
16 November 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note
by India**

5 December 2017

This document reproduces a written contribution by India submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

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1. The Indian Competition Law regime has undergone a concomitant change after India embarked on the course of liberalisation, privatisation and globalisation in the 1990s. In the backdrop of new economic paradigm, a new competition law (Competition Act, 2002) that ‘promotes’ as opposed to ‘regulates’ competition (erstwhile MRTP Act, 1969) was enacted in the year 2003.
2. The preamble of the Competition Act, 2002 (hereinafter ‘the Act’) provides that it is an Act to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. The emphasis under the Competition Act, 2002 is to inquire into anti-competitive practices, keeping in view the behaviour of various economic agents in the market.
3. Indian Competition Act, 2002 prohibits anti-competitive agreements under Section 3, abuse of dominant position under section 4 and regulates combinations under section 5 and 6 of the Act.

1. Presumptions under Indian Competition Act, 2002

4. Section 3(3) of the Competition Act that deals with horizontal agreements including cartels, presume certain acts and conducts to be anti-competitive.¹ In contrast, provisions of section 3(4) concerning vertical agreements are examined based on ‘rule of reason’ approach.
5. With regard to agreements mentioned in Section 3(3) of the Act, the parties can rebut the presumption that such agreements are likely to cause an appreciable adverse effect on competition (AAEC). The presumptions can be rebutted in the following manner:
 1. Either the impugned conduct does not fall under section 3(3) to begin with; or

¹(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation.—For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

2. The pro-competitive effects outweigh the anti-competitive effects as per the factors mentioned in section 19(3) of the Act².
6. Regarding the manner of rebutting this presumption, in Suo Moto case No. 4 of 2013 (regarding cartelisation in manufacturing of paraphernalia used to make explosive devices), the Commission held that “the provisions of Section 3(3) envisage that once ingredients of Section 3(3) are established, there is no further need to determine the factors mentioned in Section 19(3) of the Act as there is a presumption in the Act that such agreements cause appreciable adverse effect on competition. This presumption is a rebuttable presumption and the onus to prove that there are pro-competitive effects of such agreements which outweigh the anti-competitive effects shifts on the entities facing charges.”
7. Similarly, in Case No. 68/2013 Ghanshyam Dass vs. Bajaj Corp, the Commission observed that “in case of agreements as listed in Section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut this presumption would lie upon the Opposite Parties”.
8. The aforesaid views of the Commission run across all cases involving horizontal agreements, wherein inquiries have been conducted.
9. It is pertinent that Competition Appellate Tribunal (COMPAT, now National Company Law Appellate Tribunal-NCLAT) has observed in the matter of allegation of cartelisation by 4 public sector insurance companies that the presumption under section 3(3) is “conclusive”.³ Further, in the Coordination Committee case⁴ judgment of the Supreme Court, the Court has observed that provisions of section 3(3) of the Act are per se violative of the Act. At the same time, the Supreme Court held that there is a need to delineate the relevant market prior to establishing cartel and in this regard, observed as follows:
- “The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face.”⁵*
10. The Supreme Court has further held:
- “It is the notion of ‘power over the market’ which is the key to analysing many competitive issues. Therefore, it becomes necessary to understand what is meant by the relevant market.”⁶*

² (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:— (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

³ Order dated 09.12.2016.

⁴ Competition Commission of India vs. Coordination Committee of Artists and Technicians of West Bengal. Civil Appeal No. 6691 of 2014.

⁵ At paragraph 31 of the Judgment.

⁶ Ibid at paragraph 35.

11. The introduction of the concept of ‘competitive constraints’ while assessing agreements under Section 3(3) necessitates an analysis of market power of the enterprises in question. This line of reasoning militates against the *per se* rule which rules out a conclusive inquiry into conduct which lacks any redeeming virtue, irrespective of the market power of the enterprise accused of the prohibited conduct.

12. Thus, it may be said that law in this regard is still evolving. In near future, it is expected that NCLAT and the Apex Court would pronounce further judgments in cases of horizontal agreements and cartels decided by the Commission, wherein jurisprudence on the issue is likely to be settled.

