SINGLE ECONOMIC ENTITY DOCTRINE IN INDIA

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Does the Competition Act 2002 contemplate exclusion of Single Economic Entity Doctrine?

INTRODUCTION

On 09.12.2016, the Competition Appellate Tribunal ["**CAT**"] gave the ruling in *Public Insurers* case.[2] The four insurance companies (National Insurance, New India Assurance, Oriental Insurance and United India Insurance) were alleged to have cartelized by rigging the bids that were submitted in response to the tenders floated by the Government of Kerala for selecting the insurance service provider for the RashtriyaSwasthyaBimaYojana ["**RSBY**"]. Before the Competition Commission of India ["**CCI**"], the insurance companies tried to plead that since they were constituted under General Insurance Companies Act, 2002, placing them under the control and direction of Department of Financial Services ["**DFS**"], all the four companies' along with the DFS formed a Single Economic Entity, and therefore could not have cartelised. The submission did not sail through. CCI found the four insurance companies as having cartelised and rigged the bidding process, therefore imposed a penalty of Rs. 671 crores. The insurance companies preferred an appeal before the CAT. Before the CAT, they changed their submissions. By arguing that since unlike the foreign jurisdictions, Competition Act 2002 provides for definition of 'enterprise', and if it could be proven that the four companies along with DFS constitute one enterprise as per the requirements of definition, the doctrine of Single Economic Entity ["**SEE**"] ought not to apply since an enterprise cannot cartelise with itself. The advocates for appellants, Krishnan Venugopal and Ramji Srinivasan, submitted that the Indian law by providing for definition of 'enterprise' conceptualises a broader understanding than the SEE doctrine as applied in American and European jurisdictions. Thus, if the requirements of definition of 'enterprise' are fulfilled, the control and direction test ought not to be applied to ascertain whether the entities form one SEE. Even though this was the core submission of the insurance companies which the counsels argued for over three days, the CAT in its final order dealt only summarily with the issue, dismissing the submissions made. Thus, this paper aims to

[1]The author expresses gratitude to Krishnan Venugopal, Senior Advocate for giving an opportunity to intern at his chambers.

[2]National Insurance Companies Ltd. and Ors. v. Competition Commission of India (2017) Comp LR 1 [hereinafter "**Public Insurers Case**"].

analyse the veracity of the submission that the insertion of the definition of enterprise does away with the requirements needed to prove the existence of a single economic entity.

The paper is divided into four parts. The first part examines the definition of 'enterprise'. The counsels for appellants had extensively relied upon the drafting history of both the Competition Act and its predecessor- the Monopolies and Restrictive Trade Practices Act, 1969 ["**MRTP Act**"]. In this part I shall also be looking at the judicial treatment of 'enterprise' and 'undertaking' under the MRTP Act. In the second part I shall be focusing upon the secondary issue which arose in this particular *public insurers case*-whether a government department could have subsidiaries? This question becomes important to examine since it hinges upon how the definition of enterprise is supposed to be interpreted. The very idea of a single economic entity prizes the substantive unity of the enterprise over its legal corporate form. It remains to be examined, how much should the substantive unity be valued under competition law when it is in direct confrontation with basic tenets of company law. Here it is important to examine how the competition policy intended the government enterprises to be treated and therefore, whether the separate legal personality doctrine could be ignored by competition authorities? In the third part, the focus is upon the development and adoption of single economic entity doctrine in the European Union and the United States. By examining the decided case laws, different understandings and application of the doctrine is sought. In the United States, the *copperweld case* is perceived as the watershed moment which marked the death of intra-enterprise conspiracy doctrine. In this part, the arguments put forward by scholars like Phillip Areeda for applying SEE doctrine is presented. In the final part, building on the works of Phillip Areeda and other scholars, their perception and idea of single economic entity is discussed. In light of these differing ideas of SEE doctrine, the veracity of the submission made in the *public insurers case* is, thus, appraised.

I. DEFINITION OF 'ENTERPRISE'

S. 2(h) provides for the definition of 'enterprise'. It reads as follows:

> 'S.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 a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence 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;' [Emphasis supplied][3]

The Indian law is unique as it provides for a definition of what an enterprise is. The highlighted part of the definition clause entails that the enterprise is one which acts either directly or indirectly through its constituent-units, divisions or subsidiaries. It goes beyond the company law concept of a company having 'separate legal personality' and recognises that different juristic persons may, in certain cases, be acting and behaving as one. This circumscribes the concept of SEE doctrine, which excludes the application of anti-collusion laws upon firms which form a single undertaking. The antitrust measures like anticompetitive agreements ought to be scrutinised only in the cases where they have been entered between independent undertakings. SEE doctrine however requires that the 'decisive control' of the parent company be proved over the subsidiaries. Whereas certain courts equate "decisive control" with "control of share capital", others require actual exercise of influence in either key decisions or day-to-day operations to be proved.

In the *public insurers* case, the issue raised was whether the inclusion of definition of enterprise in the Act excludes the application of SEE doctrine? That is, if the requirements of the definition are proven in a particular case, the test for direction and control need not be applied. SEE doctrine has been for long been applied by Indian authorities. The contention that section 2(h) (definition of an enterprise) ought to exclude the doctrine's application was raised for the first time in this case. The contention that section 2(h) (definition of an enterprise) ought to exclude the doctrine's application was raised for the first time in this case.

[3] Competition Act, §. 2(h) (2002).

