

Combating Anti-Competitive Practices in India: Analyzing the performance of India's Competition Commission

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1. Introduction

Competition is regarded as sine qua non for liberalized markets in economy. It is the life force of markets that creates the best incentives for businesses to increase efficiency, drives their productivity and fuels innovation.¹ In other words, Competition is a powerful instrument to help in achieving the macroeconomic policy goals of the country and is recognized as key to “economic” efficiency which in the Government context is important for maximizing the overall welfare of society.² Despite its all-embracing benefits, healthy competition may not emerge on its own. Even the staunchest supporters of a market economy admit that liberalized marketplaces cannot be taken as necessarily being competitive and effective. They may nonetheless be rife with distortions brought on by powerful monopolistic companies or confederacies of companies working together. The relationship between liberalized markets and the productivity and innovation benefits they are thought to produce is broken by such distortions.³ In other words, fair and effective competition in markets is easier said than done. It does not come about by itself, but has to be created and enforced through competition policy and law. Hence, the need for a robust competition law and policy arises.⁴ Therefore, the Governments around the world have found it necessary to prescribe ground rules for competition in the market place through competition law and policy.

The competition policy addresses competition distortions in policies relating to trade, commerce, industry, business, investment, disinvestment, fiscal, taxation, IPR, procurement, etc. and endeavors to provide competitive neutrality and level playing field. The competition law addresses anti-competitive conduct of the enterprises by a mix of preventive, punitive and remedial measures.⁵ So, both competition legislation and competition policy are necessary to increase the market's competitive dynamics. They support one another. While competition policy aims to repair the anti-competitive effects of various government policies and regulations and aid in the establishment of competitive markets, competition law restricts and penalizes anti-competitive acts by businesses operating in the market, i.e. solves market failures.⁶

¹ Competition Commission of India, “Annual Report 2018-2019” 1 (2018-19), available at <https://www.cci.gov.in/public/images/annualreport/en/3-annual-report-2018-191652253330.pdf> (last visited on 24th March, 2024).

² Government of India, “National Competition Policy, 2011”, para 3.1 (Ministry of Corporate Affairs, 2011).

³ Quoted by Vinod Dhall in his speech at workshop on “Competition assessment analyses: Instrument for competition advocacy” 1, available at http://164.100.58.95/sites/default/files/speeches/17_dhall_20080716091702.pdf (last visited on 3rd March, 2024).

⁴ Competition Commission of India, “Annual Report 2017-2018” 1 (2017-18), available at <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2017-181652253434.pdf> (last visited on 24th March, 2024).

⁵ Competition Commission of India, “Annual Report 2014-2015” 1 (2014-15), available at <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2014-151652253894.pdf> (last visited on 30th March, 2024).

⁶ Supra Note 2, para 2.5.

Competition laws have a long history which began in the 1860s and 1870s when American States passed "anti-trust" laws. The Sherman Act of 1890 served as their zenith. The Clayton Act and the Federal Trade Commission Act were passed in 1915 as a result. Following this, the Celler-Kefauver Act of 1950 and the Robinson-Patman Act of 1936 were passed. These statutes, together with subsequent amendments, judicial interpretations and the priorities and interpretations of enforcement agencies, form the body of the Competition Law as it is practiced in the US today. Articles 85 and 86 of the 1957 Treaty of Rome (now Articles 81 and 82) serve as the principal Competition Law of the European Commission\European Union. Article 85 (now Article 81) deals with the joint exercise of market power by one or more firms, and Article 86 (now Article 82) deals with the exercise of market power by a single firm. The UK's Competition Act, 1998, which went into effect on March 1, 2000, is one of the most recent laws. The revised Act is more in line with the European Commission's Competition Law. The Act has prohibitions that are in line with Articles 85 and 86 (now Articles 81 and 82) of the Treaty of Rome.⁷ Today, more than 140 jurisdictions across the world have enacted competition laws to deal with the subject matter of competition. The number of countries with Competition laws is slated to increase further in the coming few years as more and more nations are now enacting competition legislation. Many countries have modernized their competition regimes in the recent past and India belongs to the family of such nations.