1.1. Standard of Proof in cases of Horizontal Agreements and Cartels

13. Presumption under section 3(3) would require existence of agreements, establishing acts and conducts that are presumed to be anti-competitive. Since horizontal anti-competitive agreements including cartels, rarely, if ever, record their existence in contractual form, direct evidence regarding their operation is challenging to adduce. Law therefore recognises that an agreement (under Section 2(b)) need not be “*formal or in writing*” and it may be any arrangement, understanding or action in concert. The Supreme Court in the case of *Coordination Committee*⁷ has interpreted definition of ‘agreement’ under Section 2(b) stating that it is very widely worded. Not only it is inclusive, as the word ‘includes’ therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as ‘agreement’. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings or not.

14. At the same time, it is also necessary that facts and evidences in a case under inquiry should exist to establish any agreement, arrangement, understanding or action in concert.

15. The Commission in the case of *Consumer Online Foundation vs. Tata Sky* (Case No. 2 of 2009) while considering the plea of the Informant on whether DTH service providers had colluded to prevent interoperability of their smart cards in their Set Top Boxes, observed that “*for any “practice” to be considered as concerted action, the facts must be counterpoised on that fulcrum of “by agreement amongst themselves”. Such “agreement” should not be adduced, assumed or arrived at through eliminative or wishful reasoning but must be concluded through amassment of undisputable evidences. The establishing of joint mens rea of non-competition is imperative.*”

16. In the case of *Neeraj Malhotra vs. Deutsche Bank* (Case No. 5 of 2009) while examining the allegations of the Informant that all the arraigned banks had colluded by levying prepayment charges on the prepayment of amount of home loan taken, the Commission observed that it is imperative that existence of such an “agreement” is unequivocally established. Further, the Commission held that “*the existence of any “agreement” cannot be conjectured or even circumstantially adduced. Mere fact that the IBA issued a circular dated 10.09.2003 mentioning concern of some member banks cannot in itself be said to form a basis for or evidence of an agreement between banks.*”

17. The Commission in later cases has considered that facts and evidences may not only be direct but also circumstantial in nature to establish anti-competitive agreement. In

⁷ Ibid

the case of *Tyre cartel case* (MRTP Case: RTPE No. 20 of 2008), the Commission, thus, held as follows:

“It is no doubt true that as held by the Commission in Neeraj Malhotra case, an agreement must be established unequivocally. That however is not to suggest that an agreement can be established only through direct evidence.....Circumstantial evidence is of no less value than direct evidence as the law makes no distinction between the two.”

18. The Commission also discussed the evidentiary value of circumstantial evidence in the following manner:

“If direct evidences are not present, but circumstantial evidences do indicate harm to the competition at a market place, the Commission will certainly take cognizance of the same.”

19. The Commission has considered preponderance of probabilities to be the main factor while examining cartelisation. In the case of *Shoe cartel case* (Case No. 1 of 2012), the Commission, while examining allegations of bid rigging in the case of rubber shoes, held as follows:

“There is rarely a direct evidence of action in concert and the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In the light of the definition of the term ‘agreement’, the Commission has to find sufficiency of evidence on the basis of benchmark of ‘preponderance of probabilities’.”

20. In the *Soda Ash cartel case* - (Case No. 66 of 2011), the Commission mentioned the above paragraph in the *Shoe cartel case* and added as follows:

“Considering the remote possibility of getting direct evidence in the case of a cartel in many cases, the existence of an anti-competitive practice or agreement can also be inferred from the conduct of the colluding parties which may include a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement.”

21. In the suo-motu case against LPG cylinder manufacturers, the Commission held that cartelization not being a criminal offense, the test for proof to be employed should be the “balance of probabilities”, which can be established with the support of indirect and circumstantial evidence.

1.2. Assessment of vertical agreements and dominance

22. With regard to the vertical agreements that are envisaged under Section 3(4) of the Act, the Commission has looked at it based on rule of reason approach. The Commission has considered market power as the main factor to decide whether a party can through an agreement enter into anti-competitive arrangement. In *Prime Mag vs. Wiley India* (Case No. 07 of 2016), it was held that since the arraigned party had miniscule market share (4.1 %), the impugned agreement under Section 3(4) of the Act was unlikely to cause any appreciable adverse effect on competition (AAEC). Similarly, in *Sonam Sharma vs. Apple*(Case No. 24/2011), the Commission was circumspect as to the agreement in question causing AAEC. The Commission went on to observe that “no operator has more than 35% market share in an otherwise competitive mobile network service market. As none of the impugned operators (OP3 / OP4) have market-share

exceeding 30%, that smartphone market in India is less than a tenth of the entire handset market and that Apple iPhone has less than 3% share in the smartphone market in India, it is highly improbable that there would be an AAEC in the Indian market.”