The original enacted text of the MRTP Act provided for the definition of 'undertaking' as: **S. 2(v) 'Undertaking' means an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind**.[4] Soon after the enactment of the MRTP Act, in 1973 a suit reached Supreme Court, where a public limited company (appellant) had been barred from holding 100% share capital of a privately-owned company.[5] The privately-owned company was actually being floated by the appellant itself, as its own subsidiary, so that it could transfer one of its plants to the proposed private company and raise capital. The MRTP Act at the relevant time provided that the permission of central government was needed for merger or amalgamation of one undertaking with another. The issue that arose in this case was whether the company which was yet to be incorporated, could be said to be an 'undertaking' as for the purposes of MRTP Act? The Supreme Court citing an earlier reported judgment, held that as per S. 2(v), an undertaking could only be one which is actually engaged in production, supply, distribution or control of goods, at the material date and not a firm which intends to be engaged in such activity in future.[6] Importantly, the Supreme Court also noted, that through the 100% transfer of shares, the appellant was only acquiring the control and right of management of the proposed company and that it would not amount to purchase of an undertaking. Referring to the established company law principles that the company has a separate legal personality and it is the company not its shareholders, who could actually own the company; the court held that transfer of 100% shares to the appellant company only made the appellant a shareholder, not the owner of the undertaking.

The judgment in *Carew and Co.* v. *Union of India,* necessitated a review of the definition of undertaking.[7] In 1984, the definition was amended and adopted as follows:

In 1984, the definition of undertaking was	**Competition Act 2002:** S.2(h) "enterprise" means

[4]Monopolies and Restrictive Trade Practices Act, 1969 was enacted at a time when the idea of state-control of the economy was celebrated in India. It served as a precursor legislation to Competition Act, 2002. While it was in force, MRTP Act underwent several major amendments to keep the law abreast of politico-economic developments. The aims and objectives of this Act were:

1. To ensure that the operation of the economic system does not result in the concentration of economic power in hands of few rich.
2. To provide for the control of monopolies, and
3. To prohibit monopolistic and restrictive trade practices.

[5]Carew and Co. v. Union of India AIR 1975 SC 2260.

[6] Union of India v. Tata Engineering and Locomotive Co. Ltd. AIR 1972 Bom 301.

[7]Report of High-Powered Expert Committee on Companies and MRTP Acts at ¶19.21 (Ministry of Law, Justice & Company affairs, 1978), http://reports.mca.gov.in/Reports/30-Rajindar%20Sacher%20committee%20report%20of%20the%20High-powered%20expert%20committee%20on%20Companies%20&%20MRTP%20Acts,%201978.pdf (hereinafter "**Sachar Committee Report**").

amended as follows: S.2(v) "undertaking" means an enterprise which is, or has been, **or is proposed to be,**[8] engaged in the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, **either directly or through one or more of its units or divisions**, whether such unit or division is located at the same place where the undertaking is located or at a different place or at different places. Explanation I : In this clause, – (a) "article" includes a new article and "service" includes a new service; (b) "unit" of "division", in relation to an undertaking 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. Explanation II : For the purposes of this clause, a body corporate, which is, or has been, engaged only in the business of acquiring holding, underwriting or dealing with shares, debentures or other securities of any other body corporate shall be deemed to be an undertaking Explanation III : For the removal of doubts, it is hereby declared that an investment company shall be deemed, for the purposes of this Act, to be an undertaking;	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 a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence 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;

[8] The inclusion of this phrase was a direct consequence of judgment in *Carew and Co.* v. *Union of India* AIR 1975 SC 2260 and recommendations made by RajinderSachar Committee.

The absence of the phrase "**or is proposed to be engaged in any activity**" in the latter is worthy to take note of. While this phrase was part of Competition Bill 2001, it eventually got deleted because its presence was found to be confusing.[9] It could not be assumed that the drafters were unaware about the reason for inclusion of this term. Nor could it be assumed that the legislative intent is now to be understood as to exclude the firms which would go into production in future. The ratio in *Carew and Co.* v. *Union of India*, could not be understood to have been discarded. Plausibly, what could be inferred is, that the drafters and the Parliament by not focusing upon the text of the definition, intended to prize the substance over the form, ie, what the definition of enterprise implies is to be valued over what it literally says.[10]

II. GOVERNMENT ENTERPRISES UNDER COMPETITION LAW

A secondary issue which arose in this case was whether a government department could have a subsidiary? The Competition Act refers to the Companies Act, 1956 to define the term 'subsidiary'.[11] This question was posed by the bench to the counsels of insurance companies, as it is understood that only a body corporate could have a subsidiary in form of a company. The counsels were trying to submit how the government department 'Department for Financial Services' together with the four insurance companies (as its subsidiaries) formed one enterprise. A foray into the jurisprudence of company law thus needs to be made, to understand the concept of 'subsidiary'. At the same time, drafting notes of the Competition Act need to be referred to understand how a government department was envisaged to be treated vis-à-vis other juristic persons, particularly for purposes of S. 2(h).

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[9] "9.1.1 A suggestion has been received that the words "is proposed to be, engaged in any activity" in the definition of 'enterprise' in sub clause (g) of the clause appears to be confusing and thus may be deleted. The Department has agreed to delete those words appearing in second line of the sub-clause."
Department-Related Parliamentary Standing Committee on Home Affairs, Ninety Third Report on the Competition Bill, 2001 (2002) at ¶23, http://www.prsindia.org/uploads/media/1167471748/bill73_2007050873_Standing_Committee_Report_on_ Competition_Bill__2001.pdf.