2. Genesis and Evolution of Competition Law in India

In 1969, India implemented the Monopolies and Restrictive Trade Practices Act as their initial competition law. The primary goal of this law was to discourage the accumulation of economic power, regulate monopolies, and ban unfair trade practices that were monopolistic or restrictive in nature. In the 1990s, the Indian market was opened up to the world and a new economic policy was introduced. As a result, the emphasis changed from controlling monopolies to encouraging competition throughout the Indian market.⁸ For this new economic order to achieve its intended goals, the need was felt that new a legal architecture be enacted that ensures protection and promotion of competition and fair play in the marketplace. The result of this was the passing of the Competition Act 2002 and the formation of the Competition Commission of India which laid down the foundation of a modern competition regime in the country.

The Competition Act, 2002 provides a formal and legal framework to promote and sustain competition through its various provisions which, inter-alia, includes prohibition of anti-competitive agreements ;prohibition of abusive behaviour of dominant player in relevant market ; prohibition of any combination that has or is expected to have a significant negative impact on competition in the relevant Indian market and therefore requires prior approval of the Commission for the combinations above prescribed thresholds. Further, realizing limited awareness of benefits of competition among the stakeholders, the Competition Act, 2002 mandates the Commission, inter-alia, to take appropriate actions for the promotion of competition advocacy, as well as to create awareness and provide training about competition issues. Thus, to make the competition regime successful, in addition to strong enforcement, vigorous advocacy to promote competition awareness is also mandated under the Competition Act, 2002.

3. Objectives of Study

⁷ Government of India, "Report of the High-Level Committee on Competition Policy and Law", para 4.1.1 (Department of Company Affairs, 2000).

⁸ Competition Commission of India, "Annual Report 2019-2020" 2 (2019-20), available at <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2019-201665121534.pdf> (last visited on 30th March, 2024).

The overall aim of the study is to see the efficacy of Competition Commission of India in combating anti-competitive practices provided under the Competition Act, 2002.

The specific objectives are the following:

- 1) To study and analyse the subject areas in which Competition Commission of India has powers to inquire and investigate viz. Anti-Competitive Agreements, Abuse of Dominant Position and Regulation of Combination.
- 2) To assess the effectiveness of Competition Commission of India in curbing Anti-Competitive Agreements, Abuse of Dominant Position and Regulation of Combination.

4. Research Questions

The present study attempts to answers the following questions:

- 1) What are the various practices which are considered to be anti-competitive in nature under the Competition Act, 2002?
- 2) What are the measures adopted by the Competition Commission of India to prohibit such anti-competitive activities under the Competition Act, 2002?

5. Hypotheses of Study

In the backdrop of object and research question involved in the present study, the thesis broadly centers around following hypotheses:

- 1) The Competition Commission of India is effective and powerful body in sustaining competition in the Indian market economy.
- 2) The Competition Commission of India is given enough powers to prevent practices having an adverse effect on competition in India.

6. Research Methodology of Study

The present study is designed to evaluate the performance of the Competition Commission of India (CCI) in combating anti-competitive practices in India, focusing on assessing the effectiveness of the CCI in curbing anti-competitive agreements and abuse of dominant positions. The research is based exclusively on secondary sources, particularly annual reports made available on the official CCI website. The study covers the period from 2011 to 2021, offering insights into the Commission's efforts in addressing anti-competitive practices over a decade.

Parameters of Analysis

To evaluate the effectiveness of the CCI in curbing anti-competitive practices, the following parameters were considered:

1. **Receipt and Disposal of Cases by the Commission:** Reviewing the number of alleged contraventions received and the rate of disposal.
2. **Investigations and Inquiries:** Assessing the actions taken by the Director General in investigating alleged contraventions under the Competition Act.
3. **Orders Passed:** Evaluating the orders passed by the Commission regarding alleged contraventions, focusing on their impact and follow-up actions.

Method of Analysis

The study employs cross-tabulation (crosstab) analysis as the primary tool for comparative evaluation of various variables. Crosstab analysis is used to examine relationships between variables such as the type of cases received, the nature of orders passed, and the efficiency in case disposal, which are discussed with

the help of figures and tables. By employing this methodological framework, the study provides a comprehensive analysis of the Commission's performance in combating anti-competitive practices and its progress toward achieving its statutory objectives.

