the agency that it likes.

Competition law of India advocates consumerism mainly through four important aspects:

- a) Protecting consumers from anti- competitive agreements by market controllers.
- b) Protecting consumers from any abuse of dominance by market players.
- c) Protecting consumers from any type of combinations i.e. from mergers, acquisitions, amalgamations etc. having adverse effect on competition in the market.
- d) By promoting Competition Advocacy to consumers.

Important Definitions (Continue): Enterprises

ENTERPRISES [Section 2(h)]

“Enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at

Important Definitions (Continue): Enterprises

a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space.

Explanation.-For the purposes of this clause,—

- a) “activity” includes profession or occupation;*
- b) “article” includes a new article and “service” includes a new service;*
- c) “unit” or “division”, in relation to an enterprise, includes
 - i. a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;*
 - ii. any branch or office established for the provision of any service”.**

Important Definitions (Continue): GOODS

“उद्यम” [SECTION 2(h)]

“क्षेत्र” कूचद्वर कुतः सः गत्र दधद्वघ इव श्रुतः श्रुतः पत्र द्वा अत्र इत्र गत्र रक्त्तः कू
 क्षुद्वरः, कत्रम्वघर्, ब्वग, श्रुतः, १ न्ब्र ९ गत्रश्रुतः गत्रश्रुतः इव इव इह कूत्र इत्र
 इह अत्रि इघः कू दत्र अत्र श्रुतः श्रुतः श्रुतः श्रुतः रक्त्तः, गत्र श्रुतः श्रुतः श्रुतः श्रुतः कू
 द्दः, श्रुतः श्रुतः गत्र श्रुतः श्रुतः कू १ न्ब्र ९, श्रुतः, पत्रकूतः गत्र दत्र अत्र कू
 इव अत्र रक्त्तः गत्र द्वा इव चः कू गत्र क्षु इह इत्र गत्र श्रुतः इव श्रुतः गत्र श्रुतः गत्र
 द्रव श्रुतः कू रक्त्तः कू चत्र इ ९ पत्र गत्र चत्र घत्र पत्र द्रवः इव इव गत्र श्रुतः गत्र
 द्रव श्रुतः इव इव विः इव सः पत्र अत्र क्षु इह श्रुतः विः गत्र श्रुतः श्रुतः विः

Important Definitions (Continue): GOODS

हृष सल्लि प्कृम, श्च त्र ल्क्ष स्तु कुः १ त्र लप ब्रल द्घ इवघ इव कुः च द्घ श्च ग्ग चवह षण्ण हत्र एल्व प्म क्क द्घ इवघ कुः
 द्त्र ब्रक्ष कुः कुः श्च १ त्र लप ब्रल कुः हृष द्घ इवघ कुः हृष क्क रन्व ब्र, इघळ्दह, घल्ल ल्ळ १ त्र लप ब्रल कुः
 द्त्र ष्च ल श्च क्क त्र लप ब्रल इवघ श्च इ न्त्र ष्च क्क द्घ इवघ श्च ग्ग चवह क्क प्म, कुः द्त्र ष्च ल प्म कुः

Explanation:-

- (इ) श्च ग्ग चवह" इव १ प ब्रल कुः कुः ग्ग क्क द्घ इव क्क प्म
- (द) अक्षि इव १ प ब्रल कुः कुः अक्षि घ कुः इव १ प ब्रल कुः कुः अक्षि क्क प्म
- (ए) श्च द्घ क्क रव इव द्त्र ष्च १ रवळ् स्तु वह" ग्ग क्क प्म" इव १ प ब्रल श्च क्क ल प्म-
 - i. श्च द्घ अक्षि ग्ग रवळ् इव क्क द्घ, क्क क्क, क्क, श्च, १ न् ब्र ष ग्ग श्च क्क इव श्च
 इ क्क ल कुः कुः द्त्र ग्ग क्क ग्ग इवघ द्घ;
 - ii. श्च द्घ कुः कुः अक्षि इव श्च क्क ल कुः कुः द्घ ग्ग इवघ क्क प्म