23. If the Commission does wish to proceed to examine whether an agreement under Section 3(4) of the Act causes AAEC, recourse would necessarily have to be to the factors enumerated under Section 19(3) of the Act. In *Automobile Dealers Association vs. Global Automobile Limited*(Case No. 33/2011), the Commission while ascertaining AAEC in case of any agreement under Section 3(4) of the Act, observed that the possibility of AAEC has to be examined at both levels of production and supply chain in both separate markets where the agreeing parties operate. Further, the Commission went on to highlight how the assessment under Section 19(3) of the Act is to be carried out.⁸It elaborated as follows:

“The existence of the first three factors would normally indicate AAEC while the absence would normally indicate no AAEC. The presence of the remaining three factors would normally indicate no AAEC as they are in the nature of efficiency justifications. The absence of the last three factors alone can neither determine AAEC nor establish efficiency justifications. In most cases, therefore, it is more prudent to examine all the above factors together to arrive at a net impact on competition.”

1.3. Assessment of Dominance

24. While assessing dominance, the Commission considers factors mentioned in section 19(4) of the fact and therefore full blown analysis is required to assess the market power of a party. This is required in light of explanation to section 4 which defines dominance and section 19(4) of the Act which makes it obligatory for the Commission to look into the factors mentioned in section 19(4) of the Act to assess dominance⁹. Market share or any other quantitative criteria is not envisaged in the Act to establish dominance of a party. The parties are free to adduce evidence to refute the assessment of the Commission. However, once the dominance is established, in case the dominant entity is found to be indulging in the actions mentioned in section 4 of the Act, the law holds them

⁸Paragraph 12.9 of Case No. 33/2011.

⁹ “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. (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:— (a) market share of the enterprise; (b) size and resources of the enterprise; (c) size and importance of the competitors; (d) economic power of the enterprise including commercial advantages over competitors; (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise; (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (i) countervailing buying power; (j) market structure and size of market; (k) social obligations and social costs; (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any other factor which the Commission may consider relevant for the inquiry.

to be per se violative of the Act. Of course, the Commission performs analysis on all parameters before holding that a dominant player has indeed abused its position of dominance.

2. Safe Harbours under the Act

2.1. Safe Harbours in matters of Combination as per the Act and Regulations

25. The Competition Act, 2002 provides for safe harbours in the form of thresholds required for notification of combinations by the parties. At present, thresholds prescribed under the Act (as enhanced by the Central Government vide its Notification No. S.O. 675(E) dated March 4, 2016) are as provided for in Table below. In order for a combination to be considered as mandatorily notifiable, it must cumulatively satisfy both the asset and turnover thresholds.

Table 1.

		Assets	OR	Turnover
Enterprise Level	India	> 2000 INR crore	OR	>6000 INR crore
	Worldwide (with India component)	>USD 1 bn with at least >1000 INR crore in India		>USD 3 bn with at least >3000 INR crore in India
OR				
Group Level	India	>8000 INR crore	OR	>24000 INR crore
	Worldwide (with India component)	> USD 4 bn with at least >1000 INR crore in India		> USD 12 bn with at least >3000 INR crore in India

26. Exemption has been provided from regulation of combinations to share subscription, financing facility, or any acquisition by a public financial institution, a foreign portfolio investor, bank or venture capital fund pursuant to any covenant of a loan agreement or investment agreement. However, the details of such agreement would have to be notified to the Commission under Section 6(5) of the Competition Act, 2002 in the manner prescribed in Regulation 6 of the Combination Regulations and through Form III provided for in Schedule II to the Combination Regulations. The exemption provided under this Section is a blanket exemption.

27. As per Regulation 4 of the Combination Regulations, the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an AAEC in India and therefore, notice under sub-section (2) of section 6 of the Act need not normally be filed in respect of these combinations.