Data Period and Scope

The data collected spans ten years, from 2011 to 2021. This time frame is significant for understanding trends and evaluating the Commission's response to anti-competitive practices during this decade.

Limitations

While the study provides valuable insights, it is limited to publicly available secondary data and does not incorporate primary data such as stakeholder interviews or survey results. Additionally, the analysis is confined to data accessible on the Commission's website, which may not fully capture all the nuances of the Commission's operations and challenges.

7. Analysis of Available Data⁹

7.1 Receipt and Disposal of Alleged Contraventions of Sections 3 and 4 of the Act by the Commission

The Commission inquires into any alleged contravention of the provisions of sections 3 and 4 of the Act either on its own motion or on receipt of any information from any person, consumer or their association or trade association under section 19(1) (a) of the Act, or from a mention of it by the Central Government, State Government, or a legal organization according to section 19(1) (b) of the Act. On coming to know of an alleged contravention, it forms an opinion if there exists a prima-facie case to proceed further into the matter. If it determines that there is a sufficient initial evidence, it instructs the Director General to conduct an inquiry into the issue according to section 26(1) of the Act. On the other hand, if it finds that there exists no prima facie case, it closes the matter by passing an order under section 26(2) of the Act. The orders under section 26(1) and 26(2) are called prima facie orders. A cross tabulation is done between the receipt of matters relating to alleged contraventions of sections 3 and 4 of the Act and their disposal under section 26(1) and 26(2) of the Act till 31st March 2021. The results of the cross tab are shown in Table No. 1.1 and Figure 1.2.

Table No. 1.1

Receipt and Disposal of Alleged Contraventions of Sections 3 and 4 of the Act during 2011 to 2021

Year	No. of Cases received from/under						Disposal of Cases by the Commission		
	Opening Balance	MRTC	Section 19(1)(a)	Section 19(1)(b)	Suo-Moto	Total	Investigation ordered u/s 26(1)	Closed without Investigation u/s 26(2)	Total
11-12	94	0	89	4	0	187	38	51	89
12-13	71	0	86	2	6	165	32	51	83
13-14	82	0	102	8	5	197	50	72	122

⁹ Annual Reports of Competition Commission of India available at <http://www.cci.gov.in/annual-report> (last visited on 25/02/2022).

14-15	19	0	110	7	11	147	41	73	114
15-16	33	0	117	3	1	154	23	96	119
16-17	34	0	84	4	73	195	100	68	168
17-18	27	0	67	2	3	99	23	54	77
18-19	22	0	55	8	5	90	22	48	70
19-20	20	0	51	5	4	80	20	34	54
20-21	25	0	46	2	7	80	17	38	55
Total		50	909	45	120	1124	459	637	1096

Figure 1.2

Receipt and Disposal of Alleged Contraventions of Sections 3 and 4 of the Act during 2011 to 2021