Important Definitions (Continue): Enterprises

The definition of the term 'enterprises' as per Section 2(h) of the Act lists out two components:

A: Type: An enterprises of any one of the following:

- i. 'Person': the definition of the 'person' as per section 2(l) is an inclusive one and includes an
 - (a) Individual;
 - (b) HUF;
 - (c) Company;
 - (d) Firm;
 - (e) An Association of persons or body of individual, whether incorporated or not, in India or Outside India;
 - (f) Any Corporation established by or under any Central, State or Provincial Act or a Government Company as per Company Legislation;
 - (g) Any body Corporate incorporated by or under

Important Definitions (Continue): Enterprises

the laws of a country outside India; (h) A Cooperative Society registered under any law relating to Cooperative Societies; (i) A Local Authority; (j) Any other artificial Juridical Person, not falling within any of the preceding sub-clauses, or

(ii) Department of the Government.

B. Nature of Activity:

An enterprise is engaged in —

- any activity (which also includes profession or occupation), relating to
 - the production, storage, supply, distribution, acquisition or control of article (including new article) or goods, or

Important Definitions (Continue): Enterprises

- the provisions of services (including a new services) of any kind or,
 - in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate.

It does not matter whether activity is done either directly or through one or more of its **units or divisions or subsidiary**. It does not also matter that whether such units or division or subsidiary is located at the same place where the enterprise is located or at a different place or places.

Important Definitions (Continue): Enterprises

- ❖ “Unit” or “divisions” in relation to enterprises includes:
 1. a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
 2. any branch or office (established for the provision of any services)
- ❖ Further, any activity of the government relatable to the sovereign including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space have been excluded from the definition of enterprises’. Only primary, inescapable, inalienable and non-delegable functions of a Government (Like Defense, administration of justice, maintenance of law and order) qualify as sovereign functions of the Government.

Important Definitions (Continue): Enterprises

Welfare, commercial and economic activities are not covered within the meaning of sovereign function.

The important note is that profit objective is not the crucial factor to determine whether an entity is an enterprise. The Apex Court in *Competition Commission of India versus Co-ordination Committee of Artist and Technician of W.B. Film and Television*, noted:

“Any entity, regardless of its form, constitutes an ‘enterprise’ within the meaning of section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making, that involves economic trade”.

Important Definitions (Continue): Enterprises

Thus, the definition of enterprises is activity, and not the entity, based. Even the Government as an entity is not exempted. What is exempt are its acts which are relatable to sovereign functions and some others as specified. For instances, while the trade associations are constituted of member firms who are themselves undertaking economic activities, the association, even if categorized as a 'person' under the section 2(1) cannot be held to be an 'enterprise', if it is merely providing a platform to the member firms and is itself not carrying out any commercial function of the nature prescribed under section 2(h) of the Competition Act, 2002 [*Reliance Big Entertainment Ltd versus Karnataka Film Chamber of Commerce, 2012 Comp LR 221 (CCI)*]

Important Definitions (Continue): Enterprises

In the same light, economic activities carried out by sports federation associations bring them within the ambit of the term 'enterprises' [*Sh. Dhanraj Pillay versus M/s Hockey India, 2013 LR 543 (CCI)*]. Municipal activities like acquisition of land, construction of buildings, selling properties, executing work in relation to supply of water, electricity etc. have been held to be commercial activity by the CCI [*Satyendra Singh versus Ghaziabad Development Authority (GDA) (2018) 91 taxmann.com 305 (CCI)*]

Important Definitions (Continue): Goods

GOODS [SECTION 2(I)]

“Goods” means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—

(A) products manufactured, processed or mined;

(B) debentures, stocks and shares after allotment;

(C) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Section 2() of the Act provides an inclusive definition of ‘goods’. As per the definition in the Act ‘Goods’ means goods as defined in the sale of goods Act, 1930. The Sale of Goods Act 1930, through its section 2(7) defines

Important Definitions (Continue): Goods

goods exhaustively and inclusively. It means every kinds of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be served before sale or under contract of sale. Actionable claim is a term used to describe all personal rights in property, which can only be claimed or enforced by action and not by physical possession.

