



**“Workshop on Competition Policy & law”
for
Central / State Government officers
organized by
CCI in collaboration with IIPA**

***Presentation
“Competition Law Compliance”
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- Preamble of Competition Act,2002 envisages:
 - Establishment of a Commission
 - To prevent practices having adverse effect on competition
 - To promote and sustain competition in markets
 - To protect the interest of consumers and to ensure freedom of trade

Dimensions



- The three regulatory dimensions of CAO2 are –
- Prohibition of anti-competitive agreement having AAEC,
 - Prohibition of ‘abuse of dominant position by enterprise, and
 - Regulation of combinations which have potential AAEC
- Regulation is supplemented and complemented by advocacy



Scope of 'Enterprise'

- Applicable to 'Enterprise' which inter-alia includes a department of Government engaged in production, storage, supply, distribution, acquisition of articles or goods or provision of services
- Enterprise does not include activity of the Government relating to sovereign functions including Central Government Departments dealing with atomic energy, currency, defence and space

Scope of 'Consumer', 'Goods', 'Services'



- *'Consumer' means any person who buys 'goods' or avails of 'service' for consideration irrespective of the purpose i.e. for personal use or for commercial purpose*

- *'Goods' – means 'Goods' as defined in the Sale of Goods Act, 1930 and includes:*
 - *products manufactured / mined,*
 - *debentures, stocks, shares after allotment, and*
 - *goods imported into the country*



- *‘Service’ means service of any description which is made available to potential users and includes provisions of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;*



POWERS OF COMPETITION COMMISSION OF INDIA

- **To issue “Cease & Desist” Order**
- **To impose penalty on the delinquent enterprise**
- **To modify the trade agreement**
- **To approve, modify or reject combination**
- **To grant interim relief during the enquiry**
- **To award compensation**
- **To recommend division of enterprise**



Penalties:

- The CCI has been empowered to impose penalty which can be up to 10% of the average turnover for the last three preceding financial years upon each such enterprise who are parties to such agreements or abuse.
- In case of cartel, the Commission shall impose a penalty equivalent to three times of the amount of profits made out or 10% of average turn over of cartel whichever is more.
- Cartel is generally a secret understanding which can be busted conveniently with the assistance of a member of cartel.



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- Law empowers Commission to impose lesser penalty on a member of cartel if a member discloses information before enquiry is taken up and who makes first disclosure which is full, true and vital
 - Stringent penalties can be imposed on delinquent enterprise for disobedience of orders of Commission, failure to furnish information or furnishing of false information
 - A director, manager, secretary or other officer of the company shall be deemed guilty and proceeded against and punished in case contravention has taken place with consent or connivance or is attributable to neglect



Anti-competitive conduct/practice

- Private
- Public
- Government may seek opinion on competition policy / law
- CCI is mandated to give its opinion within 60 days
- Opinion of CCI is not binding

Competition Policy and its Principles



- Competition Policy is a set of market based policies that enhance competition, facilitate entry and exit, reduce administrative controls, minimise regulations etc.
- Increasing number of countries are migrating to competition oriented policies.
- Competition Law: a sub set of policy – seeks to prohibit and penalise anti-competitive practices and regulate potentially anti-competitive mergers.

Pre-requisites to promote competition in markets



- Competition driven approach to policy.
- Minimize exceptions / exemptions.
- Competitive neutrality.
- No entry / exit barriers.
- Access to essential facilities.
- Greater reliance on well functioning markets.



Deviations from Competition Principles

- Deviations from competition principles should follow 6 rules –
 - Transparent
 - Non-discriminatory
 - Procedural fairness
 - Accountability
 - In well defined ‘public interest’
 - Sun set clause

Scope of Competition Policy



- Incorporate competition principles in all policies and regulations of :
 - Central Government
 - State Governments
 - Sub-State Authorities



Statutory Authority

- 'Statutory Authority' means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purpose of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto
- Can seek opinion of CCI on a competition issue which CCI is mandated to render in 60 days
- Statutory Authority shall pass an order after receipt of opinion of the CCI

Extra territorial jurisdiction and MOUs



- CCI is empowered to exercise its jurisdiction in respect of acts taking place outside India but having impact in markets in India
- Act enables CCI to enter into MOUs with foreign agencies



Inquiry by CCI

- Inquiry by CCI
 - Any order by CCI is to be preceded by an Inquiry
 - An inquiry into alleged anti competitive agreement or abuse of dominant position may be instituted:
 - on its own motion; or
 - on receipt of information from any person, consumer or their association or trade association; or
 - on a reference by Central Government / State Government/ Statutory Authority