[10] It seems however, that the Indian competition law authorities in recent years have not paid attention to this deletion "*or is proposed to be engaged in any activity"* from the definition of enterprise nor kept the ratio of *Carew India case* in mind. This phrase entails that not just the present impact upon the competition ought to be under the supervision of competition law authorities, but also potential harm/impact upon the competition ought to be supervised. For instance in the *Third Party Administrators case,* whereas the CCI was concerned with and dealt with impact upon potential entrants to the TPA market, it also observed "*selection of partner for a yet to be formed JV TPA cannot be termed as anti-competitive at this nascent stage, which does not in any manner indicate that the mere formation of the same would automatically trigger the contravention of the provisions of the Act.*"; which indicates the oversight by CCI to look into the potential impact which the said yet-to-be-operationalised TPA could have upon the market. It is my submission therefore, that this oversight is in contravention of *Carew India case's* ratio which requires the competition law authorities to look into the potential impact of a firm which is yet to go into production upon the competition in the market.
See Association of Third Party Administrators v. General Insurers' (Public Sector) Association of India and Ors. Case No. 107/2013 (CCI) [Para 64].

[11] Competition Act, §. 2(z) (2002).

The nature of reference made by Competition Act to the Companies Act is also unclear. S. 2(z) provides as follows: **S. 2(z) words and expressions used but not defined in this Act and defined in the Companies Act, 1956 (1 of 1956) shall have the same meanings respectively assigned to them in that Act.** Overtime, Companies Act, 1956 has been replaced by the Companies Act, 2013; however the Competition Act has not been updated accordingly.

The question that was posed by the bench to the counsels of public insurance companies was whether the government department could have a subsidiary of its own? This was left unanswered. The Competition Act makes a reference to Companies Act 1956 for the terms which are undefined. However, first, it needs to be clarified whether the Competition Act intends to treat public-sector enterprises differently from private-sector?

A. COMPETITION LAW POLICY BEHIND TREATMENT OF PUBLIC SECTOR

The SVS Raghavan Committee Report (2000) spelled the intended purpose behind the Competition Bill. The Committee recorded that in recent years a lot of sectors earlier reserved for public-sector have now been opened to private competition. In light of such developments, it did not deem fit to provide preferential treatment to public sector enterprises. It records that "*the regulator should not make any distinction between public and private companies.*"[12]This distinctive treatment was however done away with back in 1991 itself, through a government notification. In a case pertaining to violation of provisions of MRTP Act, the Madras High Court noted "*Be that as it may, by a Notification G.S.R. No. 605(E) dated 27.09.1991, (published in the Gazette of India Extraordinary, Part II Section 3, Sub-section (1)), the public sector undertakings whether owned by the Government or by Government Companies (except those excluded), statutory corporations, undertakings under the management of authorised controller appointed under any law, Co-operative Societies and financial institutions, all have been brought within the purview of the MRTP Act. As such, there is now no distinction in the treatment between public sector undertakings (except the excluded ones and the private sector companies and the public sector undertakings are subject to the same discipline as the private sector companies, in the matter of monopolistic, restrictive and unfair trade practices.*"[13] The Indian government, in its communication to WTO during early years of formulation of competition law policy did express its intent of bringing public-sector under the purview of competition law and to treat public-sector enterprises no differently from private-sector. In the same letter of communication, the Indian government stated that all trade practices of undertakings owned by government (other than those in strategic sectors like

[12]Report of High Level Committee on Competition Policy & Law – Raghavan Committee (Government of India, 2000) at ¶2.8.6, https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf [hereinafter "**Raghavan Committee"**].

[13] Tamil Nadu Co-op Mil Producers' Federation v. Triad Trading Services (2010) 4 LW 289.

defence) were under the purview of MRTP Act.[14] It did not particularly clarify whether the government departments were also being regulated at par with other forms of entities under the Act.

Thus, should a government department be treated any differently from Government Company? The absurdity of such reliance upon juristic form of the entity in question was brought out by MRTP Commission's illustration-"*We may take up an illustration to adjudicate on this issue. In the territory of Delhi, Mahanagar Telephone Nigam Limited, a Government company is rendering the service of providing telephone facilities to citizens within. The Department of Telecommunications renders similar service for the citizens outside Delhi territory. Both the Mahanagar Telephone Nigam Limited and the Department of Telecommunications render the same service. Mahanagar Telephone Nigam Limited is indictable for deficiencies of service or for any negligence in carrying out its responsibilities, but the Department of Telecommunications is not indictable. This is the invidious discrimination that Dr. Aggarwal, counsel for the complainant, emphasised and argued that there is no justification in keeping one entity within the ambit of the Act and excluding another, when both are rendering the same service.*"[15]

However, this decision does not establishes a definite position of law. In this case, it was alleged that the Uttar Pradesh government's Department of Irrigation had indulged in restrictive trade practice and the same should be brought under the investigation of MRTP Commission. The MRTP Commission upon clearing its jurisdiction over the Department of Irrigation by treating it on par with government companies, had found the department guilty of restrictive trade practices. The case went on appeal before Supreme Court, and the judgment of MRTP Commission was set aside because no restrictive trade practice was found to have been committed.[16] While setting aside the judgment, the language adopted by the apex court was- "*Even if one were to assume that the State was an undertaking as defined in Section 2(V) and that the activity of arranging for the supply of water is a "service" as contemplated under the Act in the absence of this vital element of competition, the Commission could not have held that there was any restrictive trade practice within the meaning of Section 10 of the Act…*".[17] It did not deal substantively with the issue of jurisdiction. Thus, by setting aside the MRTP Commission's judgment in the case, the apex court discarded its binding value, however, it does not seem to have discarded the rationale behind treating the government departments as 'undertaking' on par with government and private-sector companies.