2.2. Safe Harbours in Form of Exemption provided by the Government

28. The Central Government of India under section 54 of the Act has the right to exempt from the application of the Competition Act: (a) behaviour by any class of enterprise if necessary in the interest of security of the state / public interest; (b) practices arising out of and in accordance with an obligation assumed by India with any other country or **countries**; and (c) enterprises that perform a sovereign function on behalf of the Central Government of India or a State Government.

29. Pursuant to Notification No SO 482(E) dated 4 March 2011 (read with Corrigendum No SO 1218(E) dated 27 May 2011) acquisitions of control, shares, assets or voting rights of an enterprise whose assets were below INR 250 crore in India or

turnover was below INR 750 crore in India, were exempt from section 5 of the Act and therefore exempt from notification to the Commission, for a period of five years ('De Minimis Exemption'). This was subsequently revised vide Notification No SO 674(E) dated 4 March 2016, which extended the De Minimis Exemption for a further period of 5 years, along with an increase in the value of assets and value of turnover in order to qualify for the exemption. Under the said notification, acquisitions of control, shares, assets, or voting rights of an enterprise whose assets are below INR 350 crore or turnover is below INR 1000 crore in India, is exempt from notification requirement to the Commission for a period of five years.

30. The Government of India amended the De Minimis Exemption vide Notification No. S.O. 988(E) dated 27th March, 2017 ("Revised De Minimis Exemption"). Vide Revised De Minimis Exemption two changes have been introduced, i.e., (a) the de minimis exemption is now applicable to mergers also as against the earlier position where the De Minimis Exemption was applicable to cases of acquisitions only; and (b) in cases of acquisition of an asset, or business division of an enterprise, relevant assets and turnover attributable to the said asset or business division only will be considered to determine the applicability of Revised De Minimis Exemption. Earlier, assets and turnover of the entire enterprise (whose control, voting rights, or shares are being acquired) was required to be considered for determining applicability of the exemption.

31. *Vide* notification dated 08.01.2013, the government had earlier exempted a banking company, in respect of which the Central Government had issued a notification under Section 45 of the Banking Regulation Act, 1949, in public interest for a period of 5 years. This is to take care of failing banks. Recently, *vide* notification dated 30.08.2017, the government had exempted "*all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalised banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years.*"

32. As per a recent notification dated 10.08.2017, the Ministry of Corporate Affairs has exempted any mergers between regional rural banks that are directed by the government for a period of 5 years.

33. Vessel Sharing Agreements of the liner shipping industry were exempted *vide* notification dated 5th February, 2015 for a period of one year in respect of carriers of all nationalities operating ships of any nationality from any Indian port. This exemption was recently extended for another 1 year with effect from 20th June, 2017.

2.3. Intellectual Property Defence

34. Safe harbours per se are not available for IPR holders under the Competition Act, 2002. As far as agreements are concerned, however, Section 3(5)(i) of the Act provides that nothing in Section 3 (which deals with prohibition of anti-competitive agreements) shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting their intellectual property rights. Thus, parties who are IPR holders and are parties to agreements can take intellectual property defence, provided the agreements impose reasonable conditions as may be necessary for protection of IP rights. In the case of *FICCI Multiplex case* (In the first ever cartel case before the Commission), one of the arguments adopted by the arraigned parties before the Commission in order to justify not providing access of their films to multiplex owners was that "*no multiplex owner can demand that the film be released in a theatre let alone dictate the commercial terms on which such film must be*

released". This, it was argued, was due to the copyright that subsisted in the films which gave them the right to decide on what terms to provide the films. The Commission held that copyright is a statutory right and not an absolute right and would be subject to the rigors of the Competition Act, 2002. This position was upheld by the High Court of Bombay.

35. In *Shamsher Kataria Case*, the Commission held that protection under Section 3(5) of the Act is available only if "necessary". In the instant case, the Commission held that the restrictions imposed by overseas automobile entities on the sale of their spare parts to anyone except their own OEMs in India was not necessary to protect the IP underlying the spare parts.