Investigation by the Director General



- Investigation by DG is a condition precedent to Inquiry into Anti-Competitive Agreements & Abuse of Dominance
- CCI may obtain Investigation Report relating to combination
- DG vested with powers as are vested in Civil Court beside power u/s 240/240A of the Companies Act, 1956



- Commission can formulate its own Regulations
- Regulations may deviate from CPC but have to adhere principles of natural justice
- Innovative features of proposed regulations
 - Equal time for pleadings
 - Preliminary conference
 - Service of notice/complaint through e-mode
 - Adjournment
 - Time frame for orders
 - Consent order
 - Confidentiality
 - Safeguard
 - Proving of facts by affidavit



Competition Act, 2002 MRTTP Act, 1969

- Aims at promoting competition
 - Focus on effects on competition in the market
 - Based on reformatory-cum-deterrent theory
 - Seeks to prohibit anti-competitive agreements, abuse of dominant position and to regulate combinations
 - Statutory Authorities can seek opinion
- Aims at curbing monopolies
 - Focus on size (uptil 1991) and on behaviour from 1991 onwards
 - Based on reformatory philosophy only
 - Prohibit monopolistic, restrictive and unfair trade practices
 - No provision to seek opinion

Contd.....



Competition Act, 2002 MRTTP Act, 1969

(contd.)

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- Central government can seek opinion on policy/law relating to competition
 - Enjoins competition advocacy
 - No more requirement to file anti-competitive agreement with DG
 - Trade Agreement having appreciable adverse effect on competition in the market is 'VOID'
- No enabling provision to render opinion to Central Government on such issues
 - No provision to undertake competition advocacy
 - Restrictive Trade Agreements are required to be filed within 60 days with the DG (I&R) for registration
 - Only restrictive clauses are held to be void

Contd.....

Competition Act, 2002 MRTTP Act, 1969



(contd.)

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- Leans heavily on ‘Rule of Reason’
 - Appreciable adverse effect is a key factor – Factors prescribed to determine AAEC
 - Cartels explicitly defined – Leniency programme exists
 - Commission to exercise jurisdiction in case of unreasonable restraints exercised in respect of IPRs.
- Obsessed with deemed concept
 - ‘Prejudicial to public interest is a key factor – parameters not mentioned in the law
 - Implicit jurisdiction in respect of cartel. No leniency programme exists
 - No explicit power with the MRTPC in respect of IPRs

Contd.....

Competition Act, 2002 MRTTP Act, 1969



(contd.)

- ❑ Concept of 'Market' is rationalized – Relevant Market=Relevant product market + Relevant Geographical market
- ❑ Primary duty to achieve the objectives of the Act devolves on CCI
- ❑ 'Combination' – a broad term, High threshold limits, only regulated and not prohibited, notification voluntary, 90 days time limit, suo-motu investigation within one year
- ❑ 'Market' has not been defined nor factors to determine 'market' have been prescribed
- ❑ Act implemented partly by Central Government and partly by the MRTTP Commission
- ❑ Combinations were regulated by the Central Government upto 1991.

Contd.....

Competition Act, 2002 MRTTP Act, 1969



(contd.)

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- Explicit jurisdiction in respect of overseas acts having impact in India- provision for MoUs – both complementary and supplementary
 - Applicable to Government Departments performing non-sovereign functions
 - Deterrent penalty provisions – linked with turnover – in case of “cartel”, the penalty has to be three times of profit or 10% of turnover whichever is more
- No provision to enter into MoUs
 - Not applicable to Government Departments
 - No penalty provisions.

Competition Act, 2002 MRTTP Act, 1969



(contd.)

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- | | |
|----------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| <input type="checkbox"/> Consumer includes both commercial buyer and ultimate user | <input type="checkbox"/> The “consumer” concept is not defined |
| <input type="checkbox"/> Comparatively more autonomous and independent-establishment of competition fund | <input type="checkbox"/> Lacked autonomy and independence |
| <input type="checkbox"/> Multi-disciplinary body | <input type="checkbox"/> Members from restricted number of fields |
| <input type="checkbox"/> Delineation of relevant market | <input type="checkbox"/> No such delineation of relevant market |
| <input type="checkbox"/> No power of review / contempt | <input type="checkbox"/> Power of review / contempt exists |



Competition Act, 2002 MRTTP Act, 1969

(contd.)