[14] World Trade Organisation, "*Working Group Interaction between Trade and Competition Policy*" – Communication from India, (WT/WGTCP/W/110, Nov. 16, 1998).
[15]Gir Prasad v. Government of Uttar Pradesh [1996] 87 CompCas 623 [Para 59].
[16]State of Uttar Pradesh v. Gir Prasad AIR 2004 SC 1756.
[17]State of Uttar Pradesh v. Gir Prasad AIR 2004 SC 1756 [¶8].

B. COULD A GOVERNMENT DEPARTMENT HAVE ITS OWN SUBSIDIARIES?

While evident, the position is not clearly established, that both the judiciary and executive went beyond the form (definition of undertaking/enterprise), and intended to treat public-sector enterprises, including government departments on par with private-sector, for the purposes of regulation under competition law. The question peculiar to the facts of the *public insurers case* that remains to be answered, is whether a government department could have its own subsidiaries? It could also be phrased as-why is it necessary that the parent body of a subsidiary be a body incorporate or a company? G.S. Singhvi in his judgment had recorded:

> "Subsidiary status is available only to companies or a body corporate. A department of the Government is neither a company nor a body corporate, and by its very nature cannot have subsidiaries. Any extended or altered meaning of the term subsidiary will mean a departure from the clear language of law under Section 2(h) read with Section 2(z) of the Act. Purposive rule and Mischief rule of interpretation cited by the counsel are not applicable in this case."[18]

A government department does not enjoy a separate legal personality. It is a non-corporate instrumentality of the government. The simplest argument against the appellants was if the idea of subsidiaries is to be expanded such that any person holding its shares could be deemed as the parent body, that would rupture the very tenets of separate legal personality as it would mean all the shareholders of all companies to be recognised as the parent body/holding company and be made liable for the acts of the company that is recognised as a subsidiary. The company law regarding subsidiaries is premised on the doctrine that the parent company is deemed not to be doing business through its subsidiaries, in the eyes of law.[19] Yet there are sufficient number of cases across jurisdictions challenging the immunity provided to the holding company for the debts, contracts or torts committed by the subsidiary etc.[20] In all such cases where the court has preferred to not be blinded by mere corporate form, are the cases where it has been demonstrated that the subsidiary is one that is a mere adjunct, agency or instrumentality of the owning company. However, in ordinary cases, the shareholder (or the holding company) cannot be made liable. Where it is not shown that the subsidiary was acting as an agent, the

[18] Public Insurers case, *supra* note 1, ¶13.9
[19] H.W. Ballantine, *Parent and Subsidiary Corporations,* 14(1) CALIFORNIA L. R. 12, 14 (1925).
Also see Gramophone and Typewriter Ltd. v. *Stanley* (1908) 1 All ER 833.
[20] *Id* at 15.

relationship remains that of a shareholder to corporation rather than constituting the subsidiary as an agent.[21]

The idea of piercing the corporate veil exists in all the jurisdictions. The directing minds of the company are made liable for any fraud or any other illegal acts undertaken by the company upon their directions. But exploring the idea of piercing the corporate veil, it only provides an indication regarding when the directing minds of the company or the holding company of a subsidiary are to be made liable.[22] While a parity is drawn between the two situations, never has any court conflated the two by calling the company a subsidiary of its shareholder(s).

Yet, this deemed independence of business operations between holding and subsidiary companies and between a shareholder and a company, is often illusory, atleast as noted from competition law point of view.[23] It is arguable that a subsidiary has no real freedom of choice. One, a parent company would instruct the subsidiary to act independently only when it is believed that such directive would promote efficiency. But this grant of independence of operation implies that the subsidiary must coordinate with the parent or other sister subsidiaries when it is beneficial. Second, this grant of freedom could be qualified or repealed by either practice or tacit understanding. Finally, it would be both economically inefficient and illogical to presume that a parent body would ever want to grant independence to such a degree such as to make the enterprise liable for anti-competitive practices.[24] In the following sections the idea of economic unity of an enterprise is explored in light of developments in the EU and US jurisdictions.

III. SINGLE ECONOMIC ENTITY DOCTRINE

C. SEE DOCTRINE IN EUROPE

The EU courts have maintained the position that the concept of 'undertaking' must be understood as an 'economic entity'.[25] This doctrine evolved in 1970-71, as a consequence of corporations being arranged into separate subsidiaries for each member-state of European Economic Community (presently, EU). In the earliest case where SEE doctrine was argued,[26] the

[21] *Id* at 19.
[22] United Statesv. Bestfoods 524 U.S. 51 (1998); RimaliBatra, *The Case of Economic Oneness of Group Companies,* JSA LAW (Sep. 2015) http://www.jsalaw.com/wp-content/uploads/2015/09/The-Case-of-Economic-Oneness-of-Group-Companies.pdf (Last visited 13 June 2017).
[23] Owen T. Prell, *Copperweld Corp.* v. *Independence Tube Corp.: An End to the Intraenterprise Conspiracy Doctrine*, 71(6) CORNELL L. R. 1151, 1171 (Sep.1986).
[24] *Id* at pg. 1172.
[25] Case C-41/90, Höfner and Elsner v. Macrotron, 1991 E.C.R. I-1979.
[26] Imperial Chemical Industries Ltd. v. Commission, Case 48/69, ECLI:EU:C:1972:70.