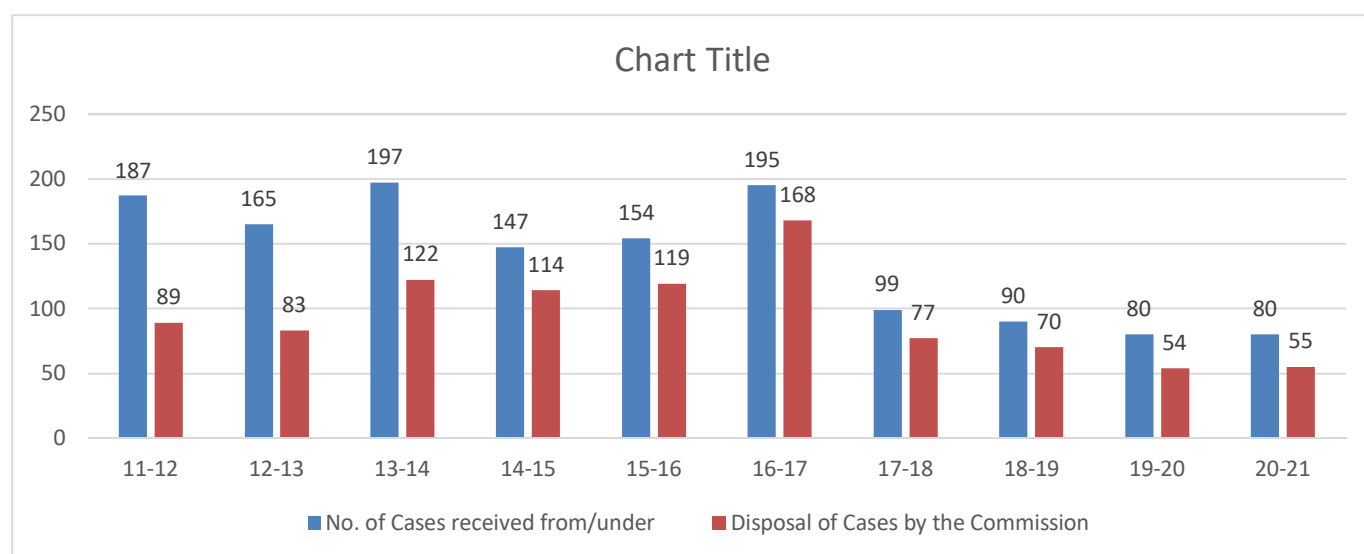


Table No. 1.1 and Figure 1.2 shows that as on 31st March 2021, the Commission received 909 information and 45 references respectively under section 19(1)(a) and 19(1)(b) of the Act. In addition to this, the Commission received 50 matters relating to alleged violation of section 3 and 4 of the Act from MRTC and 120 cases were suo-moto taken for inquiry by it under section 19(1) of the Act. Out of the total 1124 matters received during 2011-2021, the Commission took a final decision on 1096 matters of which 459 matters were ordered for investigation by the DG under section 26(1) and 637 matters were closed without investigation under section 26(2) of the Act. At the end of the financial year 2021, 25 matters were pending for assessment before the Commission.

7.2 Investigations and Enquiries undertaken by Director General for Alleged Contraventions of Sections 3 and 4 of the Act

If the Commission believes that a prima facie case of alleged violation of the provisions of section 3 and 4 of the Act exist, it shall direct the Director-General to investigate the matter under section 26(1) of the Act. Thus, the Director General conducts investigations into the alleged contraventions of the section 3 and 4 of the Act as and when directed by the Commission to do so. A cross tabulation between detail of investigation ordered and completed by the Director General is presented in Table No. 1.2 and Figure 1.3. It may be noted that in some cases, after receipt of the Director General report, if the Commission is of the opinion that further investigation is called for, it may direct the DG to do so and submit a supplementary report on specific issues. Table No. 1.2 and Figure 1.3 presents the data and analysis of original investigations and not supplementary investigations.

Table No. 1.2

Investigations Ordered and Completed by the Director General for Alleged Contraventions of Sections 3 and 4 of the Act during 2011-2021

Year	Opening Balance	No. of Investigation ordered	No. of Investigation Completed	Closing Balance
2011-2012	21	38	38	21
2012-2013	21	32	25	28
2013-2014	28	50	24	54
2014-2015	54	41	34	61
2015-2016	61	23	32	52
2016-2017	52	100	23	129
2017-2018	129	23	36	112
2018-2019	112	22	51	83
2019-2020	83	20	37	66
2020-2021	66	17	24	59
Total		459	400	

Figure 1.3

Investigations Ordered and Completed by the Director General for Alleged Contraventions of Sections 3 and 4 of the Act during 2011-2021