- Exclusion of jurisdiction in respect of export business
- Export business subject to Overseas Competition Law
- Inquiry to be preceded by investigation by DG
- DG does not have suo-motu power for investigation
- DG vested with powers of a Civil Court
- Implicit exclusion of jurisdiction in respect of export
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- Inquiry not necessarily pursuant to investigation by DG
- Suo-motu power of investigation vested in DG (I&R)
- DG does not have powers of a Civil Court

Consumer Protection Act, 1986



- General Assembly of UN adopted a resolution advising member countries to enact law for better protection of the interest of consumers
- India enacted CPA in 1986 – provides for setting up of :

“Council” at National, State and District level to suggest and advise ways and means to promote and protect the consumers; and
- **Consumer Dispute Redressal Forum / Commission at District, State and National level to provide simple, speedy, inexpensive redressal mechanism to consumer disputes through quasi judicial machinery**

Contd.....



- CPA provides redressal to an ordinary consumer and not customer
- CPA provides redressal only to such consumers who have actually bought the goods
- Does not have power to initiate action suo motu
- The focus is to offset the loss caused
- Cease and desist order power not invoked

Contd.....



- Does not have power to grant interim injunction
- No investigative machinery
- Responsibility of carriage of proceedings devolves on complainant
- Law of limitation is applicable to CPA
- Time frame has been fixed for disposal
- No power of review of its order



What necessitates to have (Competition Law Compliance Programme (CLCP))

- Deterrent penalty provisions
- Detection possibilities heightened-DG vested with power of Civil Court, MoUs with overseas authorities and competition clauses in FTAs
- Growing vigilance by regulators, NGOs, whistle blowers, media, etc.
- Incentive to whistle-blowing competitor, introduction of leniency programmes to bust cartel, growing cases of breach/cheating by members of cartels
- Aggrieved person's right to claim compensation

Contd.....



What necessitates to have CLCP

(contd.)

- No indemnification of fines imposed on individuals in case violation of the law is found to be “intentional and deliberate”
- Disqualification of a director
- Investigation/inquiry are disruptive, costly and seriously damage the reputation and goodwill of the enterprise
- Ever increasing emphasis on convergence and harmonization of competition laws and principles
- Competition regimes are being increasingly modernized

Benefits of having CLCP



- Reduces the risk of contraventions of the Act and its consequences-CLCP are generally inexpensive vis-à-vis penalties which can be imposed
- Helps in early detection of contraventions
- Early detection reduces quantum of penalties as well as compensation to third parties
- Can ensure compliance with the orders passed by the Commission
- Action can be taken against delinquent employees who have contravened or have been party to contravention

Contd.....

Benefits of having CLCP



(contd.)

- Can suggest appropriate action to the enterprise in case it is a victim of anti-competitive practice of another enterprise
- Anti trust action brings dis-repute to the organisation
- CLCP can draw up planned action
- In case, the enterprise belong to a regulated sector, CLCP can suggest strategy on competition issue
- Can facilitate in eliminating/taming anti-competitive practice emanating from public action
- Can ensure compliance with overseas competition law in case of export business/acquisition of overseas party



CLCP – A Mitigating Factor

- In US – a penalty can be reduced by more than 80%
- In Australia – a relevant factor in assessing pecuniary penalty
- In Netherlands – a relevant factor provided no senior executive is involved in the violation
- In Canada – a mitigating conduct for sentencing purposes provided contravention has been terminated soon after it became known

Seven Elements of effective CLCP



- Clearly establish compliance standards
- CLCP to be overseen by high level executives
- Exercise of due care in delegating responsibility
- Effective communication standards and procedures
- Effective steps to achieve compliance with standards
- Enforcement through appropriate disciplinary mechanism
- Quick termination of violation and effective steps to prevent future violations



Other Elements

- In-built mechanism for punishment and rewards for functionaries
- Need for continuous review
- Systematic audit is imperative
- Must be embraced and adopted at the highest level
- Compliance responsibility should be delegated to an individual who should not be accountable as to profitability

Tailoring the Compliance Programme



- Difficult to suggest a tailor-made programme
- Programme has to be comprehensive, well documented and effective keeping in view the provisions of CAO2
- Programme should be preferably developed internally

Tailoring the Compliance Programme



(contd.)

- Outside professional help can be sought from an agency which has experience
 - relating to compliance of competition law
 - specific knowledge of industry regulations

- Accreditation organisation, insurers and risk management specialists may also be helpful



The price of antitrust liability continues to increase – cookie cutter policies are not likely to meet the threshold of “effectiveness” – hence, prudence suggests launching of CLCP

Caveat: How soon and effectively the Act is implemented?



Thank you

Website: competitioncommission.gov.in