applicant, tried to made out that how collusion as per Art. 85(1) (presently, Art. 101(1)) could not be made out since despite being separate legal personalities, all the subsidiaries along with parent company, hitherto fined, actually form one economic entity. Because the matter involved a parent company based in UK, ie, beyond EEC's jurisdiction at the relevant time, it involved exercising jurisdiction extra-territorially as well. The Court referred to the opinion of Prof. Jennings (International Law professor at Cambridge, *then*) as provided by the applicant. Prof. Jennings is quoted as having stated his opinion, that unless it can be shown that the subsidiary is an automation operated by the parent, the distinct legal personality of the subsidiary ought to be respected.[27]

In *Beguelin Import Co.* v. *S.A.G.L. Import Export*[28], the parent company was based in one country (Belgium) and the subsidiary in another (France). The issue came up, whether the exclusive sales agreement between the two infringed upon Art. 85(1). The European Court, upon reference from the commission, noted that to constitute offence under Art. 85(1) there has to be an agreement amongst the undertakings. Here it was actually one entity as per their conduct in the market, disregarding their separate legal personalities. Thus as far as the agreement between the two companies was concerned, the Court held that Art. 85(1) could not have been violated, as they constituted single undertaking. The relationship between parent and subsidiary, it ruled, need not be accounted for in determining validity of exclusive dealing agreement entered between a subsidiary and a third party.

The concept of SEE doctrine stems from fundamental proposition of competition-competition requires two or more entities acting independently in the market.[29]There are number of circumstances where separate legal entities are unable to autonomously exert an economic impact-their ownership relationship often explains this inability to compete. Competition is impossible where one entity could influence/determine the policy that the other intends to adopt in the market.[30]*P Viho BV* v. *Commission* is one most-cited case in this regard. ECJ in that case had based its decision on the rationale that there could be no competition between the parent company and its subsidiaries. Since there is no real autonomy in determining their own course of

[27] *Id* at 626.
[28]Beguelin Import Co. v. S.A.G.L. Import-Export 1971 C.J. Comm. E. Rec. 949.
[29] The European Court of Justice asserted this as follows in T-Mobile v. Commission Case C-8/08 [2009] ECR I-4529, para 32: "each economic operator must determine independently the policy which it intends to adopt on the common market including the choice of persons and undertakings to which he makes offers or sells".
[30]OkeogheneOdudu and David Bailey, *The Single Economic Entity Doctrine in EU Competition Law,* 51 C. M. L. Rev.1721, 1727 (2014) [*hereinafter referred as* "**Odudu and Bailey**"]; GesellschaftAEG-TelefunkenAGv.CommissionCase 107/82 [1983] E.C.R. 3151, ¶49.

action, Article 101 could not be applicable as there is no competition conceivable amongst the group companies that needs to be protected.[31]

Unreported in the final judgment of COMPAT, in *public insurers case*, one of the questions put up to the counsels by the bench was whether SEE doctrine also protects anticompetitive agreements entered into by two subsidiaries of same company, but not by the parent company itself? *Hydrotherm* v. *Compact* is one such case in this regard.[32] In this case the legality of distribution agreement entered into between Hydrotherm and three different persons was under question. The 'three persons' were one Mr. Andreoli and two corporate legal entities over whom he had full control. The Court held that there was no competition possible between Mr. Andreoli and the two corporate legal entities held and controlled by him. *Hydrotherm* case could have therefore come to aid of the counsels for *public insurers,* however it was not argued. This case illustrates that for SEE doctrine to apply, legal relationship or the need to have a holding company for subsidiaries is not needed- what is needed is to prove that the entities exist and act as one economic entity, and thereby competition within its constituents is not possible.[33]

D. INTRA-ENTERPRISE CONSPIRACY DOCTRINE AND *COPPERWELD* CASE IN US

S. 1 of US's Sherman Act prohibits 'every contract, combination…or conspiracy in restraint of trade.'[34] This has been understood by American courts as requiring a concerted action between two or more independent firms in the market. It exempted unilateral action, S. 1 was noted as not restricting the right of trader/manufacturer engaged in entirely private business, to exercise his/her own independent discretion as to with which parties he/she shall deal with.[35] The *Copperweld*case, highlighted the difficulty in applying S. 1 of the Sherman Act upon a corporate defendant. In this case it was held that the separate divisions of a single corporation ought to be treated as a single entity in antitrust law, making them incapable of conspiring amongst themselves.[36] This case had changed the hitherto position that was "*[where defendants] availed*

[31] P Viho Europe BV v. Commission Case, C-73/95 [1996] ECR 1-5457.
[32] HydrothermGerätebauv. Compact, Case 170/83 [1984] ECR 2999.
[33] Even though *Hydrotherm*case is widely cited as a case concerning anticompetitive agreement entered between two subsidiaries of same company, this case however, involved the agreement in question having been entered into between the owner and the two corporate entities wholly held by him. There has not been a case thusfar where the parent entity was not party to the anticompetitive agreement. *P Viho Europe BV* case comes close, however, in that case too the agreement was entered in between the subsidiaries and the parent company.
See Odudu and Bailey, *supra* note 29, pp. 1734.
[34] 15 U.S.C., § 1 (2012) [Sherman Act].
[35] United States v. Colgate & Co. 250 U.S. 300, 307 (1919).
[36] Copperweld Corp. v. Independent Tube Corp. 467 U.S. 752, 768–69 (1984) [hereinafter "**Copperweld case**"].

themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from [antitrust liability]."[37]

*Copperweld*case understood the central concern of S. 1 arose from the risk of anticompetitive agreements that deprived the market of independent centres of decision-making which a competitive market assumes and demands. In a holding-subsidiary relationship, the interests of the two companies are so closely aligned that assuming them to be separate decision-making centres is absurd.[38] This decision of US Supreme Court led to discarding of hitherto upheld Intra-Enterprise Conspiracy doctrine. In the previous cases, the American courts had followed the rationale in *Perma Life Mufflers* case, as quoted above. Months prior to the decision being delivered in *Copperweld,* Prof. Phillip Areeda had written an article arguing against the intraenterprise conspiracy doctrine. Areeda had rejected the policy justifications for intraenterprise conspiracy doctrine as vacuous, suggesting that there is no meaningful distinction between separately incorporated but wholly-owned subsidiaries and separate divisions of a single corporation.[39]

In *Copperweld*case, the US Supreme Court had restricted the scope of application to the holding to a parent company with separately incorporated but wholly-owned subsidiary. It left the question open, regarding the degree of ownership or of alignment of interest, to suffice the defence of unilateral action for a case involving a parent company and less than wholly-owned subsidiary.[40] Thus it left open a divide amongst the American lower courts, while some courts applied *Copperweld*case only to situations involving parent and wholly-owned subsidiaries, others applied factual tests to determine the degree of alignment of interests in cases involving less than wholly-owned subsidiaries.[41]

IV. APPLYING THE SEE DOCTRINE IN INDIA

As evidenced in *Public Insurers case,* the competition law authorities interpret the direction and control test required to establish that different corporate entities/persons constitute a Single Economic Entity, entails finding answer to one question-whether the parent body exercises such

[37]Perma Life Mufflers, Inc. v. International Parts Corp. 392 U.S. 134, 141–42 (1968)[hereinafter "**Perma Life case**"]. ; *see also* Natasha G. Menell, *The Copperweld Question: Drawing the Line between Corporate Family and Cartel,* 101 CORNELL L. REV. 467, 472 (2016) [hereinafter "**Menell**"].
[38]Copperweld case, supra note 35.
[39] Phillip Areeda, *Intraenterprise Conspiracy in Decline,* 97(2) HARV. L. REV. 451, 452-453 (1983) [hereinafter "**Areeda**"].
[40] *Id.*
[41]Menell, *supra* note 36 at 480-483.

control over the subsidiary/unit/division that it directs the latter on how to conduct itself in day to day operations in the market? Justice G.S. Singhvi in *Public Insurers case* discarded the application of SEE doctrine, because of one of the finding being-"*In the present case, the Appellants are Board managed companies, with autonomy in operational matters and cannot be aggregated with DFS, which is not engaged in any activities relating to good or services.*"[42] However, the direction and control test has not always been applied with such consistency. In another case where the complainant wanted the exclusive distribution agreement entered into between two wholly-owned subsidiary companies of Volkswagen AG as anti-competitive, COMPAT found it convenient to find the two companies belonging to the same Single Economic Entity simply by relying on their share-capital structure. It did not found necessary nor important to delve into the amount of control exercised by the parent company.[43] These two cases, decided within two years of each other-expose how confused the approach of Indian competition law authorities is regarding understanding of and applying the SEE doctrine.[44]

Given this inconsistency and confusion regarding the SEE doctrine, it remains to be established in which cases is the SEE doctrine to be applied, what is to be understood by direction and control test and the degree to which the parent body should be noted to be influencing the decisions of the subsidiary-so they could safely be covered under the SEE doctrine. Thus, in this concluding part, I intend to examine various approaches proposed for applying the SEE doctrine and to examine whether the interpretation suggested by Sr. Advs. Krishnan Venugopal and Ramji Srinivasan, has credibility in the competition law jurisprudence. I shall begin by discussing the approach proposed by Phillip Areeda and other scholars when prior to pronouncement of *Copperweld* judgment, Areeda had argued against the application of the Intra-enterprise Conspiracy Doctrine. Based upon their submissions, relying mainly on Areeda's, the question whether the enterprise definition replaces the requirements of SEE doctrine is examined. What should be the best possible application of single economic unity in Indian law is also answered.

E. AREEDA'S APPROACH TO SEE DOCTRINE

Areeda in his 1983 paper began by critiquing the holding in *Perma Life Holders case*,[45] arguing that it was merely a conclusion based on mistaken belief that separate legal personality in corporate

[42]Public Insurers case, *supra* note 1, ¶13.12.
[43] Exclusive Motors Pvt. Ltd.v. *A*utomobili Lamborghini SPA(2014) 121 CLA 230 (CAT), ¶ 8-11, 14 [hereinafter "**Lamborghini case**"].
[44] The presiding judge too, in both the cases was same-Justice G.S. Singhvi.
[45] "where defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from antitrust liability", Perma Life case, *supra* note 36.

law entails conspiratorial capacity in antitrust law. The corporate structure is designed primarily for tax management or greater compliance with the regulatory laws, or for other factors such as allowing investments into particular aspects of the conglomerate's business. Since different parts of business may require different accounting practices, labour standards or profit-sharing plans- Areeda stated that it in advantageous/beneficial for competition of competition to allow for such corporate structures to be deemed as one competition unit since it facilitates entry and reduces costs.[46]