36. Safe harbours are available to export cartels since they are exempt from the purview of Section 3(5)(ii) of the Act, which provides that nothing in Section 3 shall restrict the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. In *Nirmal Kumar Manshani v Ruchi Soya & Ors*, Case No. 76 of 2012, the Commission found that the agreement pertained to export sales, and therefore had no effects on the markets in India. Consequently, it found that there was no contravention of the cartel provisions of the Competition Act.

2.4. Treatment of Joint Ventures

37. Sub-section 3 of Section 3 of the Act dealing with horizontal agreements and cartels that presumes certain acts and conduct to be anti-competitive, is not applicable to joint ventures, if such agreements enhance efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services by virtue of proviso below this sub-section. Detailed analysis of JV was carried out in *Association of Third Party Administrators*¹⁰ case where the Commission considered efficiencies achieved by TPA formed by the 4 PSU insurance companies and also the arguments of insurance companies regarding the efficiency enhancement brought in the public insurance sector contributing to overall consumer benefits.

2.5. Safe Harbour and Dominance

38. The Commission has, thus far, in the decisions it has rendered, refrained from adopting a bright line test for a presumption of dominance based on market shares in unilateral conduct cases. That is to say, that merely because the market share of an enterprise (alleged to have abused its dominance) is below a certain threshold, does not mean that the enterprise is not dominant. Therefore, there is no safe harbour test involving market shares. The assessment of dominance is not undertaken by a cursory look at the market shares. Rather is a holistic assessment that also involves an evaluation of the market structure, size and resource of competitors, entry conditions and countervailing buying power. In unilateral conduct cases which Commission has scrutinised from a cross-section of industries over these years, a set of the factors listed in law have been considered in conjunction with market share to arrive at a conclusion on dominance.

39. In the case of *RamakantKini vs. Hiranandani Hospital* (Case No. 39 of 2012) while ascertaining abuse of dominance allegations levelled by the Informant that an

¹⁰ Case No. 107 of 2013- Association of Third Party Administrators

exclusive agreement entered into by the hospital with a stem cell bank denied market access to other stem cell banks, the Commission considered the market share figure of approximately 63.7% provided by the DG and held as follows:

“At the outset, it may be clarified that market share of an enterprise is only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance. Also, the Act has not prescribed any market share threshold for determining dominance of an enterprise in the relevant market.”

40. In *MCX vs. NSE* (Case No. 13 of 2009, MCX alleged that NSE’s policy of a transaction fee waiver in respect of all currency future trades on its platform led to MCX also waiving the transaction fee for the transaction on its platforms. It was further alleged that the fee waiver would not only eliminate the business of MCX in the CD segment, but also eliminate potential and efficient competitors from the market. The fee waiver was seen as an exclusionary device to kill competition. While considering whether NSE was dominant, the market shares of all the 3 players in the market were looked at. NSE with a market share of 30% had the lowest market share when compared with USE (36%) and NSE itself (34%). However, the Commission reiterated that it did not follow a bright line test for dominance based on market shares. It held as follows:

“Unlike in some international jurisdictions, the evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry.” (emphasis added)

41. The Commission does not favour a presumptive standard for dominance. Given that there is a variance across industries in terms of nature of competition and technology, the Commission does not consider a one-size-fits-all approach is appropriate for presuming dominance. In cases of unilateral conduct, the Commission has not only gone by the market share of the defendant, but also attempted to assess the market shares of other competitors and to the extent possible, appreciate the competitive constraints on the defendant. In one of the case of alleged anti-competitive behaviour of an airline, the case was closed at the *prima facie* stage as the airline was not found dominant in the relevant market. The market share of the airline was 32%, followed by three other airlines with share of 22%, 18% and 17%. Along with this, the Commission also took into consideration other aspects such as the value of assets of all the airlines, availability of choice to consumers, easy access to information on flights, fare, timing and availability etc. In another case in the telecom sector, the Commission held that a market share of 27% was not sufficient to hold the defendant telecom player as dominant. The informant alleged excessive and unfair pricing by the telecom player for providing international roaming services. The Commission noted that six other players with comparable size, resources, infrastructure and expertise were present in the relevant market and posed effective competitive constraint on the defendant. Accordingly, the matter was closed. Not having a presumptive threshold is prudent given the highly dynamic business environment currently in India and also taking into cognisance the fact that the competition is still unfolding.