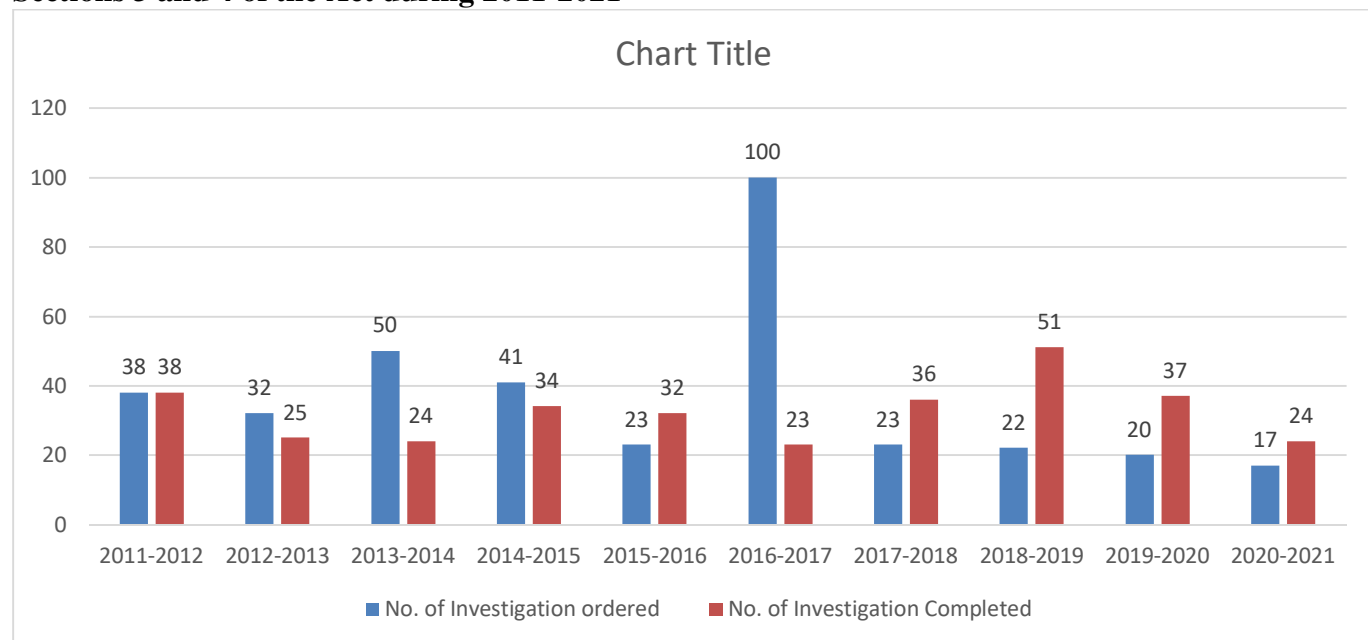


Table No. 1.2 and Figure 1.3 shows that as on 31st March, 2021, the Director General received 459 matters for investigation under section 26(1) of the Act and submitted investigation reports in 400 matters. At the end of the financial year 2021, 59 matters were pending for assessment before the Director General.

7.3 Orders passed by the Commission for Alleged Contravention of Section 3 and 4 of the Act

On noticing an alleged contravention of section 3 or 4 of the Act, the Commission takes a view if there exist a prima facie case or not. In case it exists, it passes an order under section 26(1) for investigation into the matter by the Director General. If it does not, it closes the matter by an order under section 26(2) of the Act. If no case is made out on completion of the investigation, it closes the matter by an order under section 26(6) of the Act. If there is any contravention, it passes an order under section 27 of the Act. Thus, based on the findings of the investigation and pursuant to proceedings conducted in compliance with the principles of natural justice, the Commission passes final orders under section 26(6) and 27 of the Act. The orders passed under section 26(6) and 27 are called final orders. Occasionally, a matter may warrant interim directions. In such cases, the Commission issues interim orders under section 33 of the Act. It is possible that all the members of the Commission may not hold the same view in a matter. In such cases, an order is passed with dissent. A fair share of orders with dissent reflects the rule of reason and complications in application of the rule in competition matters. An attempt is done to analyse the cross tabulation results of the matters received relating to alleged contraventions of sections 3 and 4 of the Act and order passed by the Commission under section 26(2), 26(6), 27 and 33 of the Act till March, 2021. The results are indicated in table 1.4 and figure 1.5.