At the time when Areeda had authored his paper, not all the US Circuit courts were applying the intra-enterprise conspiracy doctrine with uniformity. 7th, 8th and 9th Circuit courts amongst all were tilting most favourably to give the defence of single economic unit to the allegedly colluding enterprises.[47] This defence was provided for the firms owned or directly managed by a single individual, *natural or legal.* As noted before, post-*Copperweld* the lower courts in US were divided regarding how far to extend the application of *Copperweld's* dictum beyond 100% ownership. The US Solicitor-General in its brief in *Copperweld*had suggested that levels of 50-100% stock ownership by the parent body should create a rebuttable presumption that the two corporations are insufficiently independent to conspire with each other.[48]However, other factors like commonality of managers and employees or where the common body exercises some quantum of day-to-day control over operations of nominally independent corporations-were all seen as evidence of existence of a single economic unit that could not conspire with itself. Areeda however argued, that all these indicative factors are flawed. Here, I shall focus only those factors and their criticism which are presently relied upon by the competition law authorities.

One such factor is when a single decision maker directs day-to-day operations of commonly owned corporations. Absence thereof in the *public insurers case*, was the reason for not identifying the appellants as a single economic entity. Areeda however argued that its not an essential element since joint decision making by managements of commonly-owned corporations could also provide the same unified direction to the enterprise.[49] Thus an overlapping management is not always needed to be present. On similar lines, Areeda discarded the reliance upon commonality of office space, employees and managers. Since a single corporation may have one office or several; the employees may perform multiple functions or may have more specialised duties. Such allocation of functions between branches and employees is insignificant

[46]Areeda, *supra* note 38 at 452.
[47] *Id* at 454.
[48] Stephen Calkins, *Copperweld in Courts: The Road to Caribe,* 63(1) ANTITRUST L. REV. 345, 351 (1995).
[49]Areeda, *supra* note 38 at 465.

for the firm's antitrust policy, and it does not seem to become when the structure happens to involve several related corporations. While a complete commonality of managers certainly provides probative value-it is not an essential attribute since two divisions/companies having entirely different set of managers could be directed in subject to common direction, as long as one person or group directs them both.[50]

Areeda criticised the search for exercising day-to-day control over market operations as an unnecessary bias towards centralised decision-making. A firm could be integrally operated even based on general and infrequent policy directives from the parent organisation.[51] He cites the analogy of a grocery store owner, who may not need to be directly involved other than in the recruitment and training process of his/her employees. It would be therefore a grievous mistake to judge the store owner's extent of control merely by his/her exercise of control over day-to-day operations. This criteria is however largely relied upon because the occasional exercise of control indicates that the enterprise is actually integrated enough to constitute a single economic entity, because the complete walling-off of commonly owned corporations is rare. Yet, Areeda discusses an illustration comparable to the *public insurers case*, where the parent body directs the subsidiaries to make their own decisions independently and also to compete with each other. Wouldn't such a direction itself by the parent body and its compliance by the subsidiaries be indicative of presence of direction and control?

In the *Public Insurers case*, both the appellants' and the CCI's counsels referred to General Insurance Business Nationalisation Act, 1972 [**"GIBNA"**] to impress the court regarding their interpretation of degree of control vested with the parent body, ie, Department of Financial Services. The appellants pointed towards S. 18(1) of GIBNA which provided the government through DFS could aid, advise and assist the public insurance companies and issue directions in relation to conduct of general insurance business. Rajshekhar Rao, counsel for CCI, instead pointed to the Preamble of GIBNA which stated the intent that the appellant companies were being created *"to promote competition between them so that effective services in the field of general insurance may be rendered by them in all parts of India"*. This intent behind GIBNA is reiterated in several sections of the legislations which were brought to the notice of the bench, and thus the bench decided accordingly that GIBNA did not foster creation of a single economic entity but of multiple independent enterprises.[52]

[50] *Id* at 465-466.
[51] *Id.*
[52] Public Insurers case, supra note 1, ¶13-13.6.

Thus Areeda would have instead argued that very fact that the appellant companies were formed by virtue of one legislation, it indicates that they share a common object to provide *"effective services in the field of general insurance"*. He would have argued that encouraging competition between the four subsidiaries was akin to promoting competition between different divisions of same corporation, and for the purposes of antitrust law-both scenarios ought to be treated on par with each other. The legal form of corporations/divisions has no impact upon the competition.[53] For Areeda, the presence of common direction within a fully-owned corporate family is adequate to demonstrate the existence of a single economic entity. The very evidence to show conspiratorial coordination amongst the corporations or the presence of simple power to coordinate were enough according to Areeda to conclude that there exists a single economic unit which ought not to be charged of intra-enterprise conspiracy.[54]

F. APPRISING THE *PUBLIC INSURERS* SUBMISSION

> **S.3(1)** No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.[55]

The appellants in the *public insurers case* were rather seeking a literal statutory interpretation; mischief interpretation only to the extent to recognise that the companies held by a government department ought to be regarded as subsidiaries of the latter. They tried to demonstrate both- that the DFS and the four public insurance companies form a single economic entity, but, if that is not the case, they still form one enterprise as per the definition in S. 2(h) and therefore could not have colluded with itself. For argument sake, if it is the literal rule of interpretation that ought to be applied to S. 3(1), the section also provides that no person ought to enter into any such anticompetitive agreement. By 'person', the Competition Act refers to both natural and juristic persons-thereby implying that no company could enter into any such