The definition of goods is extremely wide and takes within its fold every kind of moveable property. Although the Sale of Act defines the terms 'property' but it does not defines 'immovable property'. The word 'property' is defined

Important Definitions (Continue): Goods

by virtue of section 2(11) of the Sale of Goods Act to mean “general property in goods, and not merely a special property”. However, the term ‘moveable property’ is defined in General Clause Act 1937 to mean “property of every description, except immovable property”. Section 3(26) of the same Act defines “immovable property” to “include land, benefits to arise out of land, things attached to the earth, or permanently fastened to anything attached to the earth.”

To sum up, all kinds of property (other than actionable claims, money and immovable property) would fall within the definition of ‘Goods’ and this would include also intangible and incorporeal property such as ‘patent’.

Important Definitions (Continue):Goods

The Delhi High Court in *Telefonaktiebolaget L M Ericsson (PUBL) v. CCI [2016 Comp LR 497 (Delhi)]* noted that the nature of patent rights does not in any manner exclude patent rights from the scope of 'goods' as defined under the Sales of Goods Act 1930.

Further, as per the definition:-

1. Products manufactured, processed or mined are also goods. Something can be produced by manufacturing if it is the end result of one or more processes through which the original commodity is made to pass. The essence of manufacturing lies in the change or modification of some material into an acceptable form to satisfy some want, desire, fancy

Important Definitions (Continue): Goods

or taste in man.

A product could be said to have been processed when it is the result of subjection of materials to some special process of treatment. It may be for the purpose of manufacture, for the purpose of development for the preparation for the market or for conversion into marketable form such as live-stock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, and fruits and vegetables by sorting and repacking.

A Product is mined when it is obtained by the process of extracting from earth.

2. Debentures, stock and shares after allotment are also goods. Debentures

Important Definitions (Continue): Goods

is simply an instrument of acknowledgment of debt by the company whereby it undertakes to pay the amount covered by it and till then it undertakes further to pay interest thereon to the debenture-holders. Debenture as ordinarily understood would not come within the purview of definition of goods. But the definition of goods includes debentures. When a statutory definition uses the word “includes” it provides an extended meaning thereto. Therefore, a debenture though not a good but it is deemed to be so in the view of its extended meaning.

Stock is a legal capital of corporation divided into shares. It is an equity representing an ownership interest in a corporation, the capital or principal

Important Definitions (Continue): Goods

fund formed by the contributions of subscriber or sale of shares.

“Shares” has been defined in section 2(46) of the Company Act 1956 to mean a share in the share capital of the company which in turn would mean that it would represent contribution of the shareholders towards the share capital of the company. Shares after allotment have been defined to be taken as goods. This means that Shares before allotment are not goods. In *Shri Gopal Jalan and Co. versus Calcutta Stock Exchange Association Ltd* (1964, SC), it has been held that in company law “allotment: means the appropriation out of the previously unappropriated capital of the company, of a certain number of shares to a person. Till allotment is made shares do

Important Definitions (Continue): Goods

not exist as such. It is only on allotment in this sense that the shares come into existence. Thus, shares before allotment would not come into existence and they cannot be regarded as goods.

3. The definition defines “goods” as including those goods which are supplied, distributed or controlled in India or the goods imported into India. The emphasis is on the words “in India” or “into India”. The goods must already be in India. Thus, where the goods are already in India, then any agreement which has the effect of eliminating competition or competitor of the sale of those goods existing in India would be restrictive trade practice, and it would be immaterial as to where the agreement takes place in relation

Important Definitions (Continue): Goods

to the sale of those goods. For the purpose of the Act, it is only the goods imported into India which fall in the definition of the “goods”. As long as import has not taken place and the goods are merely intended for export into India, the same will not fall within the definition. [*Haridas Exports versus All India Float Glass Manufacturers Association (2002) 111 Comp. Cas. 617 (SC)*]

THANKS