Table No. 1.3

Receipt of matters and Orders passed by the Commission for Alleged Contraventions of Sections 3 and 4 of the Act during 2011-2021

Year	Receipt of matters	No. of Orders passed by the Commission			
		u/s 26(2)	u/s 26(6)	u/s 27	u/s 33
2011-12	93	51	37	29	13
2012-13	94	51	15	17	4
2013-14	115	72	8	13	10
2014-15	128	73	2	20	8
2015-16	121	96	17	14	3
2016-17	161	68	4	7	1
2017-18	72	54	6	12	1
2018-19	68	48	24	21	3
2019-20	60	34	49	10	1
2020-21	55	38	23	9	3
Total	1124	637	193	153	65

Figure 1.4

Receipt of matters and Orders passed by the Commission for Alleged Contraventions of Sections 3 and 4 of the Act during 2011-2021

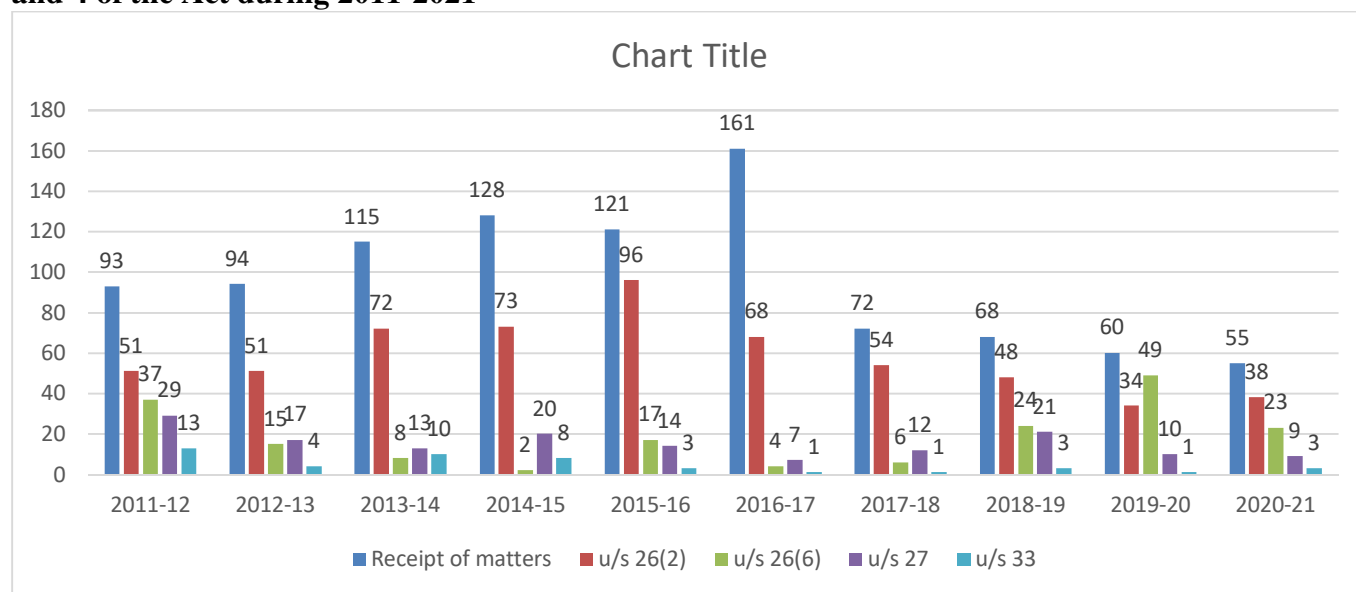


Table 1.3 and figure 1.4 shows that as on 31st March, 2021 of the total 1124 matters received relating to alleged contraventions of sections 3 and 4 of the Act, the Commission did not find any violation of the Act in 637 matters and, therefore, closed them by an order under section 26(2) of the Act at the prima facie stage. In other 459 matters, investigations were ordered under section 26(1) of the Act. On completion of the investigation by the DG and after considering the objections and submissions made by the parties, The Commission did not discover any violations of the Act's provisions in 193 cases and closed them by an order under section 26(6) of the Act and in 153 matters it found contravention and accordingly passed the orders under section 27 of the Act.

Analyzing the annual report and summarizing the performance of Commission in dealing with anti-competitive agreements and abuse of dominant position under section 3 and 4 of the Act shows that the Commission has the teeth in terms of clear cut statutory powers and expeditious process to tame it all and set it right. The increasing number of cases coming to the notice of the Commission over the years reflects increasing confidence of the stakeholders in competition regime. Also, the higher ratio of cases being disposed of under Section 26(2) and Section 26(6) reflects improved scrutiny by the Commission. This spares the parties from avoidable pains of investigation. However, it also reflects that more number of information is being filed on issues that are not subject matters of the Act.