[53]Areeda also negates the countervailing argument that if the parent body wishes the subsidiaries to operate independently, then the objective is best achieved through scrutiny of antitrust authorities. One, such scrutiny by antitrust authorities would raise the cost for the enterprise for using the 'multicorporate profit-center management' structure which it would have otherwise found efficient, and it would be unfair for the enterprise when other corporations operating through unincorporated divisions could allocate internal management without fearing the antitrust authorities. Second, this would force centralised decision making. The antitrust consequences to walling-off a subsidiary from another subsidiary or the parent body, would threaten the enterprise to not take such actions which it would have otherwise taken, since in the enterprise's assessment that would have led to more efficient operation.
See Areeda, *supra* note 38 at 468-469.
[54] *Id.* at 473.
[55]THE COMPETITION ACT, §3(1) (2002).

agreement with another.[56] That would amount to the section sanctioning the application of intra-enterprise conspiracy doctrine in Indian law. As tumultuous it may have been, such interpretation has never been sought in any of the cases before CCI or before COMPAT thus far.

Had Phillip Areeda been engaged as the counsel by the appellants, he would have argued that the very fact the Government directed the four public insurers to compete with each other, suffices the direction and control test. That the GIBNA Act was legislated by the Parliament, it clearly shows that the four public insurers-not only share a common parent but also a common object. This would have sufficed as reasons enough for Areeda to demonstrate that there exists a single economic unit and it ought to be treated as one. However, the question of interest is would Areeda have agreed that the definition of enterprise should replace the single economic entity requirements?

The intra-enterprise conspiracy doctrine was noted to have no effect on the enterprises' choice of corporate structures in US. Therefore, it was liable to unjustly treat similar businesses to divergent competition law treatment. If this doctrine was so widely applied that it would have driven the enterprises to protect themselves by integrating their personhood into one corporation, their operations, cost savings and other benefits accruing from separate incorporations would have been sacrificed- with no evident benefit to the competition in the market.[57] Is there any specific benefit accruing to competition by applying the direction and control test to an enterprise to ascertain if it's a single economic entity?

The requirements of the enterprise definition are fulfilled the moment it is shown that the parent body owns the units, divisions or subsidiaries and is directly or indirectly operating in the market. This would not entail that a business conglomerate engaged in several businesses through divisions or subsidiaries would be treated as entirely one enterprise for an antitrust liability. Antitrust liability could only arise in a particular market, therefore pertain to specific activities being engaged in. Thus the enterprise definition itself would delineate the enterprise from within the corporation by including only the divisions or subsidiaries that are directly or indirectly engaged in that market. Areeda who disagreed with the commonly applied tests for single economic entity and sought to look at only the commonality of object shared by the related corporations, would have presumably, found it agreeable that the definition of enterprise suffices the criteria needed to prove economic oneness. Others, including the Indian competition

[56] *Id.* §2(1).
[57] Areeda, *supra* note 38 at 473.

authorities, who seek a more direct evidence of direction and control would find it disconcerting to do away with the test.

The appellants submission prizes form over substance, though, for very different ends than the intra-enterprise conspiracy doctrine. In doing so, it makes a crucial oversight-that only the entities in hierarchical form could then be deemed as an enterprise. Two sister companies held by same parent, could not therefore be deemed to form an enterprise, by themselves. SEE doctrine provides that flexibility by prizing substance over form-as evidenced in the *Automobili Lamborghini case*.[58] Thus, whereas Areeda provides a convincing case to focus upon the commonality of object rather than factual claims regarding degree of control, commonality of managers/employees etc.; the case to replace the SEE doctrine's requirements, altogether, with those of enterprise defintion's, is not as convincing and would be very evidently be problematic and tumultuous.

6. CONCLUSION

As examined, the appellants in *public insurers case* made a very compelling submission by relying upon the literal rule of interpretation, however, Justice G.S. Singhvi did not do justice to the averments made in his judgment. Perhaps, considering both the primary issue with the less compelling submission for the secondary issue (whether government department could have subsidiaries?) together, led him to not devote as much consideration to the submission to replace the requirements of SEE doctrine.

It is true, that the importance given to factual considerations to prove SEE doctrine is not required. Focus upon the commonality of object would rather suffice and be in tune with the very idea of recognising that there could be substantive economic unity despite multiple incorporations. Thus, had the COMPAT considered Areeda's submissions, it would have deemed the four public insurers together with the government as constituting a single economic entity, incapable of conspiring among themselves.

The secondary question-whether the Act needs to be amended suitably to recognise that government department could have subsidiaries?, need not arise in light of *public insurers case*. SEE doctrine's requirements could not be replaced altogether by the requirements of definition of enterprise, as it would tantamount to prizing the form over substance. The factual matrix of *public insurers case* provides quite a convincing submission that there was a single economic entity,

[58]Lamborghini case, *supra* note 42.

both due to commonality of object as well as the factual evidence presented by the appellants. Yet, the Hon'ble tribunal found the case of CCI to be more compelling. While the secondary question need not be revisited in light of this case, however, the other case- *Gir Prasad* v. *State of Uttar Pradesh*,[59] whose position remains unsettled needs to be considered; therefore in light of that case, that the non-inclusion of such amendment might lead to differential treatment of private and public enterprises, the need for the amendment ought to be considered by the Parliament.

[59]Gir Prasad v. Government of Uttar Pradesh [1996] 87 Comp Cas 623; State of Uttar Pradesh v. Gir Prasad AIR 2004 SC